The High Court on Constitutional Law: The 2011 Statistics

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A INTRODUCTION

This article presents statistical information about the High Court's decision-making for 2011 at both an institutional and individual level, with an emphasis on constitutional cases as a subset of the total. The results have been compiled using the same methodology[1] employed in previous years.[2]

As always, we emphasise the importance of acknowledging the limitations that inhere in an empirical study of the decision-making of the High Court over just one year. In particular, care must be taken not to invest too much significance in the percentage calculations given the modesty of the sample size, especially in respect of the smaller set of constitutional cases. Nevertheless, this annual exercise remains worthwhile in that it offers assistance to those followers of the Court's decisions who are interested in the way in which the dynamic between its individual members translates to institutional outcomes. It provides simple empirical data about the functioning of the Court that may otherwise be left merely to impression.

We endeavour to draw readers' attention to trends and patterns observed in earlier years where these enhance understanding of the significance of these results. As it turns out, the results of our 2011 survey of decision-making on the Court provide a clear demonstration of the value of looking at the Court on a yearly basis. They are, in several key respects, notably different from those of the immediately preceding 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, with further discussion in 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] Andrew Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of its First Five Years' (2003) 26 University of New South Wales Law Journal 32; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27 University of New South Wales Law Journal 88; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2004 Statistics' (2005) 28 University of New South Wales Law Journal 14; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2005 Statistics' (2006) 29 University of New South Wales Law Journal 182; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2006 Statistics' (2007) 30 University of New South Wales Law Journal 188; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2007 Statistics' (2008) 31 University of New South Wales Law Journal 238; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2008 Statistics' (2009) 32 University of New South Wales Law Journal 181; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2009 Statistics' (2010) 33 University of New South Wales Law Journal 267; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2010 Statistics' (2011) 34 University of New South Wales Law Journal 1030.

Statistical representations of the way in which the High Court and its Justices decided the cases of any given year are only a supplement rather than any kind of substitute for scholarship that subjects the legal reasoning contained in the cases to substantive analysis or examines the impact of the court's decisions upon government and the community. We also refrain entirely from making the exercise one from which we presume to make conclusions about the particular working relationships amongst the Court's members. The results are drawn only from what may be observed from the public record of the Court's decided cases. This remains inadequate source material from which to infer, for example, the level of influence which any Justice has amongst his or her colleagues.

B THE INSTITUTIONAL PROFILE

Table A – High Court of Australia Matters Tallied for 2011

	Unanimous	By concurrence	Majority over dissent	**TOTAL**
All Matters Tallied for Period	8 (16.67%)	16 (33.33%)	24 (50.00%)	48 (100%)
All Constitutional Matters Tallied for Period	1 (12.50%)	3 (37.50%)	4 (50.00%)	8 (100%)

A total of 48 matters were tallied for 2011 – the same that were tallied in the preceding year.[3] However, in 2010 the High Court decided 50% of those matters unanimously, actually increasing on the high number of unanimous cases (over 44%) decided in the first year of Chief Justice French's tenure. Last year the Court's remarkable levels of unanimity since its present membership was finalised with the arrival of Justice Bell in 2009 were not sustained. Given that, as we earlier pointed out, the rate of unanimity in the first two years of the French Court far surpassed that observed at any time under Chief Justices Gleeson, Brennan, Mason and Gibbs, this should not be seen as surprising. If anything, the spike in agreement in 2009 was the surprise, compounded by a further rise in 2010. The decline in the level of unanimity has, however, been very significant. At about a sixth of all tallied matters for the year, the Court's rate of unanimity in 2011 was, across these annual studies, only lower in 2003 and 2007. In every other year at least 20% of cases were decided by a single joint judgment.

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[3] The data was collected using the 53 matters listed on AustLII <http://www.austlii.edu.au/> in its High Court database for 2011. Several matters were eliminated from the study. For further information about that and other decisions affecting the tallying of 2011 matters see the Appendix – Explanatory Notes at the conclusion of this paper.

In our analysis of the very high rate of unanimity over the preceding two years, we emphasised that it does not occur simply through fewer cases being decided with a dissenting opinion. However, we did acknowledge the obvious fact that dissent is fatal to any prospect of unanimity. In other words, while low levels of dissent need not result in more unanimity, high levels of dissent must of course explain the inability of the Court to decide more than a modest number of cases unanimously. In 2011, the number of decisions decided over at least one minority judgment reverted to the virtually unwavering standard of the Gleeson era – at a neat 50%. In 2009, the figure was just under half that amount and in 2010 it was only 18.75% of cases – by far the lowest results since we began these annual surveys.

