THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2006 STATISTICS

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I INTRODUCTION

These statistics present information about the High Court's decision-making over 2006 at both an institutional and individual level, with an emphasis on constitutional cases as a subset of the total. They have been compiled using the same methodology[1] employed in previous years.[2]

The annual presentation of empirical data on the decision-making of the High Court is a valuable means of enhancing understanding of the Court's work.[3] However, it remains important to preface what follows by acknowledging the limitations of an empirical study of only one year. While percentage calculations have been given in addition to raw figures for the sake of completeness and comparison, these should be treated more carefully than those produced after a significantly longer study – especially in respect of the smaller set of constitutional cases. The reader should be wary of making broad generalisations about the behaviour of the Court and its Justices based on these statistics alone. Indeed, we hope that each annual instalment in this study will be considered as building upon those of earlier years.

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

2 See Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of its First Five Years' (2003) 26 *University of New South Wales Law Journal* 32; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27 *University of New South Wales Law Journal* 88; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2004 Statistics' (2005) 28 *University of New South Wales Law Journal* 14; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2005 Statistics' (2006) 29 *University of New South Wales Law Journal* 182.

3 As we pointed out last year, this is standard practice in respect of empirical studies of the United States Supreme Court, the Constitutional Court of South Africa and the Supreme Court of Canada: Lynch and Williams, 'The High Court on Constitutional Law: the 2005 Statistics', above n 2, 183 fn 3.

But while each instalment should properly be seen as contributing to an ongoing study of trends and patterns in the behaviour of the Court and its Justices over time, there is a benefit in attempting to plot these as they actually unfold. For example, with the appointment of Justice Susan Crennan to the High Court on 8 November 2005, 2006 saw the commencement of what is known in empirical studies as a new 'natural court' – that is, a newly constituted group of decision-makers interacting with each other.[4] One of the key points of interest then, in looking at the statistical breakdown of the Court's work in 2006, is not just her Honour's individual judgment delivery but also how her replacement of Justice Michael McHugh has affected decision-making across the Court. Additionally, as we have seen in previous years, continuing Justices can find themselves markedly more or less in agreement with their colleagues than usual. There is interest in observing such shifts and reflecting upon the cases which stimulate changes of this sort.

That last point should be emphasised before turning to the statistics themselves. In producing these fairly simple tabular representations of the way in which the High Court and its Justices decided the cases of 2006, we do not assert that they are any kind of substitute for more traditional legal scholarship which subjects the reasoning contained in the cases themselves to substantive analysis. Rather, our intention in providing an overview of the way in which matters were resolved by the Court and its members is merely to complement such research and analysis.

II THE INSTITUTIONAL PROFILE

Table A – High Court of Australia Matters Tallied for 2006

	Unanimous	By concurrence	Majority over dissent	TOTAL
All Matters Tallied for Period	13 (20.63 per cent)	18 (28.57 per cent)	32 (50.79 per cent)	63 (100 per cent)
All Constitutional Matters Tallied for Period	1 (9.09 per cent)	4 (36.36 per cent)	6 (54.55 per cent)	11 (100 per cent)

4 See Anthony Blackshield, 'Quantitative Analysis: The High Court of Australia, 1964-1969' (1972) 3 *Lawasia* 1, 11; Youngsik Lim, 'An Empirical Analysis of Supreme Court Justices' Decision Making' (2000) 29 *Journal of Legal Studies* 721, 724; Russell Smyth, 'Judicial Interaction on the Latham Court: A Quantitative Study of Voting patterns on the High Court 1935-1950' (2001) 47 *Australian Journal of Politics and History* 330, 334.

From Table A it can be seen that of a total 63 matters were tallied for 2006.[5] This was a return to a more typical figure for the number of matters resolved by the Gleeson Court in a single year. In 2005 there had been a steep spike in this regard with 83 matters handed down – a 36 per cent rise on the preceding year – due in part to the need to have determined all matters on which McHugh J sat by the time of his Honour's retirement.

Despite this marked decrease overall last year, the number of matters involving constitutional questions increased from 2005, in which only eight (just 9.6 per cent of the total) were of that description. Last year, there were 11 constitutional matters, accounting for 17.46 per cent of the year's total caseload.[6] This is not as high a proportion as occurred in the years before 2005 (in 2004 31 per cent, and in 2003 22 per cent of the matters decided by the Court were classified as constitutional), but nevertheless suggests that the results in 2005 were somewhat aberrant both in the amount of decisions handed down and the very low percentage of them being concerned with constitutional law.

