THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2016 AND FRENCH COURT STATISTICS

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I INTRODUCTION

This article reports the way in which the High Court as an institution and its individual judges decided the matters that came before them in 2016. It is part of an ongoing annual study of High Court decision-making which we began in 2003.[1] In this series we examine both the totality of the Court's decisions and the subset of constitutional matters in each calendar year. These statistical 'snapshots' are intended to complement more traditional analysis of the Court's decision-making, ensuring that this is informed by data rather than mere impression as to how the Court functions as a decision-making institution comprised of seven individuals. Of particular interest over time are the formation and decline of coalitions between the Justices, as well as the frequency with which they join in stating reasons with each other or voice disagreement from the majority in the form of dissent.

The results presented in this article have been compiled using the methodology we have explained in earlier articles and applied consistently over the course of this study.[2] As always, we acknowledge the limitations of an empirical study of the decisions of any final court over the space of a single calendar year – particularly so in respect of the constitutional cases which comprise a small portion of the High Court's caseload. Nevertheless, there is a long tradition of annual studies of the decision-making in final courts, starting

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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. 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.

2 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.

with the United States Supreme Court in the 1920s,[3] because attention to developments in successive periods enables the identification of trends over the longer term. In some years, change may be quite dramatic; in others it is continuity that is most striking.

On this occasion, we also provide a consolidation of the years encompassing the tenure of Robert French as Chief Justice of the High Court. This enables us to offer a more summative assessment of patterns in decision-making that have been earlier observed year by year.[4] In particular, and given the tendency of the Court under French CJ to oscillate rather markedly between opposing poles of consensus and disagreement in the annual studies, the benefit of taking a longitudinal view is what it may reveal about the overarching or defining character of the Court as an institution over this period. Additionally, the performance of those individuals who have been on the Court for a substantial portion of this era is able to be appraised more comprehensively – something most obviously applicable in respect of French CJ himself whose entire service on the Court frames, and thus is captured by, the consolidation of the annual results.

Whether looking at the 2016 statistics or those of the French era in full, it remains necessary to emphasise in interpreting this data that individual influence should not be lightly assumed merely because some members of the Court participate in majority coalitions with marked regularity. This is particularly so in respect of the frequency with which some Justices co-authored judgments. Indeed, 'co-authorship' may not be the right word to describe this process. In December 2016, the outgoing Chief Justice, Robert French, shed light on how joint judgments come into being:

> when we have finished a case we sit around in my chambers if I've been presiding, and we will discuss the case, and if a clear consensus emerges, or a clear majority emerges, then I will suggest that one of the judges might like to write a first draft – it's just a suggestion, it's not a formal assignment, as happens in the United States Supreme Court – and that justice will write a first draft and normally the other justices will wait until that first draft is done, and it's usually done fairly promptly.
>
> Then the first draft is circulated and then if another justice agrees with the first draft they might make some suggestions for alterations. They'll circulate a single-line concurrence. And then the judge who's written the first draft will ring up the other judge and say, 'Can I join you?' And then that becomes a joint judgment of the two of them. And sometimes you'll get a cascade of those concurrences, so that you'll end up with a joint judgment sometimes of everybody.[5]

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3 See Felix Frankfurter and James M Landis, 'The Business of the Supreme Court at October Term, 1928' (1929) 43 *Harvard Law Review* 33.

4 This complements more substantive reviews of the French era: Anne Twomey, 'The Constitutional Legacy of the High Court under Chief Justice French' (2017) 91 *Australian Law Journal* 23; Harry Hobbs, Andrew Lynch and George Williams, 'The High Court under Chief Justice Robert French' (2017) 91 *Australian Law Journal* 53; Anika Gauja and Katharine Gelber, 'The French Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 311.

5 ABC Radio National, 'Retiring Chief Justice Robert French', *The Law Report*, 13 December 2016 (Chief Justice Robert French) <http://www.abc.net.au/radionational/programs/lawreport/retiring-chief-justice-robert-french/8105828#transcript>.

This accords with the earlier explanation of the Court's decision-making given by the new Chief Justice, Susan Kiefel, which we quoted in presenting the 2015 statistics. It is worth repeating her remark that, in distinction from the practices of some other final courts, in the High Court '[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]

We know from comments occasionally made about Justices after their retirement from the Court that some play a more active role in seeking to achieve consensus on the Court than others.[7] This though is not to affirm the idea, suggested by former Justice Dyson Heydon, that the Court might be divided into 'excessively dominant judicial personalities' on one hand, and those who display 'judicial herd behaviour' on the other.[8] French CJ made clear his views on that suggestion in late 2016, when he laughed it off, remarking that, 'everybody has a fairly healthy sense of their own independence, and when people agree, they agree with full intellectual assent'.[9]

II THE INSTITUTIONAL PROFILE

TABLE A: High Court of Australia Matters Tallied for 2016

	Unanimous	By Concurrence	Majority over Dissent	TOTAL
All Matters Tallied for Period	15 (30.61%)	22 (44.90%)	12 (24.49%)	49 (100%)
All Constitutional Matters Tallied for Period	1 (14.29%)	2 (28.57%)	4 (57.14%)	7 (100%)

A total of 49 matters were tallied for 2016. Fifty-three cases appear on the AustLII High Court database[10] for the year but four of these (identified in the Appendix) were excluded as matters decided by a single Justice sitting alone.

Table A shows the number and percentage of cases that were decided by the High Court in one of three ways in 2016 – through single unanimous judgment, by two or more concurring opinions, and by dividing with some Justices in formal dissent. In our 2015 article, we explained the tendency of the High Court, over the tenure of French CJ, to alternate between high levels of unanimity and

6 Justice Susan Kiefel, 'The Individual Judge' (2014) 88 *Australian Law Journal* 554, 557.

7 David Marr, 'Now History Will Be The Judge', *Sydney Morning Herald* (online), 31 January 2009 <http://www.smh.com.au/news/national/now-history-will-be-the-judge/2009/01/30/1232818725589.html?page=fullpage#contentSwap1>; Transcript of Proceedings, *Ceremonial – Farewell to Hayne J – Canberra* [2015] HCATrans 105 (13 May 2015) (French CJ).