The percentage of cases decided through two or more concurring opinions remained very close to the equivalent figure in 2009 and 2010. In short, for the first three years of the French Court, the Justices have decided approximately a third of all cases by agreeing as to the result but expressing this through two or more separate sets of reasons. While that has been consistent, the first two years may be distinguished from the third by the high unanimity-low dissent of the former and the low-unanimity-high dissent of the latter.

In 2011, there were just eight matters – or a sixth of the overall total – that involved discussion by the Court of constitutional questions. This continues the trend we have observed in recent years of the modesty of the Court's constitutional law caseload relative to the early years of the century.[4]

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

> that subset of cases decided by the High Court in the application of legal principle identified by the Court as being derived from the Australian Constitution. That definition is framed deliberately to take in a wider category of cases than those simply involving matters within the constitutional description of 'a matter arising under this Constitution or involving its interpretation.[5]

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.[6] In 2011, there were, however, no such cases.

In determining which cases are properly classified as 'constitutional', the extent to which such issues are central to the resolution of the matter is generally not a consideration – an approach we have explained in an earlier study.[7] This means that the figures pertaining to 'constitutional matters' result from a generously applied and inclusive criteria rather than one which might narrow the field based on some subjective additional criterion based upon our own sense of the relative importance of

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4 The issue of the number of constitutional matters decided by the Court in recent years was discussed in Lynch and Williams (2009), above n 2, 183-84.

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

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

7 The arguments against using a further refinement, such as use of a qualification that the constitutional issue be 'substantial', were made in Lynch and Williams (2005), above n 2, 16.

the constitutional questions.

The Court divided in half of the eight constitutional matters it decided in 2011, a fairly typical proportion. All these matters were decided by all Justices sitting together, except for that which was decided by unanimous judgment. That was the section 109 inconsistency case of *Jemena Asset Management (3) Pty Ltd v Coinvest Limited*, decided by a six-member bench, in which Justice Hayne did not take part.[8]

[8] [2011] HCA 33.

TABLE B (I) All Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[9]

Size of bench	Number of matters	How Resolved	Frequency	Cases sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	18 (37.50%)	Unanimous	1 (2.08%)	1						
		By concurrence	6 (12.50%)		4	2				
		6:1	10 (20.83%)		8	1	1			
		5:2	-							
		4:3	-							
		2:5	1 (2.08%)						1	
6	4 (8.33%)	Unanimous	1 (2.08%)	1						
		By concurrence	1 (2.08%)				1			
		5:1	1 (2.08%)				1			
		4:2	1 (2.08%)				1			
		3:3	-							
5	25 (52.08%)	Unanimous	5 (10.42%)	5						
		By concurrence	9 (18.75%)		6	2	1			
		4:1	6 (12.50%)		4	2				
		3:2	5 (10.42%)		1	4				
3	1 (2.08%)	Unanimous	1 (2.08%)	1						
		By concurrence	-							
		2:1	-							

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

TABLE B (II) Constitutional Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered [10]

Size of bench	Number of matters	How Resolved	Frequency	Cases sorted by Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	7 (87.50%)	Unanimous	-							
		By concurrence	3 (37.50%)		3					
		6:1	3 (37.50%)		2	1				
		5:2	-							
		4:3	-							
		2:5	1 (12.50%)						1	
6	1 (12.50%)	Unanimous	1 (12.50%)	1						
		By concurrence	-							
		5:1	-							
		4:2	-							
		3:3	-							

Tables B(I) and (II) reveal several things about the High Court's decision-making over 2011. First, they present a breakdown of, respectively, all matters and then just constitutional matters according to the size of the bench and how frequently it split in the various possible ways open to it. Second, the tables record the number of opinions which were produced by the Court in making these decisions. This is indicated by the column headed 'Cases Sorted by Number of Opinions Delivered'. Immediately under that heading are the figures 1 to 7, which are the number of opinions which it is possible for the Court to deliver. Where that full range is not applicable, shading is used to block off the irrelevant categories. It is important to stress that the figures given in the fields of the 'Number of Opinions Delivered' column refer to the number of *cases* containing as many individual opinions as indicated in the heading bar.

