Appendix I
Australia Day Messages, 1993-2000

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

Editor's Note

On the occasion of each Australia Day since the Society's inception, our President, the Rt Hon Sir Harry Gibbs, has forwarded an Australia Day message to all members of the Society.

Over the years, those brief messages have conveyed, in Sir Harry's characteristically limpid prose, a wealth of wisdom distilled from the mind of one of Australia's finest and most honourable public servants (employing that phrase in its time-honoured, and best, sense). Moderate, judicial (naturally), logical, incisive and pithily expressed, these messages have been warmly welcomed by our members – as well as, on a few occasions, by a wider audience when one of our national newspapers has picked up, and given some prominence to, selected passages from them.

It would be tedious to quote at length when, after all, the full texts of the messages in question are set out in the following pages, but three examples may suffice to demonstrate the truth of the preceding paragraph.

First, at a time when we were being perpetually lectured to by so-called professional historians about our "shameful" past, how refreshing it was to read the following:

> "During this century, in almost every continent there has been mass murder, inhuman torture and a total denial of basic human rights on a scale rarely seen before in history. At the same time Australia has enjoyed internal peace, order and stability – a bright beacon in a dark world". (Australia Day, 1993).

Or again, two years before Australians were given a voice on such matters via the unlikely agency of Mrs Pauline Hanson and her One Nation party, how prophetically reads the final sentence in the following:

> "No person of good will would fail to recognise that Aboriginal people who suffer special disadvantages should be treated with justice and generosity. It is another question whether any class of persons should be granted special privileges, not to remedy their particular disadvantages, but simply because their ancestors suffered injustices. There is a danger that, if the benefits which are given to a minority are perceived by the majority to be unfair, the result will be resentment rather than reconciliation". (Australia Day, 1994).

And finally, in what can only be construed as a warning against the imperial proclivities of (a growing segment of) Sir Harry's own legal profession, consider the following:

> "If it is impossible for governments to resist the fashionable clamour for a Bill of Rights, at least it is to be hoped that no attempt is made to entrench constitutionally a Bill of Rights, thus giving to the judiciary a power greater than that of Parliament to decide matters of policy and in consequence politicising the judiciary". (Australia Day, 2000).

As explained in the Foreword to this volume, the opportunity is now being taken to record these messages in the Society's Proceedings. For reasons of space, Sir Harry's messages covering the years 1993 through 2000 are contained in this volume; his messages for the years 2001 through (by that time) 2005 will appear in Volume 17.

Australia Day Message, 26 January, 1993

Australia Day is one of our two great national days, and it marks the beginning of this nation. It seems appropriate, on such an occasion, to reflect on the achievements of the past, and the needs and dangers of the future – in the case of the Society, from the constitutional point of view.

During this century, in almost every continent there has been mass murder, inhuman torture and a total denial of basic human rights on a scale rarely seen before in history. At the same time Australia has enjoyed internal peace, order and stability – a bright beacon in a dark world. In this respect we have cause to be proud of our past history. We have not been so successful in achieving the strong economy that our natural advantages would seem to make possible, and it may be argued that some of the constitutional developments that have occurred since Federation have contributed to that failure.

Now that there is a debate as to the future nature of our Constitution, I should like to refer briefly to the constitutional reform that in my opinion would be most likely to benefit Australia, and that most likely to cause us harm. Of course, other reforms, harmful and beneficial, might be mentioned; in this message I have sought to mention only the most significant.

Ours is a federal system. Some would prefer a unitary system, but it is quite unrealistic to suppose that a referendum seeking to abolish the States will be carried in the foreseeable future. The federal system should therefore be made to work. Opinions may differ as to the powers that should be accorded to the Commonwealth, and those that should remain with the States. Surely, however, it ought to be obvious that the same powers should not reside in both authorities, with the potential for an overlapping and duplication of administrative and bureaucratic effort and expense.

Of course it is highly desirable that the Constitution should permit, as it does, complete cooperation between Commonwealth and States in almost every respect, but cooperative action is a very different thing from a coercive intrusion by one authority into another's proper field. Unfortunately, under the Constitution, as it has been interpreted, the Commonwealth has been able to exercise power in respect of many important matters already the subject of State control, and the potential for conflict, waste and maladministration has been amply realised.