8 Justice J D Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 *Law Quarterly Review* 205, 215, 217.

9 ABC Radio National, above n 5 (Chief Justice Robert French).

10 Australasian Legal Information Institute <http://www.austlii.edu.au/>. For further information about decisions affecting the tallying of 2016 matters, see the Appendix at the conclusion of this article.

explicit disagreement in a two-year cycle before noting that this pattern was broken in 2015 when cases both decided unanimously and over dissent fell.[11] This was additionally noteworthy because the percentage of cases in which the bench divided dropped to 18.75 per cent, the equal lowest figure (with 2010) since we began this series of annual studies in 2003. Bearing that in mind, we should not be surprised that in 2016 the number of cases featuring explicit disagreement rose – from 18.75 per cent in 2015 to 24.49 per cent. This is not a dramatic leap; the last time dissent rose from 18.75 per cent in 2010, it did so to half of all cases decided in 2011.

In 2016, the proportion of unanimous decisions also rose. The percentage of cases decided by a single judgment was 30.61, up from 25 per cent in the preceding year. But again, what we might observe about this increase is that previously, on the aforementioned cycles of the French Court, an upward shift in unanimity was a much more pronounced swing. In short, if 2015 was the year that the hydraulic relationship between unanimity and dissent was severed, in 2016 that continued – both increased moderately and not at the expense of each other, but due to a decline in the proportion of cases decided through concurrence (from 56.35 per cent in 2015 to 44.90 per cent in 2016).

Of the 49 matters tallied for 2016, just seven – or 14.29 per cent – were constitutional in character. The lowest number of constitutional matters in a single year remains six, recorded in 2014, a year in which the total number of matters was also 49.[12] The definitional criteria that determines our classification of matters as 'constitutional' remains:

> 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 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] Such cases do not arise often, but one of the seven constitutional matters tallied in 2016 is of this kind – *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*.[15] That case concerned a question of whether the executive power of the New South Wales government over Crown lands was abrogated by section 2 of the *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54.

In 2016, the High Court decided more cases overall through concurrence than it did either by unanimous opinion or by a split in the bench as to the result. By

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11 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2015 Statistics' (2016) 39 *University of New South Wales Law Journal* 1161, 1163–4.

12 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2014 Statistics' (2015) 38 *University of New South Wales Law Journal* 1078, 1081.

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 (2016) 339 ALR 367.

contrast, dissent was more frequent in the seven constitutional matters. The Court divided in four of the seven matters and joined to speak with one voice in only one, the unsuccessful challenge to new voting rules for the Senate in *Day v Australian Electoral Officer (SA)*.[16]

TABLE B(I): All Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[17]

Size of Bench	Number of Cases	How Resolved	Frequency	Cases Sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	14 (28.57%)	Unanimous	2 (4.08%)	2						
		By concurrence	5 (10.20%)		3	1			1	
		6:1	4 (8.16%)			1	1	2		
		5:2	3 (6.12%)			2		1		
		4:3								
5	35 (71.43%)	Unanimous	13 (26.53%)	13						
		By concurrence	17 (34.69%)		13	4				
		4:1	4 (8.16%)		1	1	1	1		
		3:2	1 (2.04%)				1			

TABLE B(II): Constitutional Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[18]

Size of Bench	Number of Cases	How Resolved	Frequency	Cases Sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	7 (100.00%)	Unanimous	1 (14.29%)	1						
		By concurrence	2 (28.57%)		1				1	
		6:1	3 (42.86%)				1	2		
		5:2	1 (14.29%)			1				
		4:3								

Tables B(I) and (II) reveal several things about the High Court's decision-making over 2016. First, they present a breakdown of, respectively, all matters and then just constitutional matters according to the size of the bench and how

16 (2016) 331 ALR 386.

17 All percentages given in this table are of the total number of matters tallied (49).

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

frequently it split in the 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. Readers should note 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 35 matters heard by a five-member bench, 17 were decided by concurring opinions over no dissent, and in four of them three opinions were delivered. In this way, Table B(I) enables us to identify the most common features of the cases in the period under examination. Unusually, in 2016 there was an equal tie in terms of the 'most typical' method by which a case was resolved; 13 cases each were decided 5:0 with either a unanimous judgment or through two concurring opinions.

Only one case in 2016 featured as many opinions as there were sitting judges. This was *Paciocco v Australia and New Zealand Banking Group Ltd*, a 4:1 decision in which five separate opinions were delivered.[19] Unlike the phenomenon of 'welcome cases' in which all but the newest member of the Court issue a bare concurrence with that Justice's opinion, *Paciocco* was a case in which all five of the opinions issued were substantial.

There were four matters in 2016 that meet the description of a 'close call' – that is, a case decided over a minority of more than one Justice.[20] These were *Fischer v Nemeske Pty Ltd*,[21] *Attwells v Jackson Lalic Lawyers Pty Ltd*,[22] *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd*,[23] and *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*.[24] In only the first of these was the 'close call' a matter of a single judicial vote, with *Fischer v Nemeske Pty Ltd* being decided 3:2.

Table B(II) records the same information in respect of the subset of constitutional cases. All cases were decided by seven judges. Unusually, the most common format of a constitutional case in 2016 was a seven-judge decision decided over a solo dissent, but featuring five judicial opinions. Two of the seven matters were decided in this way.[25] The constitutional matter that produced the most separate opinions, despite featuring no dissent was *Murphy v Electoral Commissioner*.[26]

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19 (2016) 333 ALR 569.

20 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.

21 (2016) 257 CLR 615.

22 (2016) 331 ALR 1.

23 (2016) 333 ALR 384.

24 (2016) 339 ALR 367.

25 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42; *Cunningham v Commonwealth* (2016) 335 ALR 363.

26 (2016) 334 ALR 369.

