GRIFFITH UNIVERSITY GRADUATION ADDRESS

Chief Justice Murray Gleeson[*]

The following paper is the text of an address by Chief Justice Gleeson to the 2000 graduating classes of Griffith University's Faculties of Law and Science, at the Queensland Performing Arts Complex, Brisbane, on 20 April 2001. On this occasion, Griffith University awarded the honorary degree of Doctor of the University to Chief Justice Gleeson, in recognition of his distinguished contributions to the legal community.

I am greatly honoured by the award of the degree that has been conferred upon me. I am also honoured to have the opportunity of participating in this ceremony at which the achievements of so many scholars are being marked by the university. The formality associated with graduation ceremonies is a public acknowledgment of the importance attached by the university, and by the general community, to academic success. I congratulate you all. Although some of you have graduated previously, for most this marks the completion of your undergraduate course of studies. You are all entitled to be proud of your achievements. You are also entitled to look to the future with confidence and enthusiasm. It is a delight to share this occasion with you.

Many of you, no doubt, owe a great deal to the support and encouragement you have received over the years from family and friends. Although some may come from families with past university associations, I expect that most of you, like me, belong to the first generation in your families to have had the opportunity of a tertiary education. Many of you have been able to take advantage of that opportunity by reason of the support of others who were not themselves so fortunate. They share in your success. Occasions such as this are intended to honour them also.

This university, young in age, has already established a fine reputation as a progressive and innovative centre of learning. It is named after my great predecessor, Sir Samuel Griffith, the first Chief Justice of the High Court of Australia. He and I have at least two things in common. We are the only former state Chief Justices to have become Chief Justices of Australia. And I am sure you will not think I am abusing your Queensland hospitality if I mention that he and I both graduated from Sydney University. Sir Samuel Griffith, however, never graduated in Law. All three of the foundation members of the High Court, Chief Justice Griffith, and Justices Barton and O'Connor, were graduates of Sydney University; but they graduated in Arts, not Law. The Faculty of Law did not commence at Sydney until 1890. A degree in Law was not, and still is not, a necessary requirement for admission to practise as a barrister or solicitor. Until quite recently, a number of the most

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senior English judges had no law degrees, having done their undergraduate studies in other disciplines. The assumption was that legal knowledge was to be gained by experience and practical training, rather than theoretical discourse. This is not to underestimate the great contribution to the law that has been made by the universities. The development of legal theory at an academic level is now recognised as indispensable. But it is worth remembering that many great judges of the past, including Sir Samuel Griffith, learnt their law in a different way.

I am sure that it has been the purpose of the university, in conferring this degree, more to honour the High Court as an institution than me personally. I hope that today's Science graduates, as well as the Law graduates, will take some interest in that institution, which was famously described by Alfred Deakin as 'the keystone of the federal arch'. My purpose this afternoon is to seek to encourage that interest, and my remarks are directed as much to the scientists as the lawyers.

The federal union, between what had formerly been separate, self-governing British colonies, was achieved 100 years ago. It was the result of protracted negotiations, and political compromises, extending over more than 10 years. The terms on which final agreement for a union was reached were embodied in a written Constitution, which was approved by referenda and parliamentary votes in each colony, and which took legal effect by virtue of an enactment of the Imperial Parliament.

The word 'federal' comes from the Latin for a treaty. The essence of a federal system of government is an agreed division of legislative, executive and judicial powers between a central government and the governments of the constituent parts of the federation: in Australia, between the Commonwealth and the states. A federation requires a formal, written instrument that embodies the agreed division of governmental powers. That is the Constitution.

At the time of federation in Australia, there were three possible federal models: the United States of America, Canada and Switzerland. It was the model of the United States that was most influential with the founders, although they did not follow it in all respects. The two most notable differences were that Australia was established under a constitutional monarchy, and that Australia — unlike America — followed the Westminster precedent of responsible government, by which the executive required the confidence of Parliament or, more accurately, that House of Parliament which represented the people.

As in America, the federal Parliament was bicameral. The Senate was originally intended to represent the states; and the House of Representatives was to represent the people. The role of the Senate has evolved over time, but that was the original idea, and it explains why each state has the same number of Senators, regardless of population. That was part of the bargain by which federal union was achieved. The definition of the respective powers of the Senate and the House of Representatives was a major issue during the framing of the Constitution.

Plainly, a written agreement dividing governmental powers is certain to give rise to disputes as to its meaning and effect. The founders, following

precedent both in the United States and in the Australian colonies before federation, assumed that the ultimate resolution of disagreements about the interpretation of the Constitution would involve an exercise of judicial power. Such an assumption was not self-evidently correct, although it is not easy to see a practical alternative. At all events, the assumption was made. Just as the Supreme Court of the United States was, and is, the final arbiter of disputes about the meaning of the United States Constitution, so it was to be in Australia. The Constitution required the establishment of what it described as a federal Supreme Court, to be called the High Court of Australia. Subject to the possibility of appeals to the Privy Council, which were always limited, and which were finally abolished in the 1980s, the High Court was to be the ultimate interpreter and enforcer of the federal agreement.