Two provisions of the Constitution in particular are responsible for this irrational and undesirable state of affairs. The first is section 96, under which the Commonwealth can impose conditions, without limit, on the grants of financial assistance to the States. The second is the power of the Commonwealth Parliament to legislate with regard to external affairs – a power which enables the Commonwealth to seize on any international agreement as a pretext to intrude into any area of State activity.

The former provision has robbed the States of responsibility and caused a harmful fiscal imbalance, as well as contributing to the duplication of activity to which I have referred.

The latter may prove to be the more harmful provision. We have seen its effect recently in the first *Mabo* decision, which held State legislation, regarding the title to lands within the State, invalid because it was seen to be inconsistent with a Commonwealth law aimed at racial discrimination.

It cannot be doubted that if, during the first 200 years of white settlement, it had been held that the Aboriginal people had rights to land of a kind formerly unrecognised, the legislatures of the colonies or States would have enacted legislation to deal appropriately with this novel situation, to settle titles and resolve doubts. Now the exercise of the external affairs power has limited the ability of the States to resolve the serious uncertainty that exists as to the interests in use of lands within their borders. That is only one example of the extraordinary

operation of the external affairs power.

The amendment of those two constitutional provisions, to limit the ability of the Commonwealth to determine policy in matters outside its defined powers, might do much to restore the efficiency of government in Australia.

The most dangerous change that could be made would be to include in the Constitution a provision giving special rights to the Aboriginal people. One proposal seems to be to include in the Constitution a provision recognising the Aboriginal people as the indigenous inhabitants of Australia, or providing for a treaty with them; but anyone who has seen how constitutional courts appear to be able to conjure great constitutional principles from thin air will know that even simple and innocuous words, intended to do no more than improve the relations between the Aboriginal people and other Australians, could be held to be the basis of substantial rights and liabilities – as perhaps some of the advocates of a change of this kind are well aware.

Nothing could do more to divide the Australian nation than a constitutional change that gave the Aboriginal people special rights and privileges based solely on race. The Aboriginal people, like all other peoples in Australia, are not a uniform group. Some have successfully integrated into 20th Century society; others are successfully living a traditional mode of life, albeit a modified one; others unfortunately are greatly in need of help, which various governments have tried without much success to give them. Those in need should be succoured, but that does not mean that all those who are of Aboriginal race should be given special constitutional rights which would not be enjoyed by other Australians, even by those in equal need.

The constitutional debate in Australia is only beginning. Our aim should be to ensure that any change that is made benefits Australia, and that arguments based on self-interest, political expediency, mere fashion or sentimentality are exposed and rejected.

Australia Day Message, 26 January, 1994

Again, I am writing on Australia Day – a day which celebrates the courage and enterprise of generations of men and women who built Australia into a free, tolerant and humane nation.

During the last year there have been two events which seem to me to be indicative of some of the great issues that will confront Australia during the next few years. The first was the decision in the *Capital Duplicators Case*, in which the High Court was asked to reconsider the authorities which have established the meaning of the words "duties of excise" in section 90 of the Constitution. Section 90 gives the Commonwealth exclusive power to impose duties of excise, and the wide meaning given in the past by the High Court to that expression has created a major difficulty for the functioning of federalism in Australia. It has had the practical consequence that the States have been forced to impose taxes which have rightly been described as regressive, distorting and costly either to administer or to comply with, simply because no other sources of sufficient revenue are available to them.

In the *Capital Duplicators Case* the majority of Justices understandably refused to reconsider the authorities which, for over 40 years, had extended the meaning of excises to include any tax on the taking of a step in the process of production or distribution of goods before they reached the consumer, although they added that it was unnecessary in that case to consider consumption. It had been feared by some that the Court might reopen the decisions that had held that licensing fees imposed on sales of alcohol and tobacco, calculated by reference to sales made in periods other than the licensing period, were not excises, but although the majority Justices saw the theoretical force of taking that course, they fortunately refrained from doing so. At least those revenues remain available to the States.

The fact that section 90 deprives the States of the power to impose duties of excise is not the greatest impediment to the successful working of federalism in Australia, but it is one that could most easily be remedied, if the will to do so existed.

There is simply no good reason why the power of the Commonwealth to impose duties of excise should be exclusive. In the United States, most States impose sales taxes. The inability of the Australian States to impose sales taxes and other "excises" has had a crippling effect on their finances. The capricious operation of section 90 is illustrated by the *Capital Duplicators Case* itself, for what public benefit resulted from that decision invalidating a tax imposed by the Government of the ACT on X-rated videos? It would be consistent with the efficient working of the federal system if the Constitution were amended to remove the reference to "duties of excise" from section 90.

