

# The High Court on Constitutional Law: The 2017 Statistics\*

## SUMMARY

- A total of 51 matters were tallied for 2017. The manner in which these matters were decided was almost evenly distributed between unanimous judgment (35.29 per cent), by separate concurring opinions (33.33 per cent), and by majority over dissent (31.37 per cent). The percentage of matters decided by concurrence was 10 percentage points less than in the previous year, while matters resolved either unanimously or over dissent both had a modest increase in 2017 [Table A].
- Eleven of the 51 matters tallied for 2017 – or 21.57 per cent – were constitutional in character [Table A]. In the year before only 14.29 per cent of the matters decided were constitutional ones. A significant factor in the increase was the four matters in 2017 that the High Court heard as the Court of Disputed Returns and which are included in the tally of constitutional cases in this study.
- The breakdown of the way in which the constitutional matters were resolved in 2017 is unusual when compared to most of earlier annual studies in this series. Five were decided unanimously, four by concurrence and just two featured a dissenting opinion [Table A].
- The ‘most typical’ method by which a matter was resolved in 2017 was for a five judge bench to decide 4:1. However, almost as many cases were decided by a bench of the same size either unanimously or by concurring judgments [Table B(I)]. This near parity of the three ways in which this largest subset of cases was decided reflected that of the 2017 matters generally.
- Only one case in 2017 featured as many opinions as there were sitting judges: *Kendrijan v Lepore* [2017] HCA 13 [Table B(I)]. This was in performance of the High Court’s ‘welcome case’ tradition whereby a new Justice writes the lead opinion and others separately deliver a brief concurrence. On this occasion the new Justice was Edelman J, and while the tradition was essentially observed, both Nettle and Gordon JJ delivered more than a bare concurrence and made plain their adherence to views both had expressed in an earlier decision.
- There were three matters in 2017 that meet the description of a ‘close call’ – that is, a case decided over a minority of more than one Justice [Table B(I)]. Of those, only one came down to a single vote: *Hughes v The Queen* [2017] HCA 20, decided 4:3.
- In 2017 the court heard four cases with a bench of just three. All four were appeals from the Supreme Court of Nauru and were decided unanimously.
- Eight of the constitutional cases were decided by all seven judges [Table B(II)]. The constitutional matter with the most separate opinions (five) was also the only ‘close call’ constitutional case; this was *Brown v Tasmania* [2017] HCA 43, decided 5:2.

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\* This material was prepared by Professor Andrew Lynch, with the assistance of Ms Zoe Gaus.

- The list of constitutional provisions and issues considered in the matters of 2017 is an unusually long one [Table C], owing much to *Re Nash [No 2]* [2017] HCA 52 in which 15 provisions were identified by the catchwords accompanying the decision as arising.
- In the first year of the ‘Kiefel Court’, the Chief Justice was the only member not to file a minority opinion. Justices Bell and Keane JJ, who issued no dissents the preceding year, did so only once each in 2017.
- Justice Gageler wrote the most dissents with 15 per cent of all his decisions being for a minority view. After Gageler J, both Nettle and Edelman JJ issued more than 10 per cent of their decisions in dissent [Table D(I)].
- No joint dissents were issued at all and, as already noted, in only three cases was there more than a lone dissenter. Justice Gordon was never alone in minority.
- In constitutional matters, only Gordon and Edelman JJ issued a minority opinion – both did so in *Brown v Tasmania* and Edelman J also dissented in *Graham v Minister for Immigration and Border Protection* [2017] HCA 33 [Table D(II)].
- The most frequent collaboration across all cases of 2017 was between Kiefel CJ and Keane J, with them joining in 77.78 per cent of her decisions and 79.55 per cent of his. Gageler J was the member of the Court who wrote least often with all other Justices – his highest percentage of joint authorship (42.50 per cent of his decisions, with Bell J) is lower than the highest percentage of joining for all other Justices [Table E(I)].
- Chief Justice Kiefel, Bell and Keane JJ were the most frequent co-authors of joint opinions in constitutional cases. In 2016, Gageler J had joined with other Justices just once in a constitutional matter, but in 2017 he did so in 72.72 per cent of his decisions in this area. Justices Nettle and Gordon, as in 2016, joined most with each other on constitutional matters [Table E(II)].

