THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2007 STATISTICS

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I INTRODUCTION

This article presents basic statistical information about the High Court's decision-making for 2007 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 usual caveats as to the need for a sober reading of empirical data on the decision-making of the High Court over just one year apply.[3] Both the raw figures and percentage calculations, especially in respect of the smaller set of constitutional cases, need to be appreciated with this limitation in mind. However, each year's statistics often possess interesting features which might be lost across a longer study. At the same time, we are careful to place the results in context by drawing the reader's attention to how they compare to those of earlier years and whether the latest figures illustrate the continuation of particular trends and patterns or their possible evolution or breakdown.

Lastly, we repeat our familiar disclaimer that in offering these simple tabular representations of the way in which the High Court and its Justices decided the cases of 2007, we do not assert that they are any kind of substitute for more traditional legal scholarship which subjects the reasoning contained in the cases

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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; 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; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2006 Statistics' (2007) 30 *University of New South Wales Law Journal* 188.

3 See Lynch and Williams, 'The High Court on Constitutional Law: The 2005 Statistics', above n 2, 183. See also Lynch and Williams, 'The High Court on Constitutional Law: The 2006 Statistics', above n 2, 188.

themselves to substantive analysis. Our intention is merely to provide an overview of the way in which matters were resolved by the Court and its members which may hopefully stimulate and complement such research and analysis.

II THE INSTITUTIONAL PROFILE

Table A – High Court of Australia Matters Tallied for 2007

	Unanimous	By concurrence	Majority over dissent	TOTAL
All Matters Tallied for Period	9 (14.75%)	22 (36.07%)	30 (49.18%)	61 (100%)
All Constitutional Matters Tallied for Period	0 (0.00%)	5 (50.00%)	5 (50.00%)	10 (100%)

From Table A it can be seen that a total of 61 matters were tallied for 2007.[4] Of these 10 matters involved constitutional questions. Those bare figures are very comparable to the preceding year in which 63 matters were decided with 11 classified as concerning constitutional issues in some way. As a percentage the proportion of constitutional cases in 2007 is 16.39 per cent. While that is sizeable it is clear the Court continues to deal less regularly with constitutional questions in recent years than it did before 2005 (in 2004, 31 per cent, and in 2003, 22 per cent of the matters decided by the Court were so classified).

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:

4 The data was collected exclusively using the 61 cases available on AustLII <http://www.austlii.edu.au/> at 21 April 2008 in its database for High Court decisions. No cases were eliminated from the list of decisions for 2007 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, 500–2; and Lynch, 'Does The High Court Disagree More Often In Constitutional Cases? A Statistical Study of Judgement Delivery 1981–2003', above n 1, 494–6. For further information about the tallying of the 2007 matters, see the Appendix at the conclusion of this paper.

> 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]

Of course, in applying this criterion to the 2007 cases so as to identify 10 as constitutional in character, we acknowledge that the extent to which constitutional issues dominate varies amongst them.[6] In addition, we widen the net so as to include those matters that involve questions of purely state or territory constitutional law.[7] In 2007, this meant the inclusion into the sub-set of *Attorney-General for the Northern Territory v Chaffey*[8] which concerned the constraint upon the powers of the Northern Territory Legislative Assembly to legislate for an acquisition of property otherwise than on just terms. Although the *Northern Territory (Self-Government) Act 1978* is a Commonwealth enactment, no provision of the *Constitution* or the legislative powers of the Australian Parliament was directly relevant to resolution of the case. Nevertheless, it is properly included here as a decision in constitutional law made by the High Court last year.

Once again the breakdown of the High Court's annual work showed remarkable consistency with the Court splitting over the result in almost precisely 50 per cent of all cases. With only the exception of 2005 (in which just 34.94 per cent of cases featured a dissent),[9] the Gleeson Court has divided over the final orders in half the cases it has decided every year since 2001.

The fact that exactly half of the constitutional cases of 2007 were also decided by majority over dissent is, of course, merely a coincidence. As earlier years have shown, it is actually quite unlikely that the occurrence of dissent in constitutional matters will be in step with what has happened more generally. So the percentage of constitutional matters decided this way has been both lower (in 2003 and 2005, only 37.50 per cent) and higher (in 2004, 73.68 per cent).

Real disagreement may exist between judgments even when a case is decided without delivery of a formal dissent. 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 increased from 2006. This was not due to a decrease in the frequency of dissent, but instead the production of fewer unanimous opinions. For the first time since 2003, the Court's percentage of overall matters decided unanimously fell below 20 per cent. While the rate of 14.75 per cent for last year is certainly not as low as that experienced in the early

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

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

7 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.