It cannot be too often repeated that the division of power effected by a federal system is a valuable check on excesses of governmental power. Governments which seek to weaken federalism sometimes do so because they chafe under its restrictions. For various reasons federalism has been weakened in Australia, and the question whether the federal system will suffer further erosion is likely to increase in practical significance in the future.

A straw in the wind is the recent recommendation by the federal government's Regional Task Force that a new system of regional economic development organisations should be set up, to co-ordinate projects in various regions in Australia. Whatever may be said in favour of regional development, there seems no reason why that should be effected by establishing a new tier of government, with its attendant bureaucracy, and the result of doing so would necessarily be to detract from the powers and functions of the States.

The second of the significant events which I have mentioned was the passing of the *Native Title Act* 1993 – the so called *Mabo* legislation. That also raises federal issues, but in addition it obviously concerns what has become a question of great significance in Australia, namely, what should be done to remedy the present disadvantages, and to rectify the past injustices, suffered by Aboriginal people, and to recognise their position as the indigenous

inhabitants of Australia? Unfortunately, the debate on these questions has been bitter and divisive, and is potentially corrosive to Australian unity.

No person of good will would fail to recognise that Aboriginal people who suffer special disadvantages should be treated with justice and generosity. It is another question whether any class of persons should be granted special privileges, not to remedy their particular disadvantages, but simply because their ancestors suffered injustices. There is a danger that, if the benefits which are given to a minority are perceived by the majority to be unfair, the result will be resentment rather than reconciliation. I do not attempt to provide answers to these questions, but I do suggest that they are of such importance that the Society might consider them in depth at a future conference.

The Society might also wish to discuss the merits and demerits of the *Native Title Act*. The Act is not a model of simplicity. Although the preamble recognises the necessity for certainty, the Act itself does not validate past acts attributable to States and Territories, which of course are the acts which affect most land in Australia; it provides that State and Territory laws may do so, but only if they comply with the detailed requirements which the Act contains. According to the explanatory memorandum, the Act neither prevents States and Territories from attempting validation on their own terms, at their own risk regarding legality, nor indicates that past acts by States or Territories are necessarily invalid. It may be doubted whether certainty is achieved by provisions of this kind. In any case, the validation which the Act permits does not have the effect of extinguishing native title in respect of some leases, including mining leases.

It would not be useful to attempt to discuss the Act in any detail, but I may make brief mention of a few of the questions to which its provisions give rise.

From the point of view of constitutional principle, objection might be taken to the provisions which dictate the form that certain State laws should take. From a practical point of view, there is the question whether the right given to the holders of native title, and to claimants to such title, to negotiate and seek a determination by an arbitral body before a mining lease is granted or native title is compulsorily acquired, will unduly hamper desirable development in future. There is the further question as to the extent of the financial burden likely to be imposed on the nation by the payment of compensation. In some cases, compensation might be payable in respect of the validation of an act done at a time when the very existence of native title was unknown, and when there was little or no reason to believe that what was done would contravene the *Racial Discrimination Act* .

On quite a different issue, the tide of public opinion seems to have turned against the supporters of a republic, although that controversy is by no means finished.

I offer my best wishes to all members of the Society on this Australia Day.

Australia Day Message, 26 January, 1995

During the past year it has been announced that steps are being taken by the Government to attempt to remedy the public ignorance that has been found to exist as to the nature of the Australian Constitution.

Any genuine attempt to give Australians an opportunity to become better informed about our Constitution is of course to be commended, even if its principal motive is to prepare the public to accept changes to the system which is being explained to them. However, it would not be enough to inform the public of the details of the provisions of the Constitution, without at the same time explaining the reasons for the adoption of those provisions and the purposes which they are intended to serve.

In particular, it is important that it should be recognised that our federal system, by dividing the powers of government between the Commonwealth and the States, plays an important part in maintaining Australia as a free society.

Most governments resent the existence of restrictions on their powers, and claim that their ability to act for the good of the people is limited unless their power is unfettered. On the other hand, as Sir Karl Popper has pointed out, institutions need to be designed "for preventing even bad rulers from doing too much damage".

One does not have to seek hard to find proof of the fact that liberty is at risk where a government has undisputed power to exercise censorship, to disseminate propaganda, to dispense patronage and to control the police. To divide power lessens the possibility of its abuse.