As usual, in identifying 'constitutional cases' as a group within the total sample, we err on the side of generous application of the following definition:

> that subset of cases decided by the High Court in the application of legal principle identified by the Court as being derived from the Australian Constitution. That definition is framed deliberately to take in a wider category of cases than those simply involving matters within the constitutional description of 'a matter arising under this Constitution or involving its interpretation.[7]

Additionally, we widen the net so as to include those matters that involve questions of purely state constitutional law,[8] though in 2006, as has been the case for the last few years, there was no matter which owed its inclusion solely to this aspect of classification. Of course, the 11 matters are not of equal significance in respect of the constitutional issues covered.[9]

Other information recorded in Table A confirms that in 2006 the High Court returned to a more typical breakdown of the way in which matters were decided after the unusual features displayed by the statistics of the preceding year. Between 2001-2004, the Court was split over the result in almost 50 per cent of

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5 The data was collected exclusively using the 63 cases available on AustLII <http://www.austlii.edu.au/> in its database for High Court decisions. No cases were eliminated from the list of decisions for 2006 due to being decided by a single judge, nor were any cases tallied more than once on account of their containing several distinct matters. For a detailed explanation of the purpose behind multiple tallying of some cases, see Lynch, 'Dissent Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia', above n 1, 500-02; Lynch, 'Does the High Court Disagree More Often in Constitutional Cases?', above n 1, 494-96. For further information about the tallying of the 2006 matters, see the Appendix at the conclusion of this paper.

6 These are listed by name in the Appendix to this paper.

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

8 Justice Kenny, in assessing the 2002 term of the High Court, made it clear that her use of the phrase 'constitutional cases' included those involving the Constitution of an Australian state: Justice Susan Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210, 210.

9 See Lynch and Williams, 'The High Court on Constitutional Law: The 2004 Statistics', above n 2, 16 for the arguments against using a further refinement, such as the use of a qualification that the constitutional issue be 'substantial'.

all cases. But 2005, by comparison, saw a remarkable absence of formal disagreement with dissent in just 34.94 per cent of cases.[10] Last year however, saw a return to the Gleeson Court's regular percentage of 50 per cent of total cases decided with dissenting judgments being issued.

The Gleeson Court's annual rate of constitutional cases decided over dissent has never displayed much steadiness. In 2003 and 2005, only 37.50 per cent of such matters featured minority opinions, while in 2004 formal disagreement peaked at 73.68 per cent of constitutional cases. It is interesting that 2004 saw such a high rate of dissent when constitutional matters represented such a high proportion (about one third) of all cases for the year. Yet the incidence of constitutional dissent fell when there were far fewer matters in 2005. In 2006, the number of constitutional cases climbed somewhat, but correspondingly so did the proportion of them which featured a formal dissent as to the result – just over half.

Of course, real disagreement may still be found amongst a series of opinions which do not formally dissent as to the result. The percentage of matters overall and also the subset of constitutional matters which were decided by concurrence in the final orders without any dissent both dropped. That is unsurprising given the return to higher levels of minority judgments, but as in recent years the Court was able to maintain a solid percentage of overall matters decided by delivery of a unanimous opinion. It is worth recalling that this is in notable contrast to the early years of the Gleeson Court which largely continued the trends of the Brennan era for very low rates of unanimity.[11]

Only one of the 11 constitutional matters produced a unanimous judgment: the single opinion issued by the five member bench in *Hutchison 3G Australia Pty Ltd v City of Mitcham*[12] – involving an inconsistency of laws issue – is the first constitutional matter decided unanimously since three matters were so resolved back in 2003.[13]

10 Ibid, 183.
11 See Lynch, 'Does the High Court Disagree More Often in Constitutional Cases?', above n 1, 497-98.
12 (2006) 225 ALR 615.
13 Lynch and Williams, 'The High Court on Constitutional Law: The 2003 Statistics', above n 2, 89.