These tables should be read from left to right. For example, Table B(I) tells us that of the 18 matters heard by a seven member bench, ten produced a 6:1 split, and in one of those the Court delivered four separate opinions.[11] That table enables us to identify the most common features of the cases in the period under examination. In

[10] All percentages given in this table are of the total number of constitutional matters (8).

[11] The case is *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

2011 these were the delivery of a 5:0 decision resolved through two concurring opinions. It should be no surprise that in 2009 and 2010 more cases were decided unanimously by a five-member bench than any other way. But with the drop in unanimity last year, the profile of the Court's most 'typical' case has returned to that experienced in 2007 and 2008.

An arresting feature of the 2010 results that was maintained by the Court in the cases it decided over 2011 is the lack of any case decided where each Justice wrote separately. Additionally, there were even fewer matters last year that were resolved by a joint judgment written by just a pair of Justices accompanied by individual opinions from the remaining members of the bench. Indeed there were only two such matters. However, these could not be more different. The first was *Minister for Immigration & Citizenship v SZGUR*, in which two members of the bench issued bare concurrences with the other three whose reasons were contained in a joint and an individual judgment. In an earlier study we discussed the circumstances in which members of the Court seemed most likely to deliver bare concurring judgments.[12] These did not apply in this case and the frequency of this practice remains generally very low.

The second case in which there were almost as many opinions as there were Justices was the decision of *Momcilovic v R*, decided by all seven Justices, with only Justices Crennan and Kiefel co-authoring a joint opinion.[13] Unlike *SZGUR*, all the opinions delivered were substantial ones. This case requires attention for additional reasons. The level of disagreement it produced across the Court renders it an unusually difficult matter to tally in a study such as this and requires us to emphasise the methodological principles which have underpinned these annual surveys but which are rarely necessary to consider explicitly. The compilation of these statistics is carried out using a methodology essentially derived from that which has been applied for several decades by the editors of the *Harvard Law Review* in that publication's surveys of decision-making on the United States Supreme Court. However, that method could not be applied without modification given the different traditions of opinion delivery in the two institutions, namely the lack of any practice in the High Court of delivering an 'opinion for the court, from which individual judges sometimes disassociate themselves in varying degrees'.[14] The tendency here to instead follow the English tradition of seriatim opinions across the bench – admittedly waning in recent times in favour of more joint judgments – necessitated greater clarity as to what it was that those opinions to be classified as dissenting were actually in disagreement with. As one of us said at the outset of this series:

> Not only does the [High] Court as an institution not have a judgment written for it – there is the increased likelihood that there may not even be a majority of Justices in favour of one particular result. The lack of a clear majority is an accepted incident of our judicial method – the final orders will reflect varying points of consensus amongst the judgments, but not necessarily the orders

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12 Lynch and Williams (2010), above n 2, 274.

13 [2011] HCA 34.

14 Justice Ruth Bader Ginsburg, 'Remarks on Writing Separately' (1990) 65 *Washington LR* 133, 134.

favoured by any readily discernible majority of the Bench, or even those of any one Justice.[15]

Two complementary rules, adapted from their *Harvard Law Review* counterparts, were to be applied to address this possibility:[16]

- A Justice is considered to have dissented when he or she voted to dispose of the case in any manner different from the final orders issued by the Court; and
- Opinions that concur in the orders of the Court, even if not belonging to any actual majority, are not dissenting.

Using the orders of the Court as the yardstick for measuring concurrence and disagreement may, in some cases, actually result in a numerical majority of the Justices being regarded as in dissent. This has been canvassed using several case examples that demonstrate the operation of 'shifting majorities' upon 'institutional coherence'.[17] Ultimately, it was accepted that cases where a majority of judges dissent from the orders made by the Court are likely to be a rare but not an unimaginable prospect.

Momcilovic v R is the most recent manifestation of this difficult scenario. We have tallied the decision on the interaction of federal and State criminal law and the *Charter of Human Rights and Responsibilities* Act 2006 *(Vic)* as decided 2:5. This reflects the fact that only the orders favoured by the joint judgment of Crennan and Kiefel JJ entirely accord with those made by the Court as a whole. Of the seven members of the Court, Justice Heydon is most obviously in dissent for he alone amongst his colleagues would not have allowed the appeal. Although Justice Hayne did allow Momcilovic's appeal, he is also clearly in dissent since his own reasons are distinctive in finding that the State offence with which the appellant was charged was invalid for inconsistency with the Commonwealth *Criminal Code*. This led him to order both a declaration be made to this effect and that there should not be a new trial of the matter – with which no other member of the Court agreed and so this is not reflected in the Court's final orders. Additionally, Justice Hayne concurs with much of Justice Gummow's opinion, but the latter is also to be regarded as in dissent for although the orders he makes with respect to the appellant do concur with those of the Court, his Honour further orders that there should be a declaration that ss 33, 36 and 37 of the Victorian *Charter of Human Rights and Responsibilities* are invalid.