Some persons see only the disadvantages of federalism, such as the fact that different States have different regulatory or educational requirements. Disadvantages of that kind can be, and often are, avoided by sensible co-operation between governments. Those disadvantages are, however, insignificant compared with the role which is played by the federal system in the preservation of Australia as a free society.

In a society such as Australia a reasonable degree of freedom is taken for granted. It tends to be forgotten that, in the history of the world, there have been few free societies, and that even today there are comparatively few countries that can truly be described as free. It is dangerous to be complacent and to take the continuance of freedom for granted.

It is true that the traditions and sentiments of a people are very important in ensuring that a society maintains its freedom, and that Australia has been notable for its freedom and tolerance. However, during recent decades the composition of the Australian population has greatly changed, and so has the proportion of the population which is dependent on the Government for financial assistance. There are divisions in society which did not previously exist.

It is a mere matter of speculation whether, and to what extent, circumstances such as these will diminish the determination of the Australian people to resist attempts to erode their civil liberties. In any case, public sentiment is not in itself enough to resist encroachments by a government whose power is unrestricted. Indeed, even under our present system, our liberties have been suffering a gradual erosion.

There are no doubt many reasons for this, but two may be mentioned. One is that legislative supremacy is often a mere fiction, and a Parliament, when dominated by one political party, cannot always be relied on to scrutinise with care the vast volume of legislation that the Executive wishes to place on to the statute books or to have the will to curb excesses in that legislation.

A second is that various sections of society, pressing to advance interests of their own, are able to procure legislation whose effect is to infringe the liberties of others.

Obviously some detraction from freedom is necessary in an ordered society, but not all

measures taken, for purposes themselves legitimate, are reasonably justifiable. Think, for example, of the many inroads on the freedom of individuals committed for the purpose of combating discrimination of various kinds.

Some who do understand the effect of federalism in limiting power, attempt to denigrate the system by mis-describing it. They refer to federalism as the doctrine of State rights, and say that human rights are more important than State rights.

What they mean is that the particular course that they wish to pursue is made less easy because of the constitutional division of power – an impediment that will be entirely desirable if the proposed course is extreme or ill-advised, but which may usually be overcome if the course proposed is moderate and sensible.

However, no informed person nowadays supports the federal system on the basis that States have rights. The States have functions of government which the Constitution has entrusted to them, and the fact that they have these functions is a check on the abuse of central power.

More than 200 years ago John Madison wrote:

> "If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government: but experience has taught mankind the necessity of auxiliary precautions".

Our Constitution provides for a number of such auxiliary precautions – "institutional controls of power", as Karl Popper would call them – but federalism is the most effective. All are under threat.

Australia Day is an appropriate time to remind ourselves of the need to preserve and strengthen federalism in Australia.

Australia Day Message, 26 January, 1996

It has been rather encouraging that, during the past year, informed commentators have shown an increasing recognition of the need to correct the vertical fiscal imbalance that has resulted from the circumstances that the taxing power of the States is limited , but they are not guaranteed any fixed share of Commonwealth revenue, and must depend on Commonwealth grants, many of which are made on conditions which determine policy on matters concerning which the Commonwealth has no power to legislate.

A significant fetter on the taxing power of the States is imposed by s.90 of the Constitution, which denies them the power to impose "duties of excise", particularly since the High Court has held that a tax on any step on the production, manufacture, sale or distribution of goods is an excise.

However, two of the four members of the High Court who have adhered to that view have now retired, and there is accordingly a prospect that the Court may adopt the views of the three members who were previously in dissent. That would be a considerable improvement, although ideally s.90 should be amended to remove the restriction altogether.

There has also been a welcome recognition of the need to place limits on the power of the Executive to enter into treaties, or at least to make the Executive more accountable for the exercise of that power. However, the question whether s.51(xxix) of the Constitution ("external affairs") should be amended, and if so in what manner, remain matters of controversy.

The reliance on the external affairs power to give effect to treaty obligations, and the use of conditional grants, have had the result that large Commonwealth bureaucracies have been created to deal with matters which could equally well have been left to the States, and even the State bureaucracies have swollen in consequence. The members of the Commonwealth bureaucracies have an interest to oppose any change.

There seems to be support for the enactment of a Bill of Rights, which of course is superficially attractive. It may not be generally understood that a Bill of Rights, if enacted by the Commonwealth in general terms, would operate as a further impediment to the exercise of State power, since State legislation inconsistent with the Commonwealth Act would be inoperative. The effect on the States would be likely to be substantial.