Table C lists the provisions of the *Commonwealth Constitution*, as well as the state constitutional law issue, that arose for consideration in the seven constitutional law matters tallied for 2016. It is assembled by reference to the catchwords accompanying each decision. A striking feature of Table C is the lack of any matter which concerns the separation of judicial power under Chapter III of the Constitution – whether federally or at the state and territory level via the *Kable* doctrine.[27] This is the first time in these annual surveys of the Court's decisions that no such case has appeared. Indeed, were it not for the relatively discrete issue of whether the right to trial by jury in section 80 may be waived (which arose in *Alqudsi v The Queen*),[28] 2016 would have seen a total absence of any decisions engaging with any aspect of Chapter III.

TABLE C: Subject Matter of Constitutional Cases

Topic	**No of Cases**	**References to Cases (Italics indicate repetition)**
s 7	2	20, 36
s 9	1	*20*
s 10	1	*36*
s 24	2	*20*, *36*
s 30	1	*36*
s 48	1	39
s 51(xix)	1	1
s 51(xxxi)	1	*39*
s 51(xxxvi)	2	*36*, *39*
s 61	1	*1*
s 66	1	*39*
s 80	1	24
s 109	1	21
State constitutional law – whether executive power abrogated by s 2 *NSW Constitution Act 1855* (Imp)	1	50

27 There is some consideration as to whether executive detention amounts to an exercise of judicial power or not in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 85–8 (Bell J), 124–5 (Keane J) but this is only minor and does not form part of the catchwords of the decision and so the case is not tallied as concerning Ch III.

28 (2016) 258 CLR 203.

III THE INDIVIDUAL PROFILE

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

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	42	13 (30.95%)	27 (64.29%)	2 (4.76%)
Kiefel J	39	9 (23.08%)	29 (74.36%)	1 (2.56%)
Bell J	39	13 (33.33%)	26 (66.67%)	–
Gageler J	37	10 (27.03%)	24 (64.86%)	3 (8.11%)
Keane J	39	14 (35.90%)	25 (64.10%)	–
Nettle J	38	8 (21.05%)	26 (68.42%)	4 (10.53%)
Gordon J	39	12 (30.77%)	21 (53.85%)	6 (15.38%)

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2016. The Court's membership was entirely stable over this period, removing the need for caveats about the dangers of attempting direct comparisons between Justices. That said, not all judges sit on all cases and this affects the total number of opinions each delivers – but this was hardly pronounced in 2016 with a gap of just five decisions between French CJ (who delivered the most judgments) and Gageler J (who delivered the least). There are also differences in the complexity of the matters that each Justice is allocated to decide. This is, however, an inevitable factor to be borne in mind in the empirical study of any multimember court that does not routinely sit *en banc*. In this respect, the High Court of Australia, with fewer members than, for example, the South African Constitutional Court and the United Kingdom Supreme Court, presents less of a challenge.[29]

In 2015, we made two observations about the individual rates of dissent. First, unlike most of the earlier years in this series of articles, the number of cases decided by the Court with a minority opinion was not the result of predominantly one member of the Court who disagreed with his or her colleagues with a discernibly greater frequency than others did. Second, and more specifically, we noted that Gageler J's tendency to stand out by dissenting from the orders of the Court in his initial years on the bench (in 2014, he dissented in almost 20 per cent of cases he heard) had abated and that in fact Nettle J had disagreed with the outcome of cases more often in 2015.

29 Just to be clear, variation in the composition of the bench sitting in larger courts does not prevent empirical research into the decision-making of these institutions and their individual members. For recent significant examples in respect of the United Kingdom Supreme Court, see Rachel J Cahill-O'Callaghan, 'Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity' (2015) 35 *Legal Studies* 1; Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013); Thomas Poole and Sangeeta Shah, 'The Law Lords and Human Rights' (2011) 74 *Modern Law Review* 79.

In 2016, this picture shifted again, though it remains to be seen whether this is the beginning of a larger trend that will unfold over coming years. While Bell and Keane JJ did not find themselves in the minority at all in 2016, Gordon J, serving her first full year on the Court, emerged as the most frequent dissenter, filing one minority opinion for every six and a half cases she heard. Gordon J was joined (but only just) by Nettle J as the only other member of the Court reaching a dissent rate that exceeded 10 per cent. The only co-authored dissent of the year was delivered by Nettle and Gordon JJ in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*.[30] In *Fischer v Nemeske Pty Ltd*,[31] Gordon J was joined in the minority by Kiefel J, filing her only dissent for the year, but they wrote separately. Every other instance of dissent in 2016, including those opinions issued by the Chief Justice and Gageler J, was of a judge alone in the minority.

The Chief Justice added two minority opinions to a grand total of just nine dissents he delivered across his tenure on the Court (see Table H). The 2016 cases in which French CJ dissented are *Alqudsi v The Queen*[32] and *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd*.[33]

So far as participation in unanimous opinions from the Court over 2016 is concerned, Keane J did so on 14 occasions and French CJ and Bell J on 13 occasions (with Bell J participating in a higher percentage of unanimous decisions due to her deciding a smaller number of cases than French CJ). Nettle J participated in the fewest unanimous opinions – just eight.

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

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	7	1 (14.29%)	5 (71.43%)	1 (14.29%)
Kiefel J	7	1 (14.29%)	6 (85.71%)	–
Bell J	7	1 (14.29%)	6 (85.71%)	–
Gageler J	7	1 (14.29%)	5 (71.43%)	1 (14.29%)
Keane J	7	1 (14.29%)	6 (85.71%)	–
Nettle J	7	1 (14.29%)	5 (71.43%)	1 (14.29%)
Gordon J	7	1 (14.29%)	4 (57.14%)	2 (28.57%)

Table D(II) records the actions of individual justices in the seven constitutional cases of 2016. All judges heard all matters, and only one was

30 (2016) 339 ALR 367.
31 (2016) 257 CLR 615.
32 (2016) 258 CLR 203.
33 (2016) 339 ALR 242.

decided by unanimous opinion, the Court's decision in *Day v Australian Electoral Officer (SA)*.[34]

Kiefel, Bell and Keane JJ did not dissent at all, while all other Justices except Gordon J issued one dissent each. French CJ dissented in *Alqudsi v The Queen*,[35] Gageler J issued a partial dissent in *Cunningham v Commonwealth*[36] and Nettle J's dissent was a joint judgment with Gordon J in the state constitutional law case *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act*.[37] Gordon J's other, sole-authored, dissent was in the very first case of 2016, *Plaintiff M68/2015 v Minister for Immigration and Border Protection*.[38]

Tables E(I) and E(II) indicate the number of times a Justice jointly authored an opinion with his or her colleagues. Because the judges do not sit together on all cases throughout the year, these tables should be read horizontally as the percentage results vary depending on the number of judgments each member of the Court delivered. As mentioned earlier, that Justices do not necessarily sit with each other on an equal number of occasions must be noted as a factor that limits opportunities for some pairings to collaborate more often. However, the fact that the High Court's membership was stable throughout 2016 means that the variation in sittings between the judges is not especially marked.