TABLE B (I) – All Matters: Breakdown of Matters by Resolution and Number of Opinions Delivered[14]

Size of bench	Number of matters	How Resolved	Frequency	Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	18 (28.57%)	Unanimous	1 (1.59%)	1						
		By concurrence	3 (4.76%)		1		2			
		6:1	5 (7.94%)		1			2		2
		5:2	7 (11.11%)			3	4			
		4:3	2 (3.17%)				2			
6	12 (19.05%)	Unanimous	0 (0%)							
		By concurrence	7 (11.11%)		3	2	2			
		5:1	4 (6.35%)		3				1	
		4:2	1 (1.59%)				1			
		3:3	0 (0%)							
5	33 (52.38%)	Unanimous	12 (19.05%)	12						
		By concurrence	8 (12.70%)		3	3	1	1		
		4:1	9 (14.29%)		5	2	2			
		3:2	4 (6.35%)		1	1	1	1		

14 All percentages given in this table are of the total number of matters (63).

TABLE B (II) – Constitutional Matters: Breakdown of Matters by Resolution and Number of Opinions Delivered [15]

Size of bench	Number of matters	How Resolved	Frequency	Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	7 (63.64%)	Unanimous	0 (0%)							
		By concurrence	2 (18.18%)		1		1			
		6:1	1 (9.09%)					1		
		5:2	4 (36.36%)			2	2			
		4:3	0 (0%)							
6	2 (18.18%)	Unanimous	0 (0%)							
		By concurrence	2 (18.18%)		1	1				
		5:1	0 (0%)							
		4:2	0 (0%)							
		3:3	0 (0%)							
5	2 (18.18%)	Unanimous	1 (9.09%)	1						
		By concurrence	0 (0%)							
		4:1	9 (9.09%)				1			
		3:2	0 (0%)							

Tables B(I) and (II) reveal several things about the High Court's decision-making over 2006. First, they present a breakdown of all matters and then constitutional matters according to the size of the bench and how frequently it split in the possible ways open to it. Second, the tables also record the number of opinions which were produced by the Court in making these decisions. This is indicated by the column headed 'Number of Matters by Number of Opinions Delivered'. Immediately under that heading are the figures one to seven, which are, of course, the number of opinions which it is possible for the Court to

15 All percentages given in this table are of the total of constitutional cases (11).

deliver. Where part of the range is not possible, shading indicates the irrelevant categories.

These tables should be read from left to right. For example, Table B(I) tells us that of the 12 matters heard by a six member panel, four of those were resolved by a 5:1 split, but only one contained a separate written opinion from each member of the Court. The other three featured a majority joint judgment and a solo dissent. 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.

Similar to the results for 2005, Table B(I) shows that the Court's high rate of unanimous judgments is almost entirely produced by five member benches. Unanimity remains extremely unlikely when the Court sits as its full complement of seven Justices. The low rate of unanimity from seven judges sitting together last year was also reflected in the high proportion of cases decided with dissents – a contrast with 2005 where a significant number of matters heard by a seven-member bench were decided by concurrence alone. But in 2006, only four out of the 18 cases in which all Justices sat featured no dissent. The most frequent split was 5:2 – in over 11 per cent of all cases – producing between three and four opinions each time.

Only five of the 63 matters in 2006 had as many judgments as there were judges. While that is low, it should be noted that in reality the number of cases featuring a perplexing multiplicity of opinion is actually less than this. In two negligence matters dealing with 'wrongful life', three members of the Court issued opinions in a manner rarely seen much these days but very common in its early years. In both *Harriton v Stevens*[16] and *Waller v James*,[17] Justice Crennan's single judgment attracted the bare concurrence of the Chief Justice and Justices Gummow and Heydon so as to become the leading majority opinion. This was expressed by those Justices individually and with extreme brevity. Judgments of the simple 'I concur' or 'I agree' variety have diminished in recent decades as the Court has adopted practices conducive to greater joint judgment delivery.[18] It might seem tempting to regard judgments of this sort as de facto joint opinions and tally them as such. While some empirical studies have legitimately employed such an approach,[19] explanation has been given earlier in this series of annual statistics as to why separate tallying of separate opinions – even the briefest of concurrences – is preferable in this context.[20]

The sample size in respect of constitutional law cases tends to make Table B(II) of little use for any detailed analysis. It does, however, provide a simple breakdown of how opinions in those 11 matters in 2006 were delivered. None of

16 (2006) 226 CLR 52.