8 [2007] HCA 34.

9 Lynch and Williams, 'The High Court on Constitutional Law: The 2005 Statistics', above n 2, 183.

part of the Gleeson Court or across the brief Brennan era,[10] it might indicate that as the Court continues to undergo a period of renewal and change in composition, we can anticipate that explicit consensus across the bench is going to prove more elusive than on a court with a steady membership.

Table B (I) All Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered[11]

Size of bench	Number of matters	How Resolved	Frequency	Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	21 (34.43%)	Unanimous	1 (1.64%)	1						
		By concurrence	9 (14.75%)		5	2	1			1
		6:1	7 (11.48%)		2	1	2	1		1
		5:2	2 (3.28%)				1		1	
		4:3	2 (3.28%)			1		1		
6	1 (3.28%)	Unanimous	0 (0%)							
		By concurrence	0 (0%)							
		5:1	0 (0%)							
		4:2	1 (1.64%)				1			
		3:3	0 (0%)							
5	39 (63.93%)	Unanimous	8 (13.11%)	8						
		By concurrence	13 (21.31%)		6	4	2	1		
		4:1	10 (16.39%)		3	6		1		
		3:2	8 (13.11%)		1	2	4	1		

10 Lynch, 'Does The High Court Disagree More Often In Constitutional Cases? A Statistical Study of Judgement Delivery 1981–2003', above n 1, 497.

11 All percentages given in this table are of the total number of matters (61).

Table B(II) Constitutional Matters – Breakdown of Matters by Resolution and Number of Opinions Delivered [12]

Size of bench	Number of matters	How Resolved	Frequency	Number of Opinions Delivered						
				1	2	3	4	5	6	7
7	9 (90%)	Unanimous	0 (0%)							
		By concurrence	5 (50%)		3	1	1			
		6:1	2 (20%)			1		1		
		5:2	2 (20%)				1		1	
		4:3	0 (0%)							
6	1 (10%)	Unanimous	0 (0%)							
		By concurrence	0 (0%)							
		4:2	1 (10%)				1			
		3:3	0 (0%)							

Tables B(I) and (II) aim to reveal several things about the High Court's decision-making over 2007. First, they present a breakdown of respectively all matters and then just the constitutional ones according to the size of the bench and how frequently it split in the various 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 Opinions Delivered'. Immediately under that heading are the figures 1 to 7, which are the number of opinions it is possible for the Court to deliver. Where that full range is clearly not a possibility, 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 39 matters heard by a five member bench, eight of those featured a 3:2 split as to the result but in only one of those decisions was the division presented through just two judgments – one opinion from the majority and another from the minority.

12 All percentages given in this table are of the total of constitutional matters (10).

As in previous years, Table B(I) shows that the Court's production of unanimous judgments emanates almost entirely from five member benches. Unanimity remains extremely unlikely to occur when the court is sitting its full complement of Justices. The table allows us to identify what we might call the most regular features of cases in the period under examination. Based on cascading frequencies, the profile of the 'typical' 2007 High Court case was a five judge decision with no dissent and only two opinions. In 2006, by way of contrast, the most statistically common type of decision was in fact a unanimous one delivered by a five member bench. The number of decisions made by six judges fell from almost 20 per cent of the total in 2006 to just one matter last year – being the notable constitutional case of *Roach v Electoral Commissioner*.[13]

Complete individualism in the authorship of opinions was, once more, the exception rather than the rule with just five of the 61 matters in 2007 containing as many judgments as there were judges. Two of those actually featured only one major opinion. In *Mead v Mead*,[14] the Chief Justice gave an opinion which attracted unadorned consensus of the 'I agree' variety from the other four members of the bench. In *Queensland Premier Mines Pty Ltd v French*,[15] newcomer Kiefel J wrote the lead opinion and while Kirby J did make some 'additional comments' before agreeing with her Honour's reasons, the other five members of the bench simply offered statements of concurrence without further elaboration. This appears to have become something of a rite of passage for new arrivals on the Court. In 2006, the linked cases of *Harrington v Stevens*[16] and *Waller v James*[17] were decided by the opinion of the Court's latest arrival, Crennan J, with similarly succinct agreement from the other members of the majority. And in 2003, Justice Heydon's opinion in *Victims Compensation Fund Corporation v Brown*[18] met with bare concurrences from the other four judges sitting. It seems fair to recognise this as a conscious tradition on the Court, given that, as we have noted earlier, simple concurring opinions of this sort, while once not infrequent, are otherwise very rare indeed these days.[19] It is far more usual to see unqualified consensus take the form of jointly-authored opinions.