Turning to Table E(I) first and looking at the totality of matters for 2016, Kiefel, Bell and Nettle JJ all joined most frequently with French CJ, while he joined Bell J the most. Gageler and Gordon JJ joined most often with Keane J, who himself joined in reasons with Bell J most frequently. The table is visually quite interesting because the percentage figures for joining tend to be much higher in the upper left of the grid – reflecting high rates of joining between the Chief Justice and Kiefel, Bell and, to a somewhat lesser extent, Keane JJ. But as one moves down and across to the right of the table, the rates of joining drop from the 60–70 per cent range to figures hovering around 35–40 per cent, with Nettle and Gordon JJ having significantly lower rates of joining others in judgment. Sitting between these two sections of the table is Gageler J who, consistently with previous years, is the member of the Court who joined least with anybody. He is the only judge who joined others in less than a third of his total opinions for the year.

The most frequent collaboration was French CJ and Bell J with them joining in 73.81 per cent of his decisions in the year and 79.49 per cent of hers. The two judges on the Court who wrote least often together are Kiefel and Gageler JJ who joined just eight times – around 21 per cent of the total number of decisions each of them made in 2016.

34 (2016) 331 ALR 386.
35 (2016) 258 CLR 203.
36 (2016) 335 ALR 363.
37 (2016) 339 ALR 367.
38 (2016) 257 CLR 42.

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

	French CJ	Kiefel J	Bell J	Gageler J	Keane J	Nettle J	Gordon J
French CJ	–	27 (64.29%)	31 (73.81%)	10 (23.81%)	24 (57.14%)	19 (45.29%)	15 (35.71%)
Kiefel J	27 (69.23%)	–	26 (66.67%)	8 (20.51%)	23 (58.97%)	14 (35.90%)	15 (38.46%)
Bell J	31 (79.49%)	26 (66.67%)	–	10 (25.64%)	26 (66.67%)	16 (41.03%)	15 (38.46%)
Gageler J	10 (27.03%)	8 (21.62%)	10 (27.03%)	–	12 (32.43%)	9 (24.32%)	11 (29.73%)
Keane J	24 (61.64%)	23 (58.97%)	26 (66.67%)	12 (30.77%)	–	15 (38.46%)	16 (41.03%)
Nettle J	19 (50.00%)	14 (36.84%)	16 (42.11%)	9 (23.68%)	15 (39.47%)	–	15 (39.47%)
Gordon J	15 (38.46%)	15 (38.46%)	15 (38.46%)	11 (28.21%)	16 (41.03%)	15 (38.46%)	–

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

	French CJ	Kiefel J	Bell J	Gageler J	Keane J	Nettle J	Gordon J
French CJ	–	5 (71.43%)	5 (71.43%)	1 (14.29%)	3 (42.86%)	3 (42.86%)	2 (28.57%)
Kiefel J	5 (71.43%)	–	5(71.43%)	1 (14.29%)	4 (57.14%)	3 (42.86%)	2 (28.57%)
Bell J	5 (71.43%)	5 (71.43%)	–	1 (14.29%)	4 (57.14%)	2 (28.57%)	2 (28.57%)
Gageler J	1 (14.29%)	1 (14.29%)	1 (14.29%)	–	1 (14.29%)	1 (14.29%)	1 (14.29%)
Keane J	3 (42.86%)	4 (57.14%)	4 (57.14%)	1 (14.29%)	–	2 (28.57%)	2 (28.57%)
Nettle J	3 (42.86%)	3 (42.86%)	2 (28.57%)	1 (14.29%)	2 (28.57%)	–	4 (57.14%)
Gordon J	2 (28.57%)	2 (28.57%)	2 (28.57%)	1 (14.29%)	2 (28.57%)	4 (57.14%)	–

In Table E(II) we see the pattern of joint judgment authorship carried over to the subset of constitutional matters – though of course at just seven in number the opportunities for collaboration are far less frequent. The Chief Justice, Kiefel and Bell JJ were the most frequent co-authors of joint opinions in these cases and joined most with each other. Gageler J joined with all other Justices equally because he did so only once in the unanimous decision in *Day v Australian Electoral Officer (SA)*.[39] Keane J joined with Kiefel and Bell JJ the most, and then French CJ. Nettle and Gordon JJ joined most with each other on constitutional matters.

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

	French CJ	Kiefel J	Bell J	Gageler J	Keane J	Nettle J	Gordon J
French CJ	–	2	1	6	3	4	5
Kiefel J	1	–	2	6	3	5	4
Bell J	1	2	–	5	2	3	4
Gageler J	3	5	3	–	1	4	2
Keane J	2	3	1	6	–	5	4
Nettle J	1	4	2	5	3	–	3
Gordon J	2	2	2	3	1	2	–

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

	French CJ	Kiefel J	Bell J	Gageler J	Keane J	Nettle J	Gordon J
French CJ	–	1	1	4	2	2	3
Kiefel J	1	–	1	5	2	3	4
Bell J	1	1	–	4	2	3	3
Gageler J	1	1	1	–	1	1	1
Keane J	2	1	1	4	–	3	3
Nettle J	2	2	3	4	3	–	1
Gordon J	2	2	2	3	2	1	–

The rankings of co-authorship indicated by Tables E(I) and (II) are the subject of Tables F(I) and (II). It should also be noted that in some instances the difference between how frequently one judge wrote with various colleagues is not large, maybe just one or two decisions, so the ranking of different judges as

39 (2016) 331 ALR 386.

co-authors in these tables needs to be kept in perspective by referring back to Tables E(I) and (II).