It is that role — of resolving disputes between governments, or between citizens and governments, as to the interpretation of the Constitution, and of settling disagreements about the division of governmental powers and functions within the federation — that gives the High Court its distinctive character. The political and social implications of the manner in which the court discharges that responsibility are obvious. The court decides cases about the extent of the powers of democratically elected Parliaments, and about the allocation of executive and judicial power within the federation. As former Chief Justice Sir Owen Dixon pointed out, the people and governments of Australia, as parties to the federal agreement, entrusted that responsibility to the court on the faith of an understanding that the court would approach its function with strict and complete legalism.

Legalism does not mean the same thing as literalism, or formalism, but it requires adherence to legal principle and method, fidelity to the federal agreement, which it is the task of the court to interpret, not to alter or rewrite, and an acceptance of the constraints of judicial legitimacy. The founders and the people committed the task of interpreting the Constitution to a body of unelected lawyers on the understanding that they would approach that task in the manner of lawyers, bringing to it their legal skills, not their political or social enthusiasms. Sir Samuel Griffith made that point firmly in a judgment when he said:

> I hope that the day will never come when this Court will strain its ear to catch the breath of public opinion before coming to a decision in the exercise of its judicial functions.[1]

Of course, there is room for legitimate difference of legal opinion as to techniques of interpretation of a written Constitution. If it were otherwise, there would be no constitutional cases. If the meaning of the Constitution were in all respects plain, or if lawyers were all agreed as to how to go about resolving uncertainties, there would be no need for a court to interpret the Constitution. Any lawyer could tell you what it means, without contradiction

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1 *Deakin v Webb* (1904) 1 CLR 585 at 625.

from any other lawyer. Today's Law graduates would immediately recognise that as an appalling state of affairs.

But the task is one of interpretation, not of creativity. It is the express or implied meaning of the text that is controlling; not the individual opinion of a judge as to what the Constitution ought to say. No doubt it is more exhilarating to formulate ideas about what a Constitution ought to provide than to address the task of seeking the meaning of a text, written 100 years ago, in its application to current circumstances and conditions. But, for a lawyer, the latter task provides more than sufficient challenge.

The framers of the Constitution knew that the document they drafted would have to be interpreted and applied in future circumstances that they could not foresee. As an instrument of government, intended to last long into an unknowable future, and to be difficult to alter, the Constitution is dynamic. It was not meant to be read as a piece of parchment in a time capsule sealed in 1901. But, at the same time, it embodies the terms upon which the people of Australia agreed to federate, and upon which the separate self-governing colonies agreed to surrender part of their governmental powers to a new central authority. Those terms were expressed, and communicated to the future, in writing. It is the meaning, express and implied, of the language of the instrument that controls the outcome of disputes about the division of governmental powers. If the High Court were to be seen, not to seek and apply that meaning, but to rewrite and alter the federal agreement, then the foundation of the federal union, the agreement by which it was constituted, would be destroyed. If the governments of Australia, federal and state, and the citizens, had no confidence that the court would adhere to the constraints inherent in the role entrusted to it; if they apprehended that the members of the court felt entitled to devise a new Constitution, different from that agreed upon, without observance of the democratic process of amendment, built into the Constitution; if they concluded that the faith of the founders in the judicial role was misplaced, then the structure that was devised for the peace, order and good government of the Commonwealth would fall apart.

Judicial legitimacy, and adherence to the techniques of legalism, are not dull and conservative. As GK Chesterton said of another kind of orthodoxy, to be sane is more dramatic than to be mad. Anyone can think up ways to alter the Constitution. To resolve great issues as to the federal division of governmental powers by interpreting and applying the language of the federal agreement, with all its legitimate implications, is a fitting task for a judge. To maintain public confidence in the integrity with which the judicial arm of government approaches such a task, and in its fidelity to the Constitution, is a continuing challenge.

No doubt there are people in the community who wish we had a different Constitution, and are impatient with the apparent difficulty of securing the necessary popular support for change. But it would be a serious mistake to look to the court to supplement what is regarded as a deficiency in the democratic process, and to amend the Constitution by an exercise of judicial power. There is no such power. The only power of the court is that conferred upon it by, or under, the Constitution. For the court to disregard the meaning of

the instrument which is the very source of its own authority would be to undermine its own authority. And it would demoralise those upon whose consent all the institutions of government ultimately depend.

To many, the judiciary will appear unadventurous, but that is because of the nature of the task that has been entrusted to it. Reliability can be boring, but when you consider what it is that the High Court is being relied upon to do, you may see it in another light.

Justices of the High Court frequently disagree amongst themselves about the interpretation of the Constitution, and decisions of the court are a legitimate subject of comment and criticism by lawyers and non-lawyers. But there is one form of criticism that should cause people to pause and think carefully. When you hear it said that decisions of the court are legalistic, you should ask what else they might be. Members of the High Court are appointed on the basis of their legal experience and capacity. It would be unwise to complain that they behave like lawyers, without considering the alternatives.

I thank the university for the honour it has shown to me, and to the court, and I wish you all well in your future careers.