17 (2006) 226 CLR 136.

18 See Matthew Groves and Russell Smyth, 'A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903-2001' (2004) 32 *Federal Law Review* 255, 278.

19 See, eg, Smyth, above n 4, 333; Russell Smyth, 'Explaining Voting Patterns on the Latham High Court 1935-1950' (2002) 26 *Melbourne University Law Review* 88, 101; Russell Smyth, 'Acclimation Effects for High Court Justices 1903-1975' (2002) 6 *University of Western Sydney Law Review* 167, 175.

20 See Lynch, 'The Gleeson Court on Constitutional Law', above n 2, 39-40.

these cases was one of the five mentioned in the preceding paragraph where a judgment from each justice sitting in the case was the order of the day. Indeed there is nothing to suggest even on these admittedly limited results that joint judgments are less likely on the present Court in constitutional cases than in other areas. Two of the matters featured a solo dissenter while four had a minority of two Justices.

TABLE C – Subject Matter of Constitutional Cases

Topic	No of Cases	References to Cases[21] (Italics indicate repetition)
s 48	1	18
s 51(xix)	1	28
s 51(xx)	1	52
s 51 (xxiv)	1	17
s 51(xxix)	2	25, 40
s 51(xxxi)	1	*18*
s 51(xxxv)	1	*52*
s 51 (xxxvi)	1	*18*
s 51(xxxviii)	1	*25*
s 71	1	44
s 72	1	*44*
s 73	2	22, *44*
s 75	2	8, *44*
s 76	1	*44*
s 77 (iii)	1	*44*
s 92	1	*8*
s 109	2	*8*, 12
s 117	1	*8*
s 122	1	*52*
Judicial power	3	*40*, 41, *44*
Conflict of laws between States	1	*8*

Table C lists the provisions of the Constitution that arose for consideration in the 11 matters tallied. For about the last decade, issues relating to judicial power have dominated constitutional litigation. But 2006 saw a set of constitutional cases in which federalism questions were particularly prominent. The two most significant cases of 2006 were *XYZ v Commonwealth*[22] and *New South Wales v Commonwealth (Work Choices)*,[23] neither of which involved an examination of judicial power.

21 The reference numbers given are a shorthand citation of the case – the medium-neutral citation for each of these cases simply requires prefixing the number given with '[2006] HCA'. Full case details are given in the Appendix.

22 (2006) 227 ALR 495.

23 (2006) 231 ALR 1 ('*Work Choices*').

III THE INDIVIDUAL PROFILE

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

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	55	11 (20.00%)	40 (72.73%)	4 (7.27%)
Gummow J	55	12 (21.82%)	42 (76.36%)	1 (1.82%)
Kirby J	58	9 (15.52%)	21 (36.21%)	28 (48.28%)
Hayne J	53	10 (18.87%)	41 (77.36%)	2 (3.77%)
Callinan J	38	6 (15.79%)	28 (73.68%)	4 (10.53%)
Heydon J	58	11 (18.96%)	38 (65.52%)	9 (15.52%)
Crennan J	46	8 (17.39%)	38 (82.61%)	0 (0%)

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2006. It must be noted that two of the Justices delivered fewer opinions than the rest of the Court. Justice Crennan handed down 46 judgments – not so far off her colleagues who decided between 53-58 cases as to preclude some rough comparability. Justice Callinan, however, delivered just 38 opinions and consequently the reader should be wary of comparing the results in respect of his Honour too sharply with those of the other members of the Court.

In 2005 we observed that across the bench – including Kirby and Callinan JJ, the two Justices historically outsiders on the Gleeson Court – individual dissent rates either dropped or rose just marginally. The results for 2006 are not so uniform, though for most Justices their delivery of dissents was lowered. Justice Gummow halved his total number of dissenting judgments from the preceding year to just one – his Honour's lowest result since we began presenting these figures annually. The Chief Justice, Justice Hayne and Justice Callinan also delivered fewer dissents than in 2005 (though as a percentage, Chief Justice Gleeson and Justice Callinan's rates rose slightly on account of the fewer cases each decided than in the year before). The new arrival, Crennan J, has yet to deliver a dissenting opinion from the High Court bench, having not done so even once in 2006.