The past year has provided abundant examples of the truth of the observation made by Ursula Hicks, in her work on Federation published in 1978, that "The three most obviously (potentially) divisive forces [in a federation] are ethnic (race, language and culture), religion and political ideology".

We have witnessed the break up of federations which seemed to be notable for their stability – the USSR and Yugoslavia – and that has been accompanied (particularly in the latter case) by horrifying violence.

It is not only in federations that divisions of this kind may fragment national unity – witness what has happened in Sri Lanka. If we are complacent enough to think that conditions in those countries are so remote from our own that they do not provide us with a cautionary example, we can hardly ignore the fact that the cultural and linguistic divide between Quebec and the other Canadian provinces has brought the Dominion of Canada to the verge of dissolution.

Racial origin, in itself, may not be significant, but it becomes a potent source of division when joined with differences in culture, language or religion which cause the members of a racial group to regard themselves as alien to the other members of society, particularly if they perceive themselves to be the victims of discrimination.

In Australia there has been persistent advocacy for the grant of self-government to indigenous communities in the Torres Strait Islands and in a large area of northern Australia. If this advocacy proved successful there would be a threat to the stability of Australia, and

that threat would be the more serious because the areas over which self-government is sought are of vital strategic importance.

Ursula Hicks went on to point out that what is necessary to render a nation secure against internal disruption is that all members of society, despite the differences between them, should be proud of their national citizenship. It is important that all Australian citizens, whatever their origin, should be proud to be Australians. Diversity should not mean divisiveness.

Australia Day is an appropriate occasion to celebrate the achievements of which our nation is entitled to be proud.

Australia Day Message, 26 January, 1997

During this year it is expected that the Government will convene a People's Convention to consider possible constitutional change. The primary purpose of the Convention will be to consider the question of a republic. In substance Australia is already a republic, in that the supreme power is vested in the people, and we have what many countries whose Constitutions are republican in form lack, namely a stable, democratic form of government, and political and individual liberty.

I shall not discuss here the many issues of policy that would need to be resolved before Australia could abandon the system of constitutional monarchy, for I intend to give a paper on that subject at the Conference of the Society which will be held in Canberra from 7 to 9 March. The proposal that a preliminary plebiscite should be held has, I hope, been rejected – to ask the electors to say whether or not they are in favour of making the Australian Constitution republican in form, without first deciding what that form should be, would be like asking the proprietor of a piggery to buy a pig in a poke.

Putting aside the issue of a republic, have we anything to hope for or to fear from the People's Convention? If experience is any guide, the answer is, "not much". The Constitutional Convention that laboured from 1973 to 1985 resulted only in three amendments to the Constitution, which can hardly be said to have been of major significance. However, it is possible that the People's Convention will reach consensus, and secure political and public support for significant amendments to the Constitution where its predecessors have failed.

Members of the Society are unlikely to be surprised to learn that the amendments that I would most like to see made to the Constitution are those that would strengthen – or perhaps it is more accurate to say restore – the federal nature of the Constitution. Two areas of reform are particularly necessary.

The first is to redefine the powers given to the Commonwealth so that they shall no longer be capable of indefinite expansion into areas which should more properly be left to the States. The external affairs power, as now construed, is one which most obviously offends against the principles of federalism, but it is not the sole offender.

Secondly, it should be ensured that the States are empowered to raise the revenues that they need to perform their functions, and are freed from dependence on Commonwealth grants, which are often intrusively conditional. One measure that would help to some extent to redress the imbalance that presently exists between revenue and expenditure on the part of both the Commonwealth and the States – the amendment of section 90 of the Constitution to enable the States to impose duties of excise – seems so obviously beneficial that it might have been thought that even the staunchest of centralists would support it, but experience suggests otherwise.

Federalism would be further assisted if the States were given an effective say in High Court appointments, and if Senators were appointed by State Parliaments (as was originally proposed) rather than elected, but to think that the latter suggestion is likely to be accepted is to strain optimism to its limits. There are of course other amendments to the Constitution that might beneficially be made that do not affect the federal balance – increasing the term of the House of Representatives would be an important reform. We may hope to see changes of these kinds, but there is a great gulf between hope and expectation.

On the other hand, there are grounds for apprehension that some unpalatable suggestions for change may receive support. Although the changes to which I am about to refer have no necessary relation to a republican Constitution, they are frequently advocated when the question of a republic is debated, and one wonders whether some people see a republic as a Trojan horse designed to open the door to unrelated constitutional changes.