The other four Justices, Chief Justice French, Justices Crennan, Kiefel and Bell, do not find these provisions of the Charter to be invalid and so make no order to that end. But Justices Crennan and Kiefel, having expressed doubt that the Victorian Court of Appeal should have exercised its power under s 36 of the Charter to issue a declaration that the State offence was incompatible with a protected freedom, do order that the declaration, along with the lower court's other orders, should be set aside. In contrast, the Chief Justice, in whose orders Bell J concurs, deliberately preserves the Court of Appeal's declaration of incompatibility while setting aside the rest of its orders. On this point, French CJ and Bell J are also driven into dissent since the High Court's order is to set aside the declaration. This is due to a curious

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15 Lynch, above n 2, 40.

16 Ibid 40-42. For the detailed justification behind both these rules, see Lynch, above n 1, 480-84.

17 Lynch, above n 1, 492-98.

combination of reasons that, on the one hand, the declaration of incompatibility was an exercise of a power invalidly conferred upon the Court by the Charter (Gummow, Hayne and Heydon JJ, the last having gone so far as to find the entirety of the Charter invalid), and, on the other, that the provision enabling the declaration is constitutionally valid but the power was erroneously used in this particular case (Crennan and Kiefel JJ). Given that a declaration of incompatibility under the Charter does not have legal consequences for the rights of the party, it might perhaps have been defensible to overlook the disagreement between the Chief Justice with Bell J and Crennan and Kiefel JJ on this score and instead focus on their consensus as to the validity per se of the power to issue such a declaration. But not only would this be a departure from the first of the principles stated above, it would create an impression of agreement about an important aspect of the case that is at odds with the reality. As much as it goes against the grain to describe any case as decided by the High Court 2:5, it papers over the competing individual voices with which the Court actually speaks in *Momcilovic* if we simply say it was decided 4:3.

Momcilovic v R is, as a constitutional case, also recorded in Table B(II). It hardly needs to be said that it was the constitutional matter that provoked the most disagreement.

TABLE C – Subject Matter of Constitutional Cases

Topic	No of Cases	References to Cases (Italics indicate repetition)
s 51(ii)	1	35
s 51(vi)	2	28, 29
s 51(xxxi)	1	*28*
Chapter III Judicial Power	5	4, 24, *28*, *29*, 34
s 73	1	*34*
s 75(iv)	1	*34*
s 77(iii)	1	*34*
s 90	1	40
s 109	2	33, *34*
s 122	1	*40*
Implied Freedom of Political Communication	1	*4*

Table C lists the provisions and aspects of the Commonwealth Constitution that arose for consideration in the eight constitutional law matters tallied.

C THE INDIVIDUAL PROFILE

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

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
French CJ	42	6 (14.29%)	33 (78.57%)	3 (7.14%)
Gummow J	44	7 (15.91%)	34 (77.27%)	3 (6.82%)
Hayne J	29	4 (13.79%)	24 (82.76%)	1 (3.45%)
Heydon J	44	4 (9.09%)	20 (45.45%)	20 (45.45%)
Crennan J	42	5 (11.90%)	35 (83.33%)	2 (4.76%)
Kiefel J	36	7 (19.44%)	28 (77.78%)	1 (2.78%)
Bell J	41	8 (19.51%)	29 (70.73%)	4 (9.76%)

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2011. While the composition of the Court was entirely stable over the year, it is worth noting the slightly lower sitting rate of Justice Hayne. A difference of fifteen matters separates the busiest members of the Court (Gummow and Heydon JJ) from Hayne J. Justice Kiefel also sat on fewer matters than the majority of her colleagues but this difference is not nearly so great as that with respect to Hayne J and does not seriously qualify the ability to compare the results in her respect.

The most striking feature across these results is the percentage of dissenting opinions delivered by Heydon J – which at 45% of the opinions he authored far outstrips that of any of his colleagues on the Court last year, is roughly triple his previous highest dissent rates and places him on a par with the Court's recently departed 'Great Dissenter' Justice Michael Kirby. Let us unpack each of those three observations in sequence.