Lastly, Table B(I) once more disposes of the myth that a lone dissenter – most likely to be Kirby J – frustrates the Court's opportunities to deliver more unanimous opinions. For although a minority of one Justice exists in 17 of the 61 cases (27.87 per cent) – in only five of these matters were the majority able to come together to author a single concurring opinion (two being decided by a seven-member bench, three being by a five-member bench). Dissent, it must be recognised, is only one of the

13 [2007] HCA 43.
14 [2007] HCA 25.
15 [2007] HCA 53.
16 [2006] HCA 15.
17 [2006] HCA 16.
18 (2003) 201 ALR 260. His Honour's reasons in *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318, decided a few months earlier, almost received the same response from all six of his new colleagues but Justice McHugh also contributed reasons to explain his judgment.
19 Lynch and Williams, 'The High Court on Constitutional Law: The 2006 Statistics', above n 2, 194. See also Lynch, 'The Gleeson Court on Constitutional Law: An Empirical Analysis of its First Five Years', above n 2, 39–40 for explanation as to why tallying such concurrences separately is preferred.

obstacles to securing unanimity, with disagreement amongst the concurring Justices over how a commonly favoured result should be justified also posing a formidable challenge. There were 11 matters decided without any dissent yet with one member of the Court frustrating unanimity by choosing to write apart from a joint judgment authored by the rest of his or her colleagues.

Table B(II) provides a simple breakdown of how opinions in the ten constitutional matters for 2007 were delivered. Two of the matters featured a solo dissenter while three had a minority of two Justices.

Table C – Subject Matter of Constitutional Cases

Topic	No of Cases	References to Cases[20] (Italics indicate repetition)
s 1	1	38
s 7	1	43
s 8	1	*43*
s 24	1	*43*
s 30	1	*43*
s 44(ii)	1	*43*
s 51(vi)	2	29, 33
s 51(xiii)	1	9
s 51(xiv)	1	*9*
s 51(xxix)	1	*33*
s 51(xxxii)	1	*33*
s 51(xxxvi)	1	*43*
s 51 (xxxvii)	1	*33*
s 51(xxxix)	1	14
s 61	1	*38*
s 68	1	*33*
s 69	1	*33*
Chapter III	4	23, 24, *29, 33*
s 71	2	*29, 33, 38*
s 73	2	*14, 38*
s 74	1	*38*
s 75	3	*14, 29, 33*
s 76(ii)	1	*29, 33*
s 76(iii)	1	*33*
s 77 (i)	1	*33*
s 78	1	*38*

20 The reference numbers given are simply a shorthand citation of the case – the medium-neutral citation for each of these cases simply requires prefixing the number given with '[2007] HCA'. Full case details are given in the Appendix.

s 79	1	*38*
s 80	1	*29*
s 109	1	*9*
s 114	1	*38*
s 122	2	18, *43*
s 128	1	*43*
NT Constitutional Law	1	34

Table C lists the provisions of the *Constitution* that arose for consideration in the ten matters tallied.

III THE INDIVIDUAL PROFILE

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

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	52	7 (13.46%)	40 (76.92%)	5 (9.62%)
Gummow J	51	9 (17.65%)	40 (78.43%)	2 (3.92%)
Kirby J	51	5 (9.80%)	25 (49.02%)	21 (41.18%)
Hayne J	53	7 (13.20%)	42 (79.25%)	4 (7.55%)
Callinan J	36	3 (8.33%)	25 (69.44%)	8 (22.22%)
Heydon J	49	8 (16.33%)	39 (79.59%)	2 (4.08%)
Crennan J	54	7 (12.96%)	44 (81.48%)	3 (5.55%)
Kiefel J	2	1 (50.00%)	1 (50.00%)	-

Table D(I) presents, in respect of each Justice, the delivery of unanimous, concurring and dissenting opinions in 2007. As Kiefel J sat on only two matters

for which judgments were handed down in 2007, her Honour is included merely for the sake of completeness. We should also be cautious about the results for Callinan J given that his Honour sat on noticeably fewer cases prior to his Honour's retirement in September, but his total of 36 opinions is comparable to the number (38) his Honour delivered in 2006. This means that while direct comparison between his Honour and his colleagues is not really possible, it is certainly open to consider his personal results for the last two years.

