Address to the Annual Loaves and Fishes Function
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"Aspects of the Commonwealth Constitution"

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My thanks to the Dean, the Very Reverend Dr Peter Catt, for inviting me here today and for the opportunity to speak to you.

The building that I work in in Canberra is almost as majestic in its proportions as this wonderful Cathedral. It was however finished rather more quickly. Like this building the High Court building is symbolic as well as functional. Its substantial proportions signify the strength of the rule of law and the authority of the Court.

Today I would like to speak to you about aspects of the architecture of our Constitution and the judicial system for which it provides.

The federation of the colonies into States of one nation was conceived of by some great men. One of them was Sir Samuel Griffith, who was the Chief Justice of Queensland and would become the first Chief Justice of the High Court which was established following Federation. He and others such as Sir Henry Parkes, Andrew Inglis Clark, Alfred Deakin, Sir Edmund Barton and Sir Robert Garran were participants in the Convention Debates which were held to discuss the shape of the Constitution and debate its terms. These are men who should be known to every schoolchild in Australia and of course to every educated adult.

On viewing our Constitution two things are immediately obvious: it is small in size and plain in its words. It is not a piece of literature and does not

commence, as the American Constitution does, with a flourish "We the people". It contains no statement of high ideals. It has been described by one of my colleagues[1] by comparison with the mighty American eagle of a Constitution as a "small brown bird". But, as he said, it is our small bird and it has some very distinctive features.

A federal system of government requires that the Constitution allocate responsibilities and power. It does so by providing the Commonwealth Parliament with power to legislate with respect to particular subject matters. This does not mean that the States cannot legislate in some of the same areas, but if they do their laws must not be inconsistent with an existing Commonwealth law. It was this aspect of the Constitution which rendered the ACT Parliament's Same Sex Marriage Act[2] invalid because the Commonwealth Marriage Act[3] then defined marriage as a union between a man and a woman. In its judgment the High Court pointed out that the Commonwealth Parliament had the power to amend the Marriage Act, which of course it recently did.

The Constitution divides responsibility for governance of the Commonwealth between the three branches of government: the legislature, the executive government and the judiciary. It effects a separation of these powers, although there is inevitably some overlap in functions. It is important though that the judicial power of the Commonwealth for which it provides can only be exercised by the courts.

The Constitution provides for a representative democracy. It has been said that the underlying principle of the Constitution is:

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1 The Hon Justice Patrick Keane "In Celebration of the Constitution" (Address to the National Archives Commission, 12 June 2008).

2 *Marriage Equality (Same Sex) Act* 2013 (ACT).

3 *Marriage Act* 1961 (Cth).

> "[T]hat the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power[4]."

The reality at Federation in 1901 was that not all persons could vote.

Nevertheless, the right of all persons qualified to vote to choose a person as their representative is fundamental to an understanding of our Constitution. It is the basis for the implied freedom of persons to communicate with each other concerning matters of politics or government. If that communication were not possible people could not be properly informed about the choice they could make at an election.

The framers of the Constitution do not appear to have thought it necessary for it to contain a Bill of Rights. Their focus was upon the power which it gave to the people and the institutions for which the Constitution provides – a legislature to be chosen by the people, a government which would operate on the principles of responsible government and the courts acting independently and according to law. They had confidence in the integrity of these institutions. The Constitution is founded upon common law principles such as the rule of law and the liberty of the subject and the framers expected the courts to continue to apply and develop these and other protections. A possible drawback of not having a Bill of rights is that there is less interest in our Constitution than there otherwise might be.

Chapter III of the Constitution establishes a federal judiciary. Some of it is said to have been drafted on Samuel Griffith's boat the Lucinda on the Hawkesbury River. It established a "Federal Supreme Court, to be called the High Court" and it defined the Court's jurisdiction, both original and appellate. It is a distinctive feature of the Australian Constitution that the High Court is a general court of appeal from the Supreme Courts of the States and of the Territories. The framers of our Constitution deliberately departed from the provisions of the United States

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[4] W Harrison Moore, *The Constitution of the Commonwealth of Australia* (1st ed, 1902) 329.

Constitution in that respect. Having one final appellate court and not one in each State has allowed the common law of Australia to develop uniformly. This development was assisted when appeals from Australian courts to the Privy Council in London were finally abolished in 1986.