IV THE FRENCH ERA – A STATISTICAL CONSOLIDATION

The High Court under Chief Justice French, referred to more succinctly as either the French era or the French Court, formally began and ended with the individual tenure of Robert French which spanned 1 September 2008 until 29 January 2017. However, identification of those matters which were decided by the 'French Court' is slightly more complex than the simple application of that date range. Only matters both heard and decided after the swearing in of French CJ are included in the tally, while those matters heard before his commencement but handed down afterwards are not included, being properly regarded as matters determined by members of the Gleeson Court. Likewise, matters heard by the High Court before the departure of French CJ but for which judgment was given after the elevation of Kiefel CJ are nevertheless attributed to the 'French Court'.[40] That this is the accurate way to regard such matters is supported by the continued designation of Kiefel as a puisne Justice in the reasons for judgment in these cases.

TABLE G: High Court of Australia Matters Tallied

	Unanimous	By Concurrence	Majority over Dissent	TOTAL
All Matters Tallied for Period	135 (31.84%)	171 (40.33%)	118 (27.83%)	424
All Constitutional Matters Tallied for Period	11 (14.47%)	34 (44.74%)	31 (40.79%)	76

The tally of matters decided by the French Court reveals a high number of cases decided by unanimous opinion (31.84 per cent), with the remainder divided between 40.33 per cent of cases comprising concurring opinions and 27.83 per cent featuring dissent. These figures demonstrate how this era saw especially high levels of agreement. The level of unanimity is striking when compared to other periods, as is the fact that nearly three out of every four matters saw no disagreement as to the result. Of the four preceding eras of the High Court under different Chief Justices, it is that of the Mason Court that comes closest to the high rate of unanimity observed under French CJ. The Mason era saw 25.93 per cent of all cases decided unanimously, but dissent was present in 43.22 per cent of cases – a clear contrast to the level of formal disagreement recorded under

40 See Lynch, 'Does the High Court Disagree More Often in Constitutional Cases?', above n 2, 492.

French CJ.[41] Other eras are marked by considerably lower levels of unanimity and a percentage of cases decided over dissent that is about half of all decided.

When looking at the institutional rates of dissent, it is important to appreciate that these tend to give an inflated sense of the extent to which the judges disagreed with one another. This was not a period when many cases were decided by a narrow majority in 'close call' cases. Where there was dissent, it was not often multiple, but was more typically expressed by a single judge alone (most frequently Heydon J).

Disagreement can be more prevalent in constitutional matters, which as an area of law lends itself less frequently to clear-cut answers.[42] This proved to be the case during the French era. As a subset of the total, constitutional matters were more divisive with just 14.47 per cent decided unanimously and 40.79 per cent giving rise to dissenting opinions. Again, these figures should be appreciated as limited in what they reveal about the *extent* of disagreement across the institution, with relatively few cases meeting the description of a 'close call', and many instances of dissent being by a single judge. This is made plain by consideration of the following two tables which reveal the decision-making of individual members of the French Court.

Having decided 371 cases over his tenure, French CJ departed the High Court with an overall rate of dissent of just 2.43 per cent of judgments delivered. This is a much lower rate of dissent than his predecessors: Gibbs CJ (8.90 per cent); Mason CJ (6.06 per cent); Brennan CJ (15.38 per cent) and Gleeson CJ (6.61 per cent).[43] It is also lower than any other member of the French Court, demonstrating that this was a Court with a Chief Justice who in almost every case formed part of the majority that disposed of the matter.

While French CJ's dissent rate is obviously a very low figure, less than that of any other member of the Court during this period, it is misleading to single out the Chief Justice; he formed part of a group of judges who consistently comprised the majority of the Court. Excepting Heydon J (who is the standout dissenter with a rate of 28.88 per cent) and Kirby J (who sat on only two matters), all other members of the Court over the first half of the French era have dissent rates of around 5 per cent. This shows a Court in which agreement was a dominant characteristic. A typical pattern was all of the judges agreeing on the result, with the exception of one outlier.

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41 Ibid 497. Note that these results were produced using the Commonwealth Law Reports rather than the AustLII database.

42 For general statistical analysis and discussion of this proposition, see ibid. Only in the Gibbs Court was there a higher percentage of constitutional cases decided unanimously (24.68 per cent) compared to the rate of unanimity in cases overall (20.05 per cent): ibid 497–8.

43 See ibid 503, 506, 508 for the figures for Gibbs, Mason and Brennan CJJ, but note that these results were produced using the Commonwealth Law Reports rather than the AustLII database. The figure for Gleeson CJ is arrived at by combining the results presented in ibid 512 and the annual studies in this series covering the years 2004–08. Although the different datasets should be acknowledged, namely insofar as some difference exists between the inclusion of matters in the authorised reports and the listing of matters on the online database, these may be expected to be slight and the percentiles are reliably indicative – both in their own right and to the extent they highlight the very low incidence of dissent from French CJ.

TABLE H: Actions of Individual Justices: All Matters

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	371	115 (31%)	247 (66.57%)	9 (2.43%)
Gummow J	171	51 (29.82%)	113 (66.08%)	7 (4.09%)
Kirby J	4	0	2 (50.0%)	2 (50.0%)
Hayne J	251	76 (30.28%)	160 (63.75%)	15 (5.98%)
Heydon J	187	43 (22.99%)	90 (48.13%)	54 (28.88%)
Crennan J	246	69 (28.05%)	169 (68.7%)	8 (3.25%)
Kiefel J	343	104 (30.32%)	224 (65.31%)	15 (4.37%)
Bell J	327	105 (32.11%)	208 (63.61%)	14 (4.28%)
Gageler J	177	52 (29.38%)	103 (58.19%)	22 (12.43%)
Keane J	156	58 (37.18%)	91 (58.33%)	7 (4.49%)
Nettle J	77	15 (19.48%)	52 (67.53%)	10 (12.99%)
Gordon J	61	16 (26.23%)	38 (62.30%)	7 (11.48%)

A court composed of judges by and large in furious agreement with each other might suggest an unadventurous period in which the bench was minded to maintain the status quo. Certainly, creativity and judicial adventurism are normally more associated with disagreement and dissent.[44] But in fact, the first years of the French era (what we might call, the 'French Court Mk 1' and in which the membership of the Court was stable) were characterised by a range of creative, and even landmark, decisions. This is exemplified by cases such as *Pape v Federal Commissioner of Taxation*[45] and *Williams v Commonwealth*[46] on

44 See Andrew Lynch, 'Introduction – What Makes a Dissent "Great"?' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 11–13.