In 2007, the dissent rates for all Justices with the exception of Justices Kirby and Heydon were higher than their figures for 2006. Admittedly these increases were not terribly large, except for Callinan J who was in the minority of almost a quarter of the cases on which his Honour sat whereas the year before his dissent rate was only 10.53 per cent. Over his time on the Court, his Honour always had a far less predictable level of participation in the orders reached by a majority of the Court than any other member. His Honour's figure here is on a par with that revealed by earlier studies (in 2004, 22.45 per cent of his Honour's opinions were in the minority). The Chief Justice has routinely delivered four or five dissents per year since we began recording these statistics and last year was no exception – though as a percentage of cases decided, his dissent rate has climbed incrementally. The figures for Justices Gummow and Hayne are not surprising nor are those of Crennan J though it should be noted these are her Honour's first dissents – she wrote none in 2006.

As for those who lowered their percentage of minority opinions, Justice Kirby delivered seven fewer dissents than the year before which translates to 8 per cent less. But as minority opinions still account for over 40 per cent of his total for the year he remains, as ever, the Court's great outsider, despite Justice Callinan's high dissent rate helping slightly to narrow the gap between his Honour and the rest of the Court. The reduction in the dissenting opinions of Heydon J is much more dramatic. In 2006, his Honour had the second highest dissent rate at 15.52 per cent of his judgments, while last year his Honour had the second lowest – just fractionally behind that of Gummow J, with both of them writing just two such opinions each. This result bears out our caution that last year's rise in dissent by his Honour was unlikely to be significant in the longer term.[21]

21 Lynch and Williams, 'The High Court on Constitutional Law: The 2006 Statistics', above n 2, 196.

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

	Number of Judgments	Participation in unanimous judgment	Concurrences	Dissents
Gleeson CJ	10	0 (0%)	10 (100%)	0 (0%)
Gummow J	10	0 (0%)	10 (100%)	0 (0%)
Kirby J	10	0 (0%)	7 (70%)	3 (30%)
Hayne J	10	0 (0%)	8 (80%)	2 (20%)
Callinan J	9	0 (0%)	7 (77.77%)	2 (22.22%)
Heydon J	10	0 (0%)	9 (90%)	1 (10%)
Crennan J	10	0 (0%)	10 (100%)	0 (0%)
Kiefel J	-	-	-	-

Table D(II) records the actions of individual justices in the constitutional cases of 2007. The following may be briefly noted. First, as in 2006 there were three members of the Court, the Chief Justice and Justices Gummow and Crennan, in the majority in every case. Last year Hayne J rather than Gleeson CJ completed this trio. Second, for the first time in some years, Justice Kirby's figures in this table are not so clearly in step with his results in Table D(I). Although his Honour is still the highest dissenter in constitutional matters, a dissent rate of 30 per cent is less striking than his prior tendency to dissent in every second constitutional matter.

For the record, Justices Kirby and Callinan dissented in *Attorney-General (Vic) v Andrews*,[22] Justices Kirby and Hayne in *Thomas v Mowbray*,[23] and Justices Hayne and Heydon in *Roach v Electoral Commissioner*.[24] None of the

22 [2007] HCA 9.
23 [2007] HCA 33.
24 [2007] HCA 43.

dissenters in these decisions co-authored their opinions. Additionally, Kirby J was the lone dissenter in *White v Director of Military Prosecutions*,[25] and Callinan J was in a similar position in *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited*.[26]

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

	Gleeson CJ	Gummow J	Kirby J	Hayne J	Callinan J	Heydon J	Crennan J	Kiefel J
Gleeson CJ	_____	22 (42.31%)	8 (15.38%)	19 (36.54%)	8 (15.38%)	23 (44.23%)	26 (50%)	0 (0%)
Gummow J	22 (43.14%)	_____	9 (17.65%)	36 (70.59%)	9 (17.65%)	27 (52.94%)	34 (66.66%)	1 (1.96%)
Kirby J	8 (15.68%)	9 (17.65%)	_____	8 (15.68%)	3 (5.88%)	7 (13.73%)	8 (15.68%)	0 (0%)
Hayne J	19 (35.85%)	36 (67.92%)	8 (15.09%)	_____	6 (11.32%)	25 (47.17%)	29 (54.71%)	1 (1.89%)
Callinan J	8 (22.22%)	9 (25.00%)	3 (8.33%)	6 (16.66%)	_____	12 (33.33%)	11 (30.55%)	n/a
Heydon J	23 (46.94%)	27 (55.10%)	7 (14.29%)	25 (51.02%)	12 (24.49%)	_____	29 (59.18%)	1 (2.04%)
Crennan J	26 (48.15%)	34 (62.96%)	8 (14.81%)	29 (53.70%)	11 (20.37%)	29 (53.70%)	_____	1 (1.85%)
Kiefel J	0 (0%)	1 (50.00%)	0 (0%)	1 (50.00%)	n/a	1 (50.00%)	1 (50.00%)	_____

25 [2007] HCA 29.
26 [2007] HCA 38.