First, and to leave Heydon J to one side and speak more generally about the table, it is clear that this is a Court where formal disagreement from the result remains very rare. While each Justice issued a minority opinion at some point last year, they each

did so only a few times. This is in keeping with the first two years of the French Court where, with unanimity as high as it was, dissent was unsurprisingly low. Last year actually saw the first minority opinions authored by the Chief Justice since his appointment.

Although Hayne and Kiefel JJ dissented only once each in 2011 it should be remembered that they did not decide as many matters. Even the figures that are here probably overstate the disagreement. For example, one of the dissents tallied for both French CJ and Bell J is their opinions in *Momcilovic* – which, as discussed above, were classified as such only due to their order on the lower court's declaration of incompatibility – an issue upon which there was no opposing majority consensus. In a similar vein, Kiefel J's single dissent result derives from her judgment in *Westport Insurance Corporation v Gordian Runoff Limited*[18] in which she expressly disagreed with the majority on the grounds upon which special leave to appeal was given. Although Kiefel J went on to concur with the joint judgment that the appeal should be allowed, a strict application of the rule requiring complete agreement with the final orders meant that the opinion was nevertheless tallied as dissenting.[19]

Second, although we noted in respect of the 2010 results that Heydon J was now the Court's most frequent dissenter, his percentage of dissenting opinions in that year was still under 15%. This was comparable to his rate of dissent in both 2006 and 2009. We also pointed out that this figure was lower than that of Justices McHugh and Callinan in earlier years, never mind Justice Kirby, with whom it was felt there was no obvious comparison. Heydon J's filing of a dissenting opinion in over 45% of the cases on which he sat last year is an increase in disagreement by threefold. Leaving aside the four occasions on which he joined an unanimous opinion, he dissented as often from the judgments of his colleagues as he concurred with them. While in the preceding year's study we stressed that Heydon J was not routinely a 'lone dissenter' as he had company in minority just as often as he did not, this clearly has no application to his judgments in 2011.

Third, how does a dissent rate of 45.45% in a single calendar year stack up against the annual results for Justice Kirby? Only in 2006 did the latter deliver a greater proportion of dissenting opinions (48.28%) than Heydon J did last year. In only one other year did Kirby J even have a dissent rate above 40% (41.78% in 2007). It will be interesting to see how frequently Heydon J finds himself in the majority in 2012 and beyond, but there is no doubt that his rate of disagreement in 2011 is a striking figure.

Unsurprisingly, the individual rates of participation in the delivery of unanimous opinions reflect the steep decline last year in the production of such judgments for the institution as a whole, as evidenced in Table A. In 2004, Matthew Groves and Russell Smyth wrote of a 'Kirby effect' – the idea that a spike in the number of split decisions made by the Court was due one individual Justice rather than the regular expression of disagreement more broadly across the institution.[20] In understanding

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18 [2011] HCA 37.

19 For the justification of this hardline approach in the interests of empirical consistency, see Lynch, above n 1, 487-91.

20 Matthew Groves & Russell Smyth, 'A Century of Judicial Style: Changing patterns in Judgment Writing on the High Court 1903-2001' (2004) 32 *Federal Law Review* 255, 275.

the end of the French Court's unparalleled streak of unanimity, what we might rechristen the 'Heydon effect' has clearly been a large factor. This extends beyond the sheer number of Heydon J's dissents to include the impact of his frequent delivery of a sole-authored concurrence to a joint judgment written by all the other members of the Court. The extent of this is made clearer by subsequent tables.

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

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
French CJ	8	1 (12.50%)	6 (75.00%)	1 (12.50%)
Gummow J	8	1 (12.50%)	6 (75.00%)	1 (12.50%)
Hayne J	7	0 (0%)	6 (85.74%)	1 (14.29%)
Heydon J	8	1 (12.50%)	3 (37.50%)	4 (50.00%)
Crennan J	8	1 (12.50%)	7 (87.50%)	0 (0%)
Kiefel J	8	1 (12.50%)	7 (87.50%)	0 (0%)
Bell J	8	1 (12.50%)	6 (75.00%)	1 (12.50%)

Table D(II) records the actions of individual justices in the constitutional cases of 2011. The effect of *Momcilovic* on these figures is immediately noticeable – it is in that case that the Chief Justice, Gummow, Hayne and Bell JJ deliver their only dissent in a constitutional case for the year. As earlier detailed, the joint judgment of Crennan and Kiefel JJ in that case being the only opinion which arrived at exactly the same orders as ultimately made by the Court, they are the only members of the bench not tallied as dissenting. They, and the other four Justices just mentioned did not dissent in any other constitutional matter.