45 (2009) 238 CLR 1.

46 (2012) 248 CLR 156.

federal expenditure and the executive power, *Kirk v Industrial Court (NSW)*[47] on state privative clauses and *South Australia v Totani*[48] on the exercise of state judicial power. Each of these was decided no later than 2012.

At least in the field of public law, the later period of the French Court (the 'French Court Mk 2') contained fewer decisions that evinced a willingness to develop new understandings of the law and bold innovations in constitutional interpretation.[49] Despite this, or perhaps because of it, three of the four appointments made to the changing bench of the French Court Mk 2 (Gageler, Nettle and Gordon JJ) have discernibly higher rates of dissent. However, none of these judges has emerged as a persistent outlier from a dominant majority as did Heydon J. Instead, they have been prepared to depart from the majority at more than double the rate of their predecessors on the French Court Mk 1. This suggests that the High Court under Chief Justice Kiefel will be unlikely to achieve the same rates of agreement as the Court did under her predecessor in total.

Seventy-six constitutional matters were decided by the High Court under Chief Justice French, and he sat on all but two of them (those having been heard just prior to his retirement).[50] Five of French CJ's nine dissenting judgments were issued in a constitutional matter. That is a rate of 6.67 per cent. This compares to his predecessors as follows: Gibbs CJ (17.14 per cent); Mason CJ (9.33 per cent); Brennan CJ (8.00 per cent) and Gleeson CJ (6.60 per cent).[51] In respect of constitutional cases, the last two Chief Justices have a nearly identical rate of minority judgments.

However, it is necessary to recognise that when we examine French CJ's five constitutional dissents, in two of those cases less than half of the seven Justices made orders that were in full concurrence with the orders of the Court; thus French CJ was hardly in a conventional minority on either occasion given that the Court divided without producing a clear majority.[52] Additionally, in the third constitutional case in which he was in dissent, the constitutional issues were decidedly peripheral.[53] As a result, there were only two constitutional cases of

47 (2010) 239 CLR 531.

48 (2010) 242 CLR 1.

49 See, eg, in relation to the separation of judicial power Hobbs, Lynch and Williams, above n 4, 64.

50 *Re Culleton [No 2]* [2017] HCA 4 and *Palmer v Ayres; Ferguson v Ayres* [2017] HCA 5 were heard by a bench not including French CJ but while he was still in office; handed down days after the swearing in of Kiefel CJ, consistent with their status as cases heard and decided in the French era, the identification of the new Chief Justice as a member of the bench in both is simply 'Kiefel J'.

51 See Lynch, 'Does the High Court Disagree More Often in Constitutional Cases?', above n 2, 504, 507, 510, 514 for the figures for Chief Justices Gibbs, Mason, Brennan and Gleeson with supplementation from the annual studies in this series covering the years 2004–08 for the latter. Note the earlier caveat regarding the use of different data sets in deriving these figures, above n 43.

52 *Momcilovic v The Queen* (2011) 245 CLR 1; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1.

53 *X7 v Australian Crime Commission* (2013) 248 CLR 92; see Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2013 Statistics' (2014) 37 *University of New South Wales Law Journal* 544, 556.

any significance in which French CJ was in clear dissent, in both cases alone. These were *Tajjour v New South Wales*[54] and *Alqudsi v The Queen*.[55]

TABLE I: Actions of Individual Justices: Constitutional Matters

	Number of Judgments	Participation in Unanimous Judgment	Concurrences	Dissents
French CJ	74	10 (13.51%)	59 (79.73%)	5 (6.76%)
Gummow J	40	7 (17.5%)	31 (77.5%)	2 (5.0%)
Kirby J	3	0	2 (66.6%)	1 (33.3%)
Hayne J	64	9 (14.06%)	47 (73.44%)	8 (12.5%)
Heydon J	42	6 (14.29%)	20 (47.62%)	16 (38.10%)
Crennan J	56	8 (14.29%)	46 (82.14%)	2 (3.57%)
Kiefel J	73	10 (13.70%)	59 (80.82%)	4 (5.48%)
Bell J	70	11 (15.71%)	56 (80.00%)	3 (4.29%)
Gageler J	28	2 (7.14%)	22 (77.57%)	4 (14.29%)
Keane J	29	4 (13.79%)	24 (82.76%)	1 (3.57%)
Nettle J	15	2 (13.33%)	11 (73.33%)	2 (13.33%)
Gordon J	11	1 (9.09%)	8 (72.73%)	2 (18.18%)

In constitutional matters, others have a lower rate of dissent than French CJ, but only Bell J has sat on a similar number of such cases. Again, Heydon J is the outlier having dissented in 38.10 per cent of his decisions. The next highest dissenting judge as a proportion of cases each has actually decided, is the last to be appointed to the French Court, Gordon J. Gordon J decided only 11 constitutional cases in the relevant period, so her dissent rate of 18.18 per cent,

54 (2014) 254 CLR 508.
55 (2016) 258 CLR 203.

whilst almost 20 per cent lower than that of Hedyon J over a five-year period, cannot be taken as a strong indication of anything except perhaps Heydon J's earlier exceptionalism. In addition to Gordon J, Table I shows that Gageler and Nettle JJ have a significantly higher rate of dissent than their predecessors who served on the French Court Mk 1. Whether this continues into the Kiefel era obviously remains to be seen. In a court that was already showing a propensity for several members, rather than a single regular outlier, to break with the majority, the departure of French CJ, an almost invariable member of that majority, and his replacement with Edelman J presents the potential for this dynamic to develop further.