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

	Gleeson CJ	Gummow J	Kirby J	Hayne J	Callinan J	Heydon J	Crennan J	Kiefel J
Gleeson CJ	_____	6 (10%)	1 (10%)	6 (60%)	2 (20%)	5 (50%)	6 (60%)	n/a
Gummow J	6 (60%)	_____	2 (20%)	8 (80%)	2 (20%)	6 (60%)	10 (100%)	n/a
Kirby J	1 (10%)	2 (20%)	_____	1 (10%)	0 (0%)	1 (10%)	2 (20%)	n/a
Hayne J	6 (60%)	8 (80%)	1 (10%)	_____	2 (20%)	6 (60%)	8 (80%)	n/a
Callinan J	2 (22.22%)	2 (22.22%)	0 (0%)	2 (22.22%)	_____	2 (22.22%)	2 (22.22%)	n/a
Heydon J	5 (50%)	6 (60%)	1 (10%)	6 (60%)	2 (20%)	_____	6 (60%)	n/a
Crennan J	6 (60%)	10 (100%)	1 (10%)	8 (80%)	2 (20%)	6 (60%)	_____	n/a
Kiefel J	n/a	n/a	n/a	n/a	n/a	n/a	n/a	_____

Tables E(I) and E(II) indicate the number of times a Justice jointly authored an opinion with his or her colleagues. For consistency, the tables must be read horizontally for the percentage of opinions co-authored by an individual Justice with his or her colleagues. 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, collaboration.

One needs to acknowledge that the results for Callinan J (and obviously Kiefel J) in these tables and the rankings which follow are affected by the fewer number of cases each sat on relative to the other members of the Court. It might also be

said that Justice Kirby joined so rarely with his colleagues that the figures in respect of his Honour are not really capable of much meaningful analysis as to his preferred co-authors.

Looking to Table E(1), the strongest partnership on the Court overall was once more that between Gummow and Hayne JJ who joined just a little less than in the preceding year. Again, their next preferred co-author was Crennan J. Indeed, her Honour was arguably the most consistently preferred collaborator across the Court last year. Her Honour was the second most frequent co-author not just for Justices Gummow and Hayne after each other (and by a close margin in respect of Gummow J), but also for Kirby J (after Gummow J) and Callinan J (after Heydon J). In respect of both of those two, just one opinion separated the number of times their Honours joined with Crennan J and their most frequent co-author. Add to this the fact that both the Chief Justice and Heydon J wrote more often with Crennan J than anyone else and it is clear that her Honour's arrival on the High Court has added to the consensus amongst the institution's members. Of course any change in composition must alter the dynamic between Justices to some extent since the seven members of the Court at any time must decide cases alongside each other. But they do not need to do so through joint judgments – so when a new member quickly becomes a highly preferred co-author the nature of the newly emerging judicial relationships on the Court are made much more discernible. Interestingly, our analysis of the 2004 cases showed that the arrival of Heydon J produced a similar phenomenon. In that year his Honour was the most frequent collaborator for every member of the Court with the exception of Justices Kirby and Hayne (the former writing with him only fourth most often but the latter joining with his Honour second only to doing so with Gummow J). In the years since, particularly 2006 when his Honour's rate of dissent more than doubled, Heydon J has not joined as frequently with Justices from across the Court. This decrease may reoccur with Crennan J, but then again it may not.

In this vein, it should be noted that the Chief Justice has steadily become less frequent as a co-author amongst the Court relative to its other members. His Honour was no Justice's most frequent co-author and was the fourth ranked for Justices Gummow, Hayne, Callinan and Heydon. This is not really due to his Honour writing less often with others than his Honour once did so much as the very high incidences of joining amongst much of the rest of the Court. For example, Heydon J joined the Chief Justice on almost 47 per cent of his total opinions – a high figure without doubt, but still well behind his degree of collaboration with, respectively Crennan J, Gummow J and Hayne J.