By contrast, Heydon J dissented more than in previous years, accounting for just over 15 per cent of his total opinions – almost double his Honour's rate for 2005 and 2004. But this rise may not be significant in the longer term. That caveat does not apply to the amount of express disagreement voiced by Kirby J last year, which, at 48.28 per cent, is remarkable even within the confines of a single year. Of course, Justice Kirby's high personal rate of dissenting judgments has long been a feature of these tables. But in 2005 his Honour's percentage of

such opinions fell to just a quarter,[24] which, while still robust, had precedents in earlier members of the Gibbs and Mason Courts.[25]

Justice Kirby's result for 2006 is especially notable then for two reasons. First, his Honour doubled his dissent rate of the preceding year – in which, we might point out, his Honour decided exactly the same number of cases.[26] Second, this is by far the highest rate of overall dissent recorded for Kirby J (and, it goes without saying, any Justice) across our earlier studies. For the first five years of the Gleeson Court, we found that his Honour dissented in 34 per cent of matters,[27] in both 2003 and 2004 that was lifted to exactly 38.46 per cent,[28] and, as just noted, his Honour's minority opinions fell quite a way in 2005. It is reasonable to presume that with formal disagreement this high, many of his Honour's opinions concurring in the result of other cases are likely to also demonstrate a fairly distinctive approach.

Ultimately, the High Court in 2006 was a dramatic study in contrasts. On the one hand was a Justice who disagreed with the orders reached by the Court not even once, while on the other was a Justice for whom every second opinion was in the minority.

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

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	11	1 (9.09%)	9 (81.82%)	1 (9.09%)
Gummow J	11	1 (9.09%)	10 (90.91%)	0 (0%)
Kirby J	11	1 (9.09%)	5 (45.45%)	5 (45.45%)
Hayne J	11	1 (9.09%)	10 (90.91%)	0 (0%)
Callinan J	8	0 (0%)	6 (75.00%)	2 (25.00%)
Heydon J	11	1 (9.09%)	8 (72.73%)	2 (18.18%)
Crennan J	8	0 (0%)	8 (100%)	0 (0%)

Table D(II) records the actions of individual justices in the constitutional cases of 2006. Three of the members of the Court, Gummow, Hayne and Crennan JJ, were in the majority in every case. While 2006 produced the Court's first unanimous opinion in a constitutional case since 2003, somewhat ironically, Kirby J and not Crennan J was a member of that bench.

24 See Lynch and Williams, 'The High Court on Constitutional Law: The 2005 Statistics', above n 2, 190 (Table D(I)).

25 See Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia', above n 1, 503-07.

26 That number being 58: Lynch & Williams, 'The High Court on Constitutional Law: The 2005 Statistics', above n 2, 190 (Table D(I)).

27 See Lynch, 'The Gleeson Court on Constitutional Law', above n 2, 47.

28 See Lynch and Williams, 'The High Court on Constitutional Law: the 2003 Statistics', above n 2, 93; Lynch and Williams, 'The High Court on Constitutional Law: The 2004 Statistics', above n 2, 19.

In this group of cases, Gleeson CJ and Kirby J both dissented in *Campbells Cash and Carry Pty Limited v Fostif Pty Limited*;[29] Heydon and Kirby JJ were both in the minority in *Fish v Solution 6 Holdings Limited*;[30] and in the *Work Choices* case it was Callinan and Kirby JJ who each delivered passionate dissents. There was only one instance of jointly written dissent and that was from Callinan and Heydon JJ in *XYZ v Commonwealth*.[31]

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

	Gleeson CJ	Gummow J	Kirby J	Hayne J	Callinan J	Heydon J	Crennan J
Gleeson CJ	———	26 (47.27%)	13 (23.64%)	25 (45.45%)	11 (20.00%)	27 (49.09%)	25 (45.45%)
Gummow J	26 (47.26%)	———	13 (23.64%)	40 (72.73%)	12 (21.82%)	23 (41.82%)	32 (58.18%)
Kirby J	13 (22.41%)	13 (22.41%)	———	12 (20.69%)	4 (6.90%)	10 (17.24%)	9 (15.52%)
Hayne J	25 (47.17%)	40 (75.47%)	12 (22.64%)	———	11 (20.75%)	19 (35.85%)	27 (50.94%)
Callinan J	11 (28.95%)	12 (31.58%)	4 (10.53%)	11 (28.95%)	———	17 (44.74%)	13 (34.21%)
Heydon J	27 (46.55%)	23 (39.66%)	10 (17.24%)	19 (32.76%)	17 (29.31%)	———	24 (41.38%)
Crennan J	25 (54.35%)	32 (69.57%)	9 (19.57%)	27 (58.70%)	13 (28.26%)	24 (52.17%)	———