V CONCLUSION

The French Court came to an end on 29 January 2017, when Robert French resigned a few weeks before his 70th birthday. The Court ran from French's appointment on 1 September 2008, a period approaching eight and a half years. It was marked, until its final two years, by alternating periods of high levels of unanimity and explicit disagreement. When it came to public law, the Court handed down landmark decisions in areas including the executive power of the Commonwealth, Ch III of the *Constitution* insofar as it restricts state legislatures and the exercise of power in respect of asylum seekers.[56]

Unlike other times in the Court's history, the French Court was not attended by significant controversy or disputation with government. The one prominent exception was the response to *Plaintiff M70/2011 v Minister for Immigration and Citizenship*.[57] In that decision, the Court interpreted section 198A of the *Migration Act 1958* (Cth) to strike down a declaration by which the Gillard government had sought to swap 800 asylum seekers held in Australian detention centres for 4000 refugees waiting in Malaysia. Stung by the result and with its political fortunes wavering, the government struck out. Prime Minister Julia Gillard suggested that the decision 'turns on its head the understanding of the law in this country' and accused the Chief Justice of inconsistency, arguing that he had 'considered comparable legal questions when he was a judge of the Federal Court and made different decisions to the one that the High Court made yesterday'.[58]

This highly charged response was not indicative of how decisions of the French Court were received. In other areas, even where the Court did turn prior understandings of law on their head, such as in *Kirk v Industrial Court (NSW)*,[59]

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56 See Hobbs, Lynch and Williams, above n 4.

57 (2011) 244 CLR 144 ('*Malaysia Solution Case*').

58 Matthew Franklin, 'Julia Gillard versus the High Court as the PM Takes Aim at Chief Justice Robert French', *The Australian* (online), 2 September 2011 <http://www.theaustralian.com.au/national-affairs/julia-gillard-versus-the-high-court-as-the-pm-takes-aim-at-chief-justice-robert-french/story-fn59niix-1226127707674>, referring to *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119 and/or *Ruddock v Vadarlis* (2001) 110 FCR 491.

59 (2010) 239 CLR 531.

or created previously undiscovered limitations on federal executive power, as in *Pape v Commissioner of Taxation*[60] and *Williams v Commonwealth*,[61] there was little or no political pushback.

These decisions, and perhaps also their reception, reflect the leadership of French CJ and the undeniable influence he had upon the direction of the Court. His impact can be seen in qualitative terms. It can hardly be coincidental that a renewed interest in federalism and limits upon Commonwealth power arrived at the Court at the same time as a Chief Justice who had expressed just such views over prior years.[62] Indeed, it was remarkable that in such a short period of time the High Court flirted with ideas and reasoning that might previously have been regarded as heresy.[63] Chief Justice French's own commitment to such views was manifest in a number of cases, including in one of his extremely rare dissents in *Alqudsi v The Queen*[64] in 2016.

The impact of French CJ can also be seen in empirical terms through the work of our surveys. As we note at the beginning of this article, it is a mistake to necessarily equate being in the majority of the Court with having influenced that result. On the other hand, the frequency with which French CJ was in a majority cannot be discounted. In the 371 cases he decided, he dissented in only nine matters (five of which raised constitutional questions). At 2.43 per cent, this is by far the lowest rate of dissent by a Chief Justice in many decades, at least since Gibbs CJ took up the role in 1981. Over this period, the Chief Justice with the next lowest rate of dissent is Mason CJ at 6.06 per cent. Significantly, Sir Anthony Mason was a judge who then and since has been regarded as having a very significant impact upon the Court that he led.[65]

Robert French first joined the High Court as Chief Justice. His successor, Susan Kiefel, assumes the office after having spent the best part of a decade already on the Court. Her record shows her to be, like French, a judge who is consistently in the majority. She joined the Court on 3 September 2007, almost exactly a year before French. By the close of 2016, she had sat on 380 matters, with 20 dissents (a rate of 5.26 per cent). Her dissents are inflated by three years, 2008, 2009, and 2010, when she disagreed six, three, and four times respectively. Since then, with the exception of 2013, when she dissented twice, she has never dissented more than once in any year. The last three years are indicative: in 2016 in 39 matters, she dissented once (in a non-constitutional matter); in 2015, she heard 40 matters, and dissented once (in a constitutional matter); in 2014, she sat on 38 matters, and dissented once (in a non-constitutional matter). The past three years show that Kiefel J dissented only three times in 117 matters, a rate of 2.56 per cent.

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60 (2009) 238 CLR 1.

61 (2012) 248 CLR 156.

62 See, eg, Robert S French, 'The Referral of State Powers' (2003) 31 *University of Western Australia Law Review* 19.

63 David Hume, Andrew Lynch and George Williams, 'Heresy in the High Court? Federalism as a Constraint on Commonwealth Power' (2013) 41 *Federal Law Review* 71.

64 (2016) 258 CLR 203.

65 Paul Kildea and George Williams, 'The Mason Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 244, 244.

Kiefel assumes the office of Chief Justice at a time when she has consistently achieved an extraordinarily low rate of dissent on par with that of the former Chief Justice. There is no doubt that she is a key part of the majority that almost always determines the outcome of matters before the Court. In remarks delivered early in her new position, the new Chief Justice made clear her commitment to the continuance of the 'collegiate approach' to judicial decision-making that was so evident on the High Court under her predecessor.[66] What is less certain, and indeed at this point unknowable, is the level of personal influence she will, as Chief Justice, bring to the resolution of matters. But being Chief Justice of course does not by itself equate to being an intellectual leader of the Court. Indeed, there have been a number of eras on the Court in which another person has overshadowed the Chief Justice in this respect, such as Sir Isaac Isaacs or Sir Owen Dixon before they became Chief Justice.