Table E(II) illustrates the dominance, not of the usual partnership between Justices Gummow and Hayne (though that is obviously still strong), but between Gummow J and Crennan J. Not only did their Honours join each other in judgment in all 10 constitutional cases in 2007 (meaning that neither wrote apart from the other in a single constitutional matter in the first two years of Justice

Crennan's tenure on the Court),[27] they were also the most frequent co-authors for all other members of the bench.

For the sake of clarity, these 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

	Glee'n	Gum'w	Kirby	Hayne	Call'n	Hey'n	Cren'n	Kief'l
Glee'n	___	3	5	4	5	2	1	-
Gum'w	4	___	5	1	5	3	2	6
Kirby	2	1	___	2	4	3	2	-
Hayne	4	1	5	___	6	3	2	7
Call'n	4	3	6	5	___	1	2	n/a
Hey'n	4	2	6	3	5	___	1	7
Cren'n	3	1	5	2	4	2	___	6
Kief'l	___-	1	___-	1	n/a	1	1	

27 This trend was brought to an end by the publication in early 2008 of the reasons in *Attorney-General (Cth) v Alinta Limited* [2008] HCA 2 in which Justices Gummow and Crennan do not share in the same opinion.

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

	Glee'n	Gum'w	Kirby	Hayne	Call'n	Hey'n	Cren'n	Kief'l
Glee'n	___	1	4	1	3	2	1	n/a
Gum'w	3	___	4	2	4	3	1	n/a
Kirby	2	1	___	2	-	2	1	n/a
Hayne	2	1	4	___	3	2	1	n/a
Call'n	1	1	-	1	___	1	1	n/a
Hey'n	2	1	4	1	3	___	1	n/a
Cren'n	3	1	4	2	4	3	___	n/a
Kief'l	n/a	n/a	n/a	n/a	n/a	n/a	n/a	___

IV CONCLUSION

At first glance, the statistics of the High Court's opinion delivery in 2007 conforms to trends observed over previous years – the solidity of majority opinion on the Court; the dominant partnership between Justices Gummow and Hayne; the all too frequent isolation of Kirby J and the fact that one in two cases is decided over a minority.

But closer consideration bears out the claim we made in respect of the 2006 results that while these features appear unshakeable, the Court is nevertheless still changing in other respects. The clearest evidence of this last year was the emergence of Crennan J as a dominant part of the Court's consensus. Not only has her Honour dissented just three times in her two years on the bench (matched by Gummow J) – in 2007 her Honour laid claim to the broadest appeal across all members of the Court as a collaborator on joint judgments. In respect of constitutional matters, her Honour is yet to find herself in disagreement with the

Court's orders. Justices Crennan and Gummow also shared in the same opinion in all 18 of the constitutional cases in which both participated in 2006-07.

By way of, albeit very limited, contrast, 2007 was one of those years which demonstrated that, in the area of constitutional law, the often unshakeable partnership of Gummow and Hayne JJ can occasionally break down. The two co-wrote in all 11 constitutional matters of 2006, and while Hayne J joined Gummow and Crennan JJ in eight of the ten such cases last year, in two of them he was driven to dissent. As stated earlier, one of these decisions was *Roach v Electoral Commissioner* – perhaps the constitutional case of 2007 whose outcome most surprised observers – and the other was *Thomas v Mowbray*[28] where the result was as many anticipated but Hayne J being in minority with Kirby J was probably not. The disagreement between Justices Gummow and Hayne in *Thomas v Mowbray* put in mind the division which issues of judicial power and individual liberty produced between them in 2004 – firstly through separate concurrences in *Fardon v Attorney-General (Queensland)*[29] and then in Justice Gummow's dissent from the majority decision led by Hayne J in *Al Kateb v Godwin*.[30]

In light of the very close collaborative relationship between Gummow, Hayne and Crennan JJ, and the almost defining isolation of Kirby J, the departure of Callinan J – who has long proven to be by far the Court's most statistically unpredictable member – means that the Chief Justice and Heydon J are probably the most interesting continuing members of the Court to watch in 2008. Of course both are very often in agreement with the aforementioned trio, but how that manifests itself in the production of written reasons tends to vary. And as Heydon J showed in 2006, a batch of challenging cases can find one speaking out more often against the majority cohort with which one is more usually aligned.