The High Court now stands at the apex of all courts in Australia. The courts below it are, in descending order of stature, the Supreme Courts of the States and other federal courts. Each of these courts has its own appellate court so that appeals are brought to the High Court from those courts. Below them are the District or County Courts and then the Magistrates or Local Courts. The appellate work of the High Court involves civil disputes ranging over many areas of law. It hears appeals in criminal matters. Its appellate role largely involves correcting errors made in the courts below. It cannot realistically hear all appeals brought from the courts. It principally hears matters which involve an important question or where there has been a possible miscarriage of justice.

At the time of Federation the colonies were largely self-governing and each of the colonies, which were to become States, had its own Supreme Court. Generally speaking they continued to have the same jurisdiction with respect to State laws and the common law after Federation.

The Constitution however provided for a federal jurisdiction and the creation of federal courts, in addition to the High Court, to exercise it. It is an especially distinctive feature of the Constitution that it also allowed for State courts to be able to exercise federal jurisdiction. And so they did for many years when there was no Federal Court and no Family Court. Today some federal jurisdiction has been given exclusively to federal courts, but there are many areas of federal jurisdiction which State courts can exercise at the same time as they exercise their own jurisdiction.

This distinctive feature of the Constitution was described by the High Court in 1956 in the *Boilermakers case* as "the autochthonous expedient"[5]. This description surprised lawyers, largely because they had never heard the word "autochthonous" before. Sir Owen Dixon, who was most likely the author of it, was probably the only person in Australia who knew it.

The principal responsibilities of the High Court are to uphold the Constitution and maintain the rule of law. Disputes concerning the Constitution, its operation and effect may arise between citizens or between a citizen and government or between State and Federal governments. In any of these disputes it might be argued that a particular statute is invalid, for example because no power to legislate on that topic is provided by the Constitution or the legislation goes beyond the scope of the power given it conflicts with a freedom which is guaranteed by the Constitution. Recently some legislation in Tasmania directed at peaceful protests in forests was held invalid because it denied persons the ability to communicate their protests.

A person may also seek a review by the Court of the legality of decisions or actions on the part of the Executive Government. The litigation undertaken by the Kerrigan family in The Castle was loosely of this kind.

The Constitution expressly gives the Court power to make orders preventing action being taken or requiring action to be taken by any officer of the Commonwealth. This includes Ministers. These powers are not at large; the basis for them is that the governmental action in question is unlawful. They are important powers for the protection of the citizen. They are unique amongst Constitutions and they are constitutionally entrenched. They cannot be taken away.

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[5] *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.

The High Court is also established as the Court of Disputed Returns. In that role it decides disputes about elections. The Commonwealth Electoral Act[6] allows the Senate or the House of Representatives to refer questions about whether a person is qualified to sit in the Parliament or has been properly elected. This is what occurred in the recent dual citizenship cases.

It is important to the maintenance of the rule of law upon which our Constitution is based that citizens and government alike have confidence in the Court and its decisions. That is only possible where the Court is able to and is seen to act independently. There are provisions of the Constitution the purpose of which is to secure that independence, such as preventing the removal of a federal judge except for "proved misbehaviour or incapacity".

Because the Court and the judges which comprise it must act independently and according to law it sometimes happens that its decisions are not always welcomed by everyone. It has in the past come under attack from government and from the media. It is at these times that the maintenance of the rule of law may depend upon citizens. Just as the Constitution gave citizens political power it gave them the responsibility for upholding the institutions which it created. There may be occasions in the future when the Court as an institution will need the support of your citizens. And of course that will only be possible if there is an awareness and an understanding of the role of the Court and its importance to our society.

In closing, I would like to quote from Sir Harry Gibbs, a great Queenslander who served on the High Court, including as Chief Justice. He said:

> "In a democracy, every educated citizen should have an understanding of the role of the judiciary, the manner in which the courts function and the history of the relationship between the courts and other organs of government. This is particularly important because ... the independence and authority of the

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[6] *Commonwealth Electoral Act* 1918 (Cth) s 376.

judiciary, upon which the maintenance of a just and free society so largely depends, in the end has no more secure protection than the strength of the judges themselves and the support and confidence of the public."[7]

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[7] Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) v.