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

	Gleeson CJ	Gummow J	Kirby J	Hayne J	Callinan J	Heydon J	Crennan J
Gleeson CJ	———	5 (45.45%)	2 (18.18%)	5 (45.45%)	2 (18.18%)	4 (36.36%)	3 (27.27%)
Gummow J	5 (45.45%)	———	3 (27.27%)	11 (100%)	2 (18.18%)	4 (36.36%)	8 (72.73%)
Kirby J	2 (18.18%)	3 (27.27%)	———	3 (27.27%)	0 (0%)	2 (18.18%)	1 (9.09%)
Hayne J	5 (45.45%)	11 (100%)	3 (27.27%)	———	2 (18.18%)	4 (36.36%)	8 (72.73%)

29 (2006) 229 ALR 58.
30 (2006) 225 CLR 180.
31 (2006) 227 ALR 495.

Callinan J	2 (25.00%)	2 (25.00%)	0 (0%)	2 (25.00%)	———	3 (37.50%)	2 (25.00%)
Heydon J	4 (36.36%)	4 (36.36%)	2 (18.18%)	4 (36.36%)	3 (27.27%)	———	3 (27.27%)
Crennan J	3 (37.50%)	8 (100%)	1 (12.50%)	8 (100%)	2 (25.00%)	3 (37.50%)	———

Tables E(I) and E(II) indicate the number of times a Justice jointly authored an opinion with his or her colleagues. Given that not all members of the Court sat on the same number of matters, the percentage figures may vary for co-authorship as a proportion of each Justice's total number of opinions – even when the raw figure is the same. As a result, both tables should be read horizontally for clarity. It needs to be acknowledged that the results for Callinan J, and to a lesser extent Crennan J, and the rankings which follow in Tables F(I) and F(II) are affected by the fewer number of cases each sat on compared to the other members of the Court.

Looking to Table E(1), the strongest partnership on the Court remains that between Gummow and Hayne JJ with each writing over 72 per cent of his total judgments for 2006 with the other. Their next preferred co-author, with whom both joined in over half their opinions, was Crennan J. The latter effectively supplanted Heydon J as the member of the Court who most frequently wrote with Gummow and Hayne JJ. It will be recalled that prior to Justice Heydon's appointment, it was the Chief Justice who wrote most with this duo. But while Gleeson CJ has continued, as a percentage of his own opinions, to collaborate just as much, if not a little more, with the team of Gummow and Hayne JJ than in previous years, in 2006 Heydon J co-wrote with them noticeably less often than he had since arriving on the bench. We do not mean to exaggerate this – the three Justices still joined with great regularity, but nevertheless there was a perceptible drop in the number of such occasions. Justice Heydon remained the most frequent co-author of opinions written by both the Chief Justice and Callinan J, but for everyone else he came in as their fourth ranked collaborator. This combined with his Honour's higher dissent rate in a year when, barring Kirby J, that of everyone else decreased, might suggest that his was a more individual voice amongst the members of the Court last year.

Table E(II) follows a similar pattern, though here the dominance of the Gummow and Hayne JJ partnership is really most striking. Not only did their Honours join each other in judgment in all 11 constitutional cases in 2006, they were, with the exception of Callinan J who still favoured Heydon J, the most frequent co-authors for all other members of the bench. Justice Crennan joined with them in all eight constitutional matters on which she sat.