## A THE INSTITUTIONAL PROFILE

**Table A – High Court of Australia Matters Tallied for 2017**

	<b>Unanimous</b>	<b>By concurrence</b>	<b>Majority over dissent</b>	<b>TOTAL</b>
<b>All Matters Tallied for Period</b>	18 (35.29%)	17 (33.33%)	16 (31.37)	51 (100%)
<b>All Constitutional Matters Tallied for Period</b>	5 (45.45%)	4 (36.36%)	2 (18.18%)	11 (100%)

**TABLE B (I) All Matters –  
Breakdown of Matters by Resolution and Number of Opinions Delivered<sup>1</sup>**

Size of bench	Number of cases	How Resolved	Frequency	Number of Opinions							
				1	2	3	4	5	6	7	
<b>7</b>	17 (33.33%)	Unanimous	4 (7.84%)	4							
		By concurrence	8 (15.69%)		3	3	1				1
		6:1	2 (3.92%)		2						
		5:2	2 (3.92%)				1	1			
		4:3	1 (1.96%)				1				
<b>6</b>	2 (3.92%)	Unanimous	1 (1.96%)	1							
		By concurrence	-								
		5:1	1 (1.96%)				1				
		4:2	-								
		3:3	-								
<b>5</b>	28 (54.90%)	Unanimous	9 (17.65%)	9							
		By concurrence	9 (17.65%)		6	3					
		4:1	10 (19.61%)		3	6	1				
		3:2	-								
<b>3</b>	4 (7.84%)	Unanimous	4 (7.84%)	4							
		By concurrence	-								
		2:1	-								

<sup>1</sup> All percentages given in this table are of the total number of matters tallied (51).

**TABLE B (II) Constitutional Matters –  
Breakdown of Matters by Resolution and Number of Opinions Delivered <sup>2</sup>**

Size of bench	Number of cases	How Resolved	Frequency	Number of Opinions							
				1	2	3	4	5	6	7	
7	8 (72.73%)	Unanimous	4 (36.36%)	4							
		By concurrence	2 (18.18%)			1	1				
		6:1	1 (9.09%)		1						
		5:2	1 (9.09%)					1			
		4:3	-								
5	3 (27.27%)	Unanimous	1 (9.09%)	1							
		By concurrence	2 (18.18%)		2						
		4:1	-								
		3:2	-								

**TABLE C – Subject Matter of Constitutional Cases<sup>3</sup>**

Topic	No of Cases	References to Cases (Italics indicate repetition)
s 7	1	<i>52</i>
s 10	1	<i>52</i>
s 12	1	<i>52</i>
s 13	1	<i>52</i>
s 14	1	<i>52</i>
s 15	1	<i>52</i>
s 16	1	<i>45</i>
s 24	1	<i>52</i>
s 30	1	<i>52</i>
s 31	1	<i>52</i>
s 34	1	<i>45</i>
s 41	1	<i>52</i>

<sup>2</sup> All percentages given in this table are of the total number of constitutional matters tallied (11).

<sup>3</sup> Table C lists the provisions and principles of the Commonwealth Constitution that arose for consideration in the eleven constitutional law matters tallied for 2017. It is assembled primarily through reference to the catchwords accompanying each decision.

s 44	1	52
s 44(i)	2	45, 52
s 44(ii)	1	4
s 44(iv)	1	52
s 44(v)	1	14
s 45	1	52
s 45(i)	2	45, 52
s 51(xxxvi)	1	52
s 53	1	40
s 54	1	40
s 56	1	40
s 75(iv)	1	23
s 75(v)	1	33
s 77(i)	1	33
s 77(iii)	1	33
s 81	1	40
s 83	1	40
Ch III	2	5, 29
Implied Freedom of Political Communication	1	43
State Courts, Kable principle	1	29
Whether Constitution denies Commonwealth legislative or executive power to authorise or to take part in activity in another country that is unlawful under domestic law of that country.	1	31

## **B THE INDIVIDUAL PROFILE**

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

	<b>Number of Judgments</b>	<b>Participation in unanimous judgment</b>	<b>Concurrences</b>	<b>Dissents</b>
<b>Kiefel CJ</b>	45	14 (31.11%)	31 (68.89%)	-
<b>Bell J</b>	40	13 (32.5%)	26 (65.00%)	1 (2.50%)
<b>Gageler J</b>	40	10 (25.00%)	24 (60.00%)	6 (15.00%)
<b>Keane J</b>	44	17 (38.64%)	26 (59.09%)	1 (2.27%)
<b>Nettle J</b>	45	15 (33.33%)	25 (55.56%)	5 (11.11%)
<b>Gordon J</b>	35	9 (25.71%)	23 (65.71%)	3 (8.57%)
<b>Edelman J</b>	34	13 (38.24%)	17 (50.00%)	4 (11.76%)