Of course, the Justice who will generate the most curiosity over 2008 is Kiefel J whose work on the Court has only just begun to filter through. Where she will find herself in relation to the other six members of a Court which appears to have such a clear and consistent internal dynamic will be extremely interesting. As the last Howard government appointment to the High Court it is tempting to assume that her Honour will fall in rapidly with the five of her new colleagues who find so much consensus amongst themselves. But such predictions are, as always, unwise. Just as an example, it is fascinating to consider the contrasts between the last two Justices – Gummow and Kirby – appointed to the Court by the outgoing Keating Labor government in 1995, and before that the final two appointments of the Fraser Coalition government in 1982 – Justices Deane and Dawson. Such pairings are better understood by the distinctly different contributions which each member made to Court than any uniformity of approach. In the case of Justice Kiefel, as with any new appointment, we simply must wait and see what transpires.

28 [2007] HCA 33.
29 (2004) 223 CLR 575.
30 (2004) 219 CLR 562.

The election of the Rudd Labor government in November 2007 means that the impending departures from the Court may be more likely to be used to effectuate greater diversity of opinion amongst its members than would otherwise have been the case. However, the fact that one of the retiring members is Kirby J lessens this potential. The departure of the Chief Justice by 30 August 2008 opens, however, far more intriguing possibilities. Not only is this because Gleeson CJ has been such a consistent member of the Court's majority opinions over his tenure, but also because of the leadership capacities of the office his Honour will be vacating. Understanding of the ability of Chief Justices to shape consensus is far from well developed and there are interestingly conflicting precedents in this regard. In recent times, Sir Anthony Mason presided over a Court which was home to a great diversity of opinion while simultaneously maintaining a very low personal dissent rate.[31] By contrast, Gibbs CJ dissented more frequently on his own Court – particularly in constitutional cases.[32] The present Chief Justice has avoided being in the minority with even more success than Mason CJ but then his Court has been unusually homogenous.

It will be interesting to see whether the Rudd government views filling the office of the Chief Justice as a chance to reorient the Court. The history of the institution should warn us against simply assuming that the Court's next most senior member, Gummow J, will be elevated to the top job as a matter of course. The appointments of Sir John Latham and Sir Garfield Barwick to the office over the heads of those already on the Court are two examples where this did not occur, though that was probably due as much to the personal ambitions of both men as it was a desire to effectuate change. In any case, a repetition of the appointment of the Attorney-General must be seen as unlikely – especially on this occasion.

A much clearer demonstration of strategic appointment to the Chief Justiceship is provided by the Howard government's decision to appoint Gleeson CJ from outside the Court rather than elevate Justice Mary Gaudron, the most senior judge at the time but the appointee of an earlier Labor government.[33] A more spectacular and controversial precedent is that of the Canadian government under Prime Minister Pierre Trudeau, which attempted to change the direction of that country's Supreme Court by promoting its most junior judge and highest dissenter, Bora Laskin, to the Chief Justiceship in 1973.[34] But with Kirby J due to follow Chief Justice Gleeson into retirement just over six months later, the 'elevate the court's outsider' option is not open to the new government. If it

31 Lynch, 'Does The High Court Disagree More Often In Constitutional Cases? A Statistical Study of Judgement Delivery 1981–2003', above n 1, 506–7.

32 Ibid 503–5.

33 The only other outsider slotted into the post in this fashion was Sir Adrian Knox in 1919.

34 At first the opinions of the new Chief Justice continued to languish in minority but with further appointments, Laskin came to lead the dominant bloc on the Court. McCormick pinpoints 1979 as the pivotal year, but says that 'on purely statistical indicators it is unclear whether it was the appointment of Justice Chouinard or Justice Lamer that turned the critical corner': Peter McCormick, 'Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada' (2004) 42 *Osgoode Hall Law Journal* 99, 122. See also, Justice Claire L'Heureux-Dubé, 'The Dissenting Opinion: Voices of the Future?' (2000) 38 *Osgoode Hall Law Journal* 495, 505.

wants to try to influence change through the appointment of a new Chief Justice it needs to identify a suitable candidate from beyond its current membership. As revealed by the interviews which Jason Pierce conducted with many members of the Australian judiciary, the Attorney-General will be making his choice from a field of possible contenders amongst whom are several only too keen for an end to the approach and outlook which has dominated the Gleeson era.[35]

This involves the new government in making not one, but two, assumptions. The first, of course, is that which is always made in respect of any appointment – the prediction, quite often disappointed, that the individual in question will decide particular controversies in a certain way and by means of a certain methodology. The second concerns the nature and influence of the office of the Chief Justice. While the Chief Justice's vote is just one amongst the possible seven available, it is a mistake to think he or she is merely 'first among equals'. As the description of the office offered by Sir Anthony Mason in the *Oxford Companion to the High Court of Australia* makes clear there are a number of ways in which its holder can have an impact.[36] Amongst these are the control of oral argument before the bench, the implementation of an appropriate system of deliberation, allocation of judgment writing and representing the Court in consultations over new appointments. None of these responsibilities is insignificant, but they do not necessarily ordain the holder with the capacity or opportunity for the intellectual leadership of the Court.