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

	Gleeson CJ	Gummow J	Kirby J	Hayne J	Callinan J	Heydon J	Crennan J
Gleeson CJ	___	2	4	3	5	1	3
Gummow J	3	___	5	1	6	4	2
Kirby J	1	1	___	2	5	4	3
Hayne J	3	1	5	___	6	4	2
Callinan J	3	2	5	3	___	1	4
Heydon J	1	3	6	4	5	___	2
Crennan J	3	1	6	2	5	4	___

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

	Gleeson CJ	Gummow J	Kirby J	Hayne J	Callinan J	Heydon J	Crennan J
Gleeson CJ	___	1	4	1	4	2	3
Gummow J	3	___	5	1	6	4	2
Kirby J	2	1	___	1	n/a	2	3
Hayne J	3	1	5	___	6	4	2
Callinan J	2	2	n/a	2	___	1	2
Heydon J	1	1	3	1	2	___	2
Crennan J	2	1	4	1	3	2	___

As ever, it must be stressed that a high incidence of joint judgment delivery for one Justice across the other members of the Court cannot be simply equated with influence. A just as likely explanation is that the Justice concerned is a great 'joiner' and not necessarily the Court's intellectual leader. Alternatively, it may be that some Justices have a greater like of, and aptitude for, co-operative work.

IV CONCLUSION

This statistical presentation of the High Court's opinion delivery in 2006 shows a combination of continuity and change from preceding years. It also demonstrates a number of contradictions. One all too familiar example of this is provided by the fact that while the high number of unanimous decisions handed down by the Court has been sustained since first climbing in 2004, once more unanimity largely eluded the seven judges when sitting together.

Similarly, dissent has bounced back to its usual rate of about one in two cases after it had dipped sharply in 2005, but this is largely due to the personal dissent rate of Kirby J. Smyth and Groves once looked to the so-called 'Kirby effect' as an explanation for the rise in the Court's number of cases decided over dissent.[32]

32 Groves and Smyth, above n 18, 275. This was supported through their finding that joint judgments per 100 judgments (by which they mean any authored by two or more Justices) remained high (and climbed) in the first three years of the Gleeson Court, while the number of single-author concurring opinions was still at much lower levels than in the Court's past: 267-68.

That must certainly be so for 2006. It is tempting to think that Kirby J alone hinders the other members of the Court in increasing the number of unanimous judgments they might deliver – but care should be taken in this regard. Tables B(I) and (II) show that in a majority of cases it is not simply the individualism of a single member which prevents this occurring. For instance, Table B(I) reveals that there were nine matters featuring a solo dissent accompanied by a joint judgment from the rest of the Bench. That is not an insignificant amount of potential unanimity blocked by a single Justice in disagreement, but even so there are many more matters containing both more concurrences and more dissents.

In any event, 2006 saw the Court produce what we would regard as a solid percentage of unanimous opinions. To the extent that a single dissenting voice as regular as Justice Kirby's further inhibits the opportunities for unanimity, it might not be such a bad thing. Indeed there are several arguments to suggest it may be strongly desirable.[33] However, some might regret that disagreement with the approach to legal problems of the majority of the Court is found so often in the decisions of the same judge.[34]

By contrast to Justice Kirby's confirmed status as the Court's outsider, is the apparent and continued centrality of Gummow and Hayne JJ. It is clear by now that this is one of the great judicial partnerships in the High Court's history, with the two speaking with a single voice in respect of all constitutional matters last year. Their cohesion of outlook only renders more noteworthy those rare occasions upon which they disagree.

Justice Crennan clearly found herself in sympathy with the approach of these two Justices many times over 2006, though she did join frequently with most of her colleagues. At the conclusion of the study of the High Court's statistics for 2005, we pondered where Crennan J might find herself in relation to the Court's institutional voice. We noted that the strong levels of agreement amongst most members of the Gleeson Court made her ability to operate as a 'swing vote' on a roughly divided bench highly unlikely. It is, of course, early days, but on the strength of the 46 matters her Honour has decided so far, she is clearly comfortable with the prevailing methodology on the Court.

The above may hold true in 2007, but by the end of this year another new Justice will have been appointed to replace Callinan J (who must retire by 1 September). An additional two new appointments will also need to be made over the following two years due to the retirements of Gleeson CJ and Kirby J.[35] In short, the Court will shortly undergo a major change in personnel – akin to that which took place between 1995 and 1998. With three retirements due in as many years, the continued dominance of the Court's core group may be exposed to far greater challenge than we have become accustomed to seeing.