The other matters in which Heydon J dissented were *Wainohu v New South Wales,*[21] *Haskins v Commonwealth*[22] and *Nicholas v Commonwealth*.[23] These last two matters

[21] [2011] HCA 24.
[22] [2011] HCA 28.
[23] [2011] HCA 29.

were heard at the same time and the opinions delivered in *Haskins* essentially served to determine the outcome in *Nicholas*.

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

	French CJ	**Gummow J**	**Hayne J**	**Heydon J**	**Crennan J**	**Kiefel J**	**Bell J**
French CJ	_____	25 (59.52%)	18 (42.86%)	5 (11.90%)	26 (61.90%)	27 (64.29%)	24 (57.14%)
Gummow J	25 (56.82%)	_____	25 (56.82%)	6 (13.64%)	27 (61.36%)	23 (52.27%)	30 (68.18%)
Hayne J	18 (62.07%)	25 (86.21%)	_____	3 (10.34%)	22 (75.86%)	18 (62.07%)	21 (72.41%)
Heydon J	5 (11.36%)	6 (13.64%)	3 (6.82%)	_____	8 (18.18%)	6 (13.64%)	9 (20.45%)
Crennan J	26 (61.90%)	27 (64.29%)	22 (52.38%)	8 (19.05%)	_____	27 (64.29%)	28 (66.67%)
Kiefel J	27 (75.00%)	23 (63.89%)	18 (50.00%)	6 (16.67%)	27 (75.00%)	_____	23 (63.89%)
Bell J	24 (58.54%)	30 (73.17%)	21 (51.22%)	9 (21.95%)	28 (68.29%)	23 (56.10%)	_____

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

	French CJ	Gummow J	Hayne J	Heydon J	Crennan J	Kiefel J	Bell J
French CJ	_____	5 (62.50%)	4 (50.00%)	1 (12.50%)	5 (62.50%)	6 (75.00%)	5 (62.50%)
Gummow J	5 (62.50%)	_____	6 (75.00%)	2 (25.00%)	7 (87.50%)	6 (75.00%)	7 (87.50%)
Hayne J	4 (57.14%)	6 (85.71%)	_____	1 (14.29%)	6 (85.71%)	5 (71.43%)	6 (85.71%)
Heydon J	1 (12.50%)	2 (25.00%)	1 (12.50%)	_____	2 (25.00%)	2 (25.00%)	2 (25.00%)
Crennan J	5 (62.50%)	7 (87.50%)	6 (75.00%)	2 (25.00%)	_____	7 (87.50%)	7 (87.50%)
Kiefel J	6 (75.00%)	6 (75.00%)	5 (62.50%)	2 (25.00%)	7 (87.50%)	_____	6 (75.00%)
Bell J	5 (62.50%)	7 (87.50%)	6 (75.00%)	2 (25.00%)	7 (87.50%)	6 (75.00%)	_____

Tables E(I) and E(II) indicate the number of times a Justice jointly authored an opinion with his or her colleagues. It should be borne in mind that the judges do not hear the same number of cases in a year. For this reason, the tables should be read horizontally as the percentage results vary depending on the number of cases each member of the Court actually sat on. That Justices do not necessarily sit with each other on an equal number of occasions should also be considered as a factor that limits opportunities for some pairings to collaborate more often. This particularly applied to Hayne J in the 2011 results.

It has steadily become clear that co-authorship is a much more complex thing to track in the current court than was the case for much of the Gleeson era. Increasingly, there are no partnerships that occur so regularly as to stand out as notable. Leaving aside Heydon J who wrote with others very little indeed, the members of the Court tended to write frequently with all of their colleagues. The differences between the number of occasions on which any one judge wrote with each of the others do not appear to be significant and so the more regular co-authoring relationships may not point to anything particularly important or long-lasting, as, say, the rate of joining by Gummow and Hayne JJ in earlier studies in this series.