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

	<b>Number of Judgments</b>	<b>Participation in unanimous judgment</b>	<b>Concurrences</b>	<b>Dissents</b>
<b>Kiefel CJ</b>	11	5 (45.45%)	6 (54.55%)	-
<b>Bell J</b>	10	5 (50.00%)	5 (50.00%)	-
<b>Gageler J</b>	11	5 (45.45%)	6 (54.55%)	-
<b>Keane J</b>	11	5 (45.45%)	6 (54.55%)	-
<b>Nettle J</b>	10	4 (40.00%)	6 (60.00%)	-
<b>Gordon J</b>	9	4 (44.44%)	4 (44.44%)	1 (11.11%)
<b>Edelman J</b>	9	5 (55.56%)	2 (22.22%)	2 (22.22%)

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

	<b>Kiefel CJ</b>	<b>Bell J</b>	<b>Gageler J</b>	<b>Keane J</b>	<b>Nettle J</b>	<b>Gordon J</b>	<b>Edelman J</b>
<b>Kiefel CJ</b>	_____	29 (64.44%)	15 (33.33%)	35 (77.78%)	23 (51.11%)	19 (42.22%)	20 (44.44%)
<b>Bell J</b>	29 (72.50%)	_____	17 (42.50%)	28 (70.00%)	19 (47.50%)	18 (45.00%)	15 (37.50%)
<b>Gageler J</b>	15 (37.50%)	17 (42.50%)	_____	16 (40.00%)	13 (32.50%)	13 (32.50%)	9 (22.50%)
<b>Keane J</b>	35 (79.55%)	28 (63.64%)	16 (36.36%)	_____	25 (56.82%)	18 (40.90%)	22 (50.00%)
<b>Nettle J</b>	23 (51.11%)	19 (42.22%)	13 (28.89%)	25 (55.56%)	_____	18 (40.00%)	16 (35.56%)
<b>Gordon J</b>	19 (54.29%)	18 (51.43%)	13 (37.14%)	18 (51.43%)	18 (51.43%)	_____	11 (31.43%)
<b>Edelman J</b>	20 (58.82%)	15 (44.12%)	9 (26.47%)	22 (64.71%)	16 (47.06%)	11 (32.35%)	_____



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

	<b>Kiefel CJ</b>	<b>Bell J</b>	<b>Gageler J</b>	<b>Keane J</b>	<b>Nettle J</b>	<b>Gordon J</b>	<b>Edelman J</b>
<b>Kiefel CJ</b>	_____	9 (81.82%)	7 (63.64%)	9 (81.82%)	6 (54.55%)	6 (54.55%)	6 (54.55%)
<b>Bell J</b>	9 (90.00%)	_____	8 (80.00%)	9 (90.00%)	6 (60.00%)	6 (60.00%)	6 (60.00%)
<b>Gageler J</b>	7 (63.64%)	8 (72.73%)	_____	8 (72.73%)	6 (54.55%)	6 (54.55%)	5 (45.45%)
<b>Keane J</b>	9 (81.82%)	9 (81.82%)	8 (72.73%)	_____	7 (63.64%)	7 (63.64%)	5 (45.45%)
<b>Nettle J</b>	6 (60.00%)	6 (60.00%)	6 (60.00%)	7 (70.00%)	_____	8 (80.00%)	4 (40.00%)
<b>Gordon J</b>	6 (66.67%)	6 (66.67%)	6 (66.67%)	7 (77.78%)	8 (88.89%)	_____	4 (44.45%)
<b>Edelman J</b>	6 (66.67%)	6 (66.67%)	5 (55.56%)	5 (55.56%)	4 (44.45%)	4 (44.45%)	_____

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

	<b>Kiefel CJ</b>	<b>Bell J</b>	<b>Gageler J</b>	<b>Keane J</b>	<b>Nettle J</b>	<b>Gordon J</b>	<b>Edelman J</b>
<b>Kiefel J</b>	_____	2	6	1	3	5	4
<b>Bell J</b>	1	_____	5	2	3	4	6
<b>Gageler J</b>	3	1	_____	2	4	4	5
<b>Keane J</b>	1	2	6	_____	3	5	4
<b>Nettle J</b>	2	3	6	1	_____	4	5
<b>Gordon J</b>	1	2	3	2	2	_____	4
<b>Edelman J</b>	2	4	6	1	3	5	_____

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

	<b>Kiefel CJ</b>	<b>Bell J</b>	<b>Gageler J</b>	<b>Keane J</b>	<b>Nettle J</b>	<b>Gordon J</b>	<b>Edelman J</b>
<b>Kiefel CJ</b>	_____	1	2	1	3	3	3
<b>Bell J</b>	1	_____	2	1	3	3	3
<b>Gageler J</b>	2	1	_____	1	3	3	4
<b>Keane J</b>	1	1	2	_____	3	3	4
<b>Nettle J</b>	3	3	3	2	_____	1	4
<b>Gordon J</b>	3	3	3	2	1	_____	4
<b>Edelman J</b>	1	1	2	2	3	3	_____