Even so, while the ability to lead the Court and influence its decisions must ultimately be determined by the qualities of the individual in question, it would be strange to therefore assume that the right person might just as well be appointed the Court's newest junior member than as Chief Justice. Clearly the Howard government was not of that view when it filled the office in 1998. Perhaps the Rudd government will feel similarly about its opportunity to appoint Australia's next Chief Justice.

APPENDIX – EXPLANATORY NOTES

The notes identify when and how discretion has been exercised in compiling the statistical tables in this article. As the Harvard Law Review editors once stated in explaining their own methodology, 'the nature of the errors likely to be committed in constructing the tables should be indicated so that the reader might assess for himself the accuracy and value of the information conveyed'.[37]

35 Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006). See also Andrew Lynch, 'The Once and Future Court? – Jason L Pierce's "Inside the Mason Court Revolution: The High Court of Australia Transformed"' (2007) 35 *Federal Law Review* 145.

36 Sir Anthony Mason, 'Chief Justice, role of' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 90–1.

37 Louis Henkin, 'The Supreme Court, 1967 Term' (1968) 82 *Harvard Law Review* 63, 301.

A Case Reports Identified As Constitutional

Attorney-General (Vic) v Andrews [2007] HCA 9;
Bodruddaza v Minister for Immigration and Multicultural Affairs [2007] HCA 14;
Bennett v Commonwealth [2007] HCA 18;
Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board [2007] HCA 23;
Visnic v Australian Securities and Investments Commission [2007] HCA 24;
White v Director of Military Prosecutions [2007] HCA 29;
Thomas v Mowbray [2007] HCA 33;
Attorney-General for the Northern Territory v Chaffey; *Santos Limited v Chaffey* [2007] HCA 34;
Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited [2007] HCA 38;
Roach v Electoral Commissioner [2007] HCA 43.

B Case Reports Not Tallied

No matter was excluded from tallying for this year.

C Case Reports Involving a Number of Matters – How Tallied[38]

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

Sons of Gwalia Ltd v Margaretic [2007] HCA 1;
Cornwell v R [2007] HCA 12;
Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board [2007] HCA 23;
Attorney-General for the Northern Territory v Chaffey; Santos Limited v Chaffey [2007] HCA 34;
CGU Insurance Limited v AMP Financial Planning Pty Ltd [2007] HCA 36;
Tofilau v The Queen; *Marks v The Queen; Hill v The Queen; Clarke v the Queen* [2007] HCA 39;
Weston Aluminium Pty Limited v Environment Protection Authority; Weston Aluminium Pty Limited v Alcoa Australia Rolled Products [2007] HCA 50;
Elliott v The Queen; *Blessington v The Queen* [2007] HCA 51.

No cases were tallied multiple times in this study.

38 The purpose behind multiple tallying in some cases – and the competing arguments – are considered in Lynch, 'Dissent: Towards a Methodology for Measuring Judicial Disagreement in the High Court of Australia', above n 1, 500–2.

D Tallying Decisions Warranting Explanation

Klein v Minister for Education [2007] HCA 2: Chief Justice Gleeson and Kirby J are tallied as dissenting as they agree that the appeal should be heard and dismissed while the majority orders the revocation of special leave;

X v Australian Prudential Regulation Authority [2007] HCA 4: Justice Kirby is tallied as concurring since despite disagreement on a point of statutory interpretation the majority joint judgment otherwise dismisses the appeal with which his Honour agrees;

The Queen v Hillier [2007] HCA 13: Justice Callinan is tallied as dissenting since although his Honour agrees that the appeal should be allowed, his Honour proposes a retrial rather than agreeing with the orders of the Court for a rehearing of the appeal by the Court of Appeal of the Supreme Court of the Australian Capital Territory, a difference which the Chief Justice contrasts in explaining his decision to concur with the joint majority opinion;

Channel Seven Adelaide Pty Ltd v Manock [2007] HCA 60: Justice Kirby is tallied as dissenting since, although his Honour agrees with the four orders of the majority, his Honour adds a fifth which would allow the appellant leave to re-plead factual particulars to support its defence within 28 days.