But for the sake of drawing out the specifics of Table E(I), we note that Bell J was the most frequent co-author for Gummow, Heydon and Crennan JJ. Gummow J was the most frequent co-author for Hayne and Bell JJ. Kiefel J wrote most and equally with the Chief Justice and Crennan J – in three-quarters of all matters on which she sat – while she was French CJ's most regular co-author, but by just one more judgment than he wrote with Crennan J. Interestingly, no two judges wrote with each other on more than 70% of occasions whereas in 2010 we identified three such partnerships that did – this, of course, reflects the lower instances of unanimity last year while also suggesting that joining with others occurred a little less. While Heydon J's propensity to dissent may explain the drop in cases resolved through unanimous judgment, it cannot account for a lower rate of co-authorship between his colleagues.

Table E(II) reveals joint judgments in constitutional matters. This displays a fairly high level of co-authorship in this area across the Court and again, no standout partnerships are discernible. Every member of the Court delivered at least one sole authored opinion in a constitutional law case last year.

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

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

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

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

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

Kief'l	2	2	3	4	1	___	2
Bell	3	1	2	4	1	2	___

D CONCLUSION

2011 was the year that the French Court returned to the norm. Gone were the historically high levels of unanimity of 2009 and 2010, with last year instead presenting a more familiar, fractured court. It is difficult for any bench composed of seven independent judges to sustain high levels of agreement across the work of the High Court, let alone in controversial constitutional cases. What was remarkable was that the French Court did so for its first two years.

A central reason for why unanimity proved more elusive in 2011 was the so-called 'Heydon effect'. Justice Heydon has been a more regular dissenter during his tenure on the High Court than many of his colleagues, but in 2011 he greatly exceeded all prior expectations. His rate of dissent across all cases for the year tripled from a previous high of around 15% to over 45%. This amount of formal disagreement has only been exceeded once in the annual surveys we have conducted on decision-making in the Court – and that was by the Court's greatest ever dissenter Justice Michael Kirby in 2006. Kirby J's level of dissent in other years during the Gleeson era was anything upwards of around 25% but never as high as that of Heydon J last year.

2011 may prove to be an aberration in Justice Heydon's rate of dissent. Certainly it would seem difficult to sustain, but conversely it would be surprising if it subsided dramatically. That the latter appears unlikely is borne out by other indicators. There has been a gradual, but noticeable, change in tone and approach in many of his judgments, with a greater willingness on his part to express his legal opinion even more forcefully and in striking and colourful language. In *Momcilovic v R*, for example, he went further than any other judge in holding, in dissent, the whole of the Victorian Charter to be invalid. He did so in a judgment that was dismissive of the Charter, and of human rights statutes and human rights principles in general, stating at one point that: 'The odour of human rights sanctity is sweet and addictive. It is a comforting drug stronger than poppy or mandragora or all the drowsy syrups of the world. But the effect can only be maintained over time by increasing the strength of the dose.'[24] With Justice Heydon a reader never need doubt where he stands on a legal question, and his often sharply critical reaction to the judgments of other members of the Court stands up well with the best traditions of High Court dissent.

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[24] [2011] HCA 34, [453].

Justice Heydon will, however, have limited opportunities for future dissent. The requirement in s 72 of the Constitution that High Court judges retire at the age of 70 means that he must leave the Court in early 2013. He is not alone in his impending departure. The first will actually be Justice Gummow, who must retire in October 2012. Justices Hayne and Crennan must then retire in 2015. All up, a majority of the Court will depart in a little over three years, with only Chief Justice French and Justices Bell and Kiefel of the current bench then remaining (with their years of retirement being, respectively, 2017, 2021 and 2024). The stability that has marked the early period of the French Court is about to end, to be replaced with upheaval as the Court's personnel undergoes rapid change.

Given the breakdown in 2011 of the trends of the French Court in its first two years, it will be interesting to observe how the Court decides those matters before it in the last remaining months of its present composition. Even more interesting will be to see the changes that follow from the replacement of those two Justices who appear to play such different roles on the High Court today – Gummow J whose opinions have consistently reflected majority thinking on the Court since his appointment in 1995 and Heydon J who now most regularly represents the alternative minority voice on the institution.

APPENDIX – EXPLANATORY NOTES

These notes identify when and how discretion has been exercised in compiling the statistical tables in this article. As the *Harvard Law Review* editors once stated in explaining their own methodology, 'the nature of the errors likely to be committed in constructing the tables should be indicated so that the reader might assess for himself the accuracy and value of the information conveyed'.[25]

A Cases identified as constitutional

- *Hogan v Hinch* [2011] HCA 4;
- *Wainohu v New South Wales* [2011] HCA 24;
- *Haskins v The Commonwealth* [2011] HCA 28;
- *Nicholas v The Commonwealth* [2011] HCA 29;
- *Jemena Asset Management (3) Pty Ltd v Coinvest Limited* [2011] HCA 33;
- *Momcilovic v The Queen* [2011] HCA 34;
- *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2011] HCA 35;
- *Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCA 40.