In the case of Kiefel, she became Chief Justice having already driven a significant change of direction on the Court. Arguably, her most important intellectual contribution to date relates to the use of proportionality in the balancing of rights and interests in constitutional contexts.[67] It appears that her interest in and development of the subject has led the Court to embark upon a major reassessment of its use in the context of the implied freedom of political communication. *McCloy v New South Wales*,[68] a joint judgment comprising French CJ, Kiefel, Bell and Keane JJ, opens by setting down an elaborate reformulation of the proportionality test, heavily influenced by German jurisprudence. This structured approach represents a bold, new method of addressing such questions in Australian law, and may have a wider impact on how the Court balances rights and interests in other contexts.[69]

Beyond this, we will have to wait and see what impact Kiefel has as Chief Justice. Like other judges, her opportunities will be determined by the types of matters that come before the Court. For many years, the Court's constitutional jurisprudence has been dominated by matters concerning the limits on Commonwealth and state power arising from the separation of judicial power in Chapter III of the *Constitution*. A surprising aspect of the 2016 statistics is that not one matter raised this issue. This may be an aberration – simply a quirk of the data points lying at either end of the calendar year, or perhaps Chapter III cases are finally on the wane. While far too early to say, any decline of such cases may be attributable to the more deferential approach adopted by the Court in recent years as deterring would-be litigants, or perhaps the recognition by Parliaments of the need for a more prudential approach in drafting legislation in this field. Either way, it will be interesting to see what balance of work emerges for the Court over the coming years, and what opportunities this creates for the Chief Justice and her colleagues to leave their mark on the law.

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66 Chief Justice Susan Kiefel, 'Judicial Methods in the 21st Century' (Speech delivered at the Supreme Court Oration, Banco Court, Supreme Court of Queensland, 16 March 2017).

67 Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85.

68 (2015) 257 CLR 178, 194–5.

69 Though note that the more recent decision of the High Court in *Murphy v Electoral Commissioner* [2016] HCA 36; (2016) 334 ALR 369 may have paused the rise of structured proportionality.

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 [or herself] the accuracy and value of the information conveyed'.[70]

A Matters Identified as Constitutional

- *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42; [2016] HCA 1.
- *Day v Australian Electoral Officer (SA); Madden v Australian Electoral Officer (Tas)* 331 ALR 386; [2016] HCA 20.
- *Bell Group NV (in liq) v Western Australia; WA Glendinning & Associates Pty Ltd v Western Australia; Maranoa Transport Pty Ltd (in liq) v Western Australia* (2016) 331 ALR 408; [2016] HCA 21.
- *Alqudsi v The Queen* (2016) 258 CLR 203; [2016] HCA 24.
- *Murphy v Electoral Commissioner* (2016) 334 ALR 369; [2016] HCA 36.
- *Cunningham v Commonwealth* (2016) 335 ALR 363; [2016] HCA 39.
- *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 339 ALR 367; [2016] HCA 50.

B Matters Not Tallied

- *Aristocrat Technologies Australia Pty Ltd v Allam* (2016) 327 ALR 595; [2016] HCA 3 – Gageler J sitting alone.
- *Obeid v The Queen* (2016) 329 ALR 372; [2016] HCA 9 – Gageler J sitting alone.
- *Obeid v The Queen [No 2]* (2016) 329 ALR 379; [2016] HCA 10 – Gageler J sitting alone.
- *Construction Forestry Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate* (2016) 338 ALR 360; [2016] HCA 41 – Nettle 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 common factual bases or questions:

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

- *Bell Group NV (in liq) v Western Australia; WA Glendinning & Associates Pty Ltd v Western Australia; Maranoa Transport Pty Ltd (in liq) v Western Australia* (2016) 331 ALR 408; [2016] HCA 21.
- *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 333 ALR 569; [2016] HCA 28.
- *Minister for Immigration and Border Protection v SZSSJ; Minister for Immigration and Border Protection v SZTZI* (2016) 333 ALR 653; [2016] HCA 29.
- *Miller v The Queen; Smith v The Queen; Presley v DPP (SA)* (2016) 334 ALR 1; [2016] HCA 30.
- *Sio v The Queen* (2016) 334 ALR 57; [2016] HCA 32.
- *NH v DPP (SA); Jakaj v DPP (SA); Zefi v DPP (SA); Stakaj v DPP (SA)* (2016) 334 ALR 191; [2016] HCA 33.
- *Timbercorp Finance Pty Ltd (in liq) v Collins; Timbercorp Finance Pty Ltd (in liq) v Tomes* (2016) 339 ALR 11; [2016] HCA 44.
- *Bywater Investments Ltd v Federal Commissioner of Taxation; Hua Wang Bank Berhad v Federal Commissioner of Taxation* (2016) 339 ALR 39; [2016] HCA 45.
- *Castle v The Queen; Bucca v The Queen* (2016) 339 ALR 182; [2016] HCA 46.

D Tallying Decisions Warranting Explanation

- *CGU Insurance Ltd v Blakeley* (2016) 327 ALR 564; [2016] HCA 2 – catchwords include *Commonwealth Constitution*, section 76(ii) amongst provisions discussed, but the reference made to this provision in the reasons for decision is minimal. This matter was not included in the tally of constitutional cases.
- *Mok v DPP (NSW)* (2016) 257 CLR 402; [2016] HCA 13 – catchwords include *Commonwealth Constitution*, sections 51(xxiv) and 52(i) amongst provisions discussed, but the reference made in the reasons for decision is minimal. This matter was not included in the tally of constitutional cases.
- *Miller v The Queen; Smith v The Queen; Presley v DPP (SA)* (2016) 334 ALR 1; [2016] HCA 30 – Gageler J is tallied as dissenting because as a consequence of his decision to overrule *McAuliffe v The Queen* (1995) 183 CLR 108 he concludes that the convictions should be quashed and a retrial on counts other than those which rely on extended joint criminal enterprise should be ordered. This is distinguished from the decision of the rest of the Court that the Court of Criminal Appeal should reconsider its earlier rejection of the appellant's ground that the verdict at trial was unreasonable.
- *Cunningham v Commonwealth* (2016) 335 ALR 363; [2016] HCA 39 – Gageler J concurs in finding the changes to parliamentary retirement

allowances valid but dissents with respect to the validity of changes to the Gold Passes which he alone finds invalid. His judgment is tallied as dissenting.

E 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.
- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2014 Statistics' (2015) 38 *University of New South Wales Law Journal* 1078.

- Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2015 Statistics' (2016) 39 *University of New South Wales Law Journal* 1161.