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33 See Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement' (2003) 27 *Melbourne University Law Review* 724, 725-51, for a canvassing of the benefits which minority opinions bring to judicial work. For a fairly self-aware discussion of this topic, see Justice Michael Kirby, 'Judicial Dissent' (Speech delivered at James Cook University, 26 February 2005).

34 See Cass Sunstein, *Why Societies Need Dissent* (2003) 80 for a discussion of the dangers of a member of any decision-making group becoming a 'domesticated dissenter'.

35 Chief Justice Gleeson and Kirby J are due to retire by 30 August 2008 and 18 March 2009 respectively.

APPENDIX – EXPLANATORY NOTES

These 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'.[36]

A Case Reports Identified As Constitutional

Sweedman v Transport Accident Commission [2006] HCA 8;
Hutchison 3G Australia Pty Ltd v City of Mitcham [2006] HCA 12;
Dalton v NSW Crime Commission [2006] HCA 17;
Theophanous v Commonwealth [2006] HCA 18;
Fish v Solution 6 Holdings Limited [2006] HCA 22;
XYZ v Commonwealth [2006] HCA 25;
Koroitamana v Commonwealth [2006] HCA 28;
Vasiljkovic v Commonwealth [2006] HCA 40;
Campbells Cash and Carry Pty Limited v Fostif Pty Limited [2006] HCA 41;
Forge v Australian Securities and Investments Commission [2006] HCA 44;
New South Wales v Commonwealth (Work Choices) [2006] HCA 52.

B Case Reports Not Tallied

No matter was excluded from tallying for this year.

C Case reports involving a number of matters – how tallied[37]

The following cases involved a number of matters but were tallied singly due to the presence of a common factual basis or questions:[38]

Antoun v The Queen; Antoun v The Queen [2006] HCA 2;
Waller v James; Waller v Hoolahan [2006] HCA 16;
State of Queensland v Stephenson & Anor; Reeman v State of Queensland [2006] HCA 20;
Davison & Ors v State of Queensland [2006] HCA 21;
Batistatos v Roads and Traffic Authority of New South Wales; Batistatos v Newcastle City Council [2006] HCA 27;
Island Maritime Limited v Filipowski; Kulkarni v Filipowski [2006] HCA 30;
Darkan v The Queen; Deemal-Hall v The Queen; McIvor v The Queen [2006] HCA 34;

36 Louis Henkin, 'The Supreme Court, 1967 Term' (1968) 82(1) *Harvard Law Review* 63, 301.
37 The purpose behind multiple tallying is considered in Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia', above n 1, 500-02.
38 The arguments for single tallying of a number of matters dealt with in one case have earlier been considered in the context of multiple tallying (something not done at all in respect of this year's results) in Lynch, 'the Gleeson Court on Constitutional Law', above n 2, 63 fn 72.

Campbells Cash and Carry Pty Limited v Fostif Pty Limited; Australian Liquor Marketers Pty Limited v Berney [2006] HCA 41;
New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia [2006] HCA 52;
Clayton v The Queen; Hartwick v The Queen; Hartwick v The Queen [2006] HCA 58.

No cases were tallied multiple times in this study.

D Tallying Decisions Warranting Explanation

CSR Ltd v Della Maddalena [2006] HCA 1: Callinan and Heydon JJ agree the appeal should be allowed but disagree that there should be a retrial. As there is a significant practical difference between the orders proposed by Callinan and Heydon JJ and the rest of the court, their judgment is counted as a partial dissent and this matter is therefore tallied as majority over dissent.

Hutchison 3G Australia Pty Ltd v City of Mitcham [2006] HCA 12: of the various respondents, only the City of Mitcham and the SA Attorney-General are required to pay costs. However, the decision is unanimous and, as the orders do not otherwise significantly differentiate between the respondents, this is tallied as a single matter.

Forge v Australian Securities and Investments Commission [2006] HCA 44: the report identifies three distinct matters, however each of these involves a common factual basis and they have therefore been tallied as one. In relation to the first matter, though Kirby J agrees in part that the proceedings commenced by ASIC were a matter under a law made by Parliament within the meaning of s76(ii) of the Constitution, he otherwise dissents from the majority position. His partial concurrence in respect of just that matter does not prevent tallying his judgment in the case as a dissent.