Not tallied as constitutional cases, but perhaps meriting some brief explanation, were *Lacey v Attorney-General of Queensland* [2011] HCA 10 (in which the types of appeals that can arise under s 73 of the Constitution was discussed at [17]) and *Braysich v The Queen* [2011] HCA 14 (in which the mandate of trial by jury under s 80 of the Constitution was referenced at [31]). The joint judgment of Heydon and Crennan JJ in *Byrnes v Kendle* [2011] HCA 26 included some brief discussion of constitutional construction at [95-97], however this was not in issue, while in *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2011] HCA 27, Gummow ACJ referred to s 51(xxxvi) of the Constitution in his conclusion only.

A very prominent decision of 2011 that concerned the powers of the Commonwealth government was *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32 but this did not involve any constitutional issue but rather interpretation of the relevant Minister's powers under the *Migration Act* 1958 (Cth).

B Cases not tallied

A total of five matters were not tallied from the full list of those decided in 2011 as they were heard by a single judge sitting alone: [2011] HCA 5, [2011] HCA 6, [2011] HCA 23, [2011] HCA 25, and [2011] HCA 46.

C Cases involving a number of matters – how tallied

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[25] 'The Supreme Court, 1967 Term' (1968) 82 Harvard Law Review 63, 301.

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

- *Commissioner of Taxation v BHP Billiton Limited; Commissioner of Taxation v BHP Billiton Petroleum (North West Shelf) Pty Ltd; Commissioner of Taxation v The Broken Hill Proprietary Company Pty Ltd; Commissioner of Taxation v BHP Billiton Minerals Pty Ltd* [2011] HCA 17;
- *Cush v Dillon; Boland v Dillon* [2011] HCA 30;
- *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32;
- *AB v Western Australia; AH v Western Australia* [2011] HCA 42;
- *Hargreaves v The Queen; Stoten v The Queen* [2011] HCA 44;
- *Green v The Queen; Quinn v The Queen* [2011] HCA 49;
- *Handlen v The Queen; Quinn v The Queen* [2011] HCA 51;
- *Shahi v Minister for Immigration and Citizenship* [2011] HCA 52.

No case was tallied as a multiple number of matters in this study.[26]

Tallying Decisions warranting explanation

- *Edwards v Santos Ltd* [2011] HCA 8 - Hayne J concurs, but disagrees that the costs order of the Federal Court at first instance can be substituted by the High Court. Although this issue forms the bulk of his brief opinion, disagreement confined to costs only has typically been set aside in compiling these results and Hayne J is nevertheless tallied as concurring.

- *Cush v Dillon; Boland v Dillon* [2011] HCA 30 – the joint judgment of French CJ, Crennan and Kiefel JJ concurs that the appeals should be dismissed but would also vary the third order of the Court of Appeal so as to explicitly confine the new trial that is to be held to the issue of whether the defence of qualified privilege was destroyed by malice. The CA order simply referred to a 'new trial on the defence of qualified privilege', but in their joint judgment, Gummow, Hayne and Bell JJ are of the view that the 'parties accept that the effect of the orders made by the Court of Appeal' is that the new trial is confined to the effect of malice by the respondent. For this reason neither they nor Heydon J in a separate concurrence feel the need to vary the relevant order of the Court of Appeal. Given this apparent agreement as to what the new trial should address, French CJ, Crennan and Kiefel JJ are tallied as concurring despite the additional order they make in dismissing the appeals.

- *Momcilovic v The Queen* [2011] HCA 34 – see discussion earlier in main text.

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[26] The purpose behind multiple tallying in some cases – and the competing arguments – are considered in Lynch (2002), above n 1, 500–02.

- *Westport Insurance Corporation v Gordian Runoff Limited* [2011] HCA 37 – Although Kiefel J concurs with the joint judgment that the appeal should be allowed, she partially dissents on the scope for which special leave is to given. This is a matter she addresses explicitly and her Honour's view is very clearly rejected by the joint judgment delivered in the case. Having dismissed the possibility of tallying the special leave decision separately from the appeal (which would have distorted figures for the joint judgment and the other dissenter, Heydon J) a single tallying of the case leads to Kiefel J's opinion as being tallied as dissenting.