One suggestion is that a republican Constitution should have incorporated in it a Bill of

Rights. A discussion of the advantages and disadvantages of a Bill of Rights would be out of place here, but my especial concern is with some of the suggested provisions, particularly one which would entrench the right to be free from discrimination on account of race, gender and other grounds.

If one accepts the current orthodoxy (recent though it is) that discrimination on these grounds is always immoral, and if one takes the further large step of agreeing that the States should give legislative sanction to these moral principles, it does not follow that the principles should be constitutionally entrenched. A constitutional provision of that kind would have an unpredictable effect, not only on government action in relation to such matters as immigration, health, education, defence and employment, but also in restricting individual liberty.

Some of those who urge that such a provision should be included in the Constitution would go further, and add to it the proviso that discriminatory action, although otherwise unlawful, would be permissible if it operated in favour of indigenous peoples or ethnic groups. To draw a constitutional distinction between citizens on the grounds of race would be completely unacceptable, and would be likely to have the same serious consequences that have been seen in other countries where a difference in status has been based on racial grounds.

There is a similar objection to the proposal that the Constitution should include a recital recognising the special position of the Aboriginal people and the Torres Strait Islanders. Some may think that such a recital would be an appropriate act of recognition or reconciliation, but as decided cases have shown, the courts can give significant effect to a mere recital, and the effects that might be given to such provision could be unpredictable, but would be likely to be potentially divisive.

Even more likely to cause constitutional difficulties would be a provision entitling the indigenous peoples to compensation for past wrongs, or conferring on them some sort of separate sovereignty. The purpose of a Constitution is to prescribe the structure and functions of the organ of government. It is a mistake to use a Constitution to attempt to enshrine community values or to dictate social policy, since values change, and any policy, although in favour today, may be varied or abandoned in the future; the mistake is the graver, if the policy sought to be imposed is one that gives preference to one social group over another.

A suggestion of a quite different kind is that the Constitution should include a recognition of local government. In Australia local government has successfully endured without constitutional recognition. To recognise its existence in the national Constitution might boost the self-esteem of some local councillors, but it would be likely to reduce the power of the States, for example, in dealing effectively with the corruption and inefficiency that sometimes occur in local government.

I have touched only on a few of the issues that may be raised when the People's Convention is held. My aim has been to suggest how significant the Constitution may possibly be for Australia's future, and how vigilant we should be to ensure that contemporary notions are not converted into binding constitutional rules.

I send best wishes to all members of the Society on this Australia Day.

Australia Day Message, 26 January, 1998

Perhaps the greatest challenge for Australia this year will be to bring about true reconciliation between the Aboriginal people and other Australians, and to prevent our society from being divided on racial issues.

No one of goodwill doubts that it is necessary to act justly to the Aboriginal people, as to all Australians, but one difficulty in meeting the demands which those who speak on behalf of the Aboriginal cause seem to make a condition of reconciliation is that, in many instances, those demands are not based on need or merit, but simply on race. This century has provided, and continues to provide, cautionary examples of the great evils that can result from racial conflict. To confer rights and privileges solely on the ground of race is to sow the seeds of conflict.

At present, two issues attract particular attention, but if these issues are resolved we may be sure that others will arise. The first, which concerns the so-called "stolen children", shows how emotion rather than reason dominates the debate. If it were not for the fact that it seems to be the fashion to demand apologies for iniquities long past, it would be almost beyond belief that the question, whether the Prime Minister of the Commonwealth should apologise for policies which neither his government nor its predecessors instituted, or had constitutional power to prevent, should be a serious political issue. And with all respect to those who genuinely think an apology is necessary, surely the discussion of this matter shows a lack of proportion.

No doubt the policy under which children of part-Aboriginal blood were removed from their parents was insensitive, and sometimes brutally administered, although it should be added that the policy was well-intentioned according to the standards of the times, and that some of the children taken into foster care owe their present success, and perhaps their lives, to that fact. During the time when this policy was in force, people of almost every race and colour were subjected throughout the world to the vilest of atrocities, and we cannot be sure that even today in Australia official brutalities do not occur. If an apology were appropriate, it would be an apology for the darker side of human nature.

The second current issue concerns the attempt to amend the *Native Title Act* – an ill conceived and defective statute which cries out for amendment. I do not attempt to consider whether the amendments proposed by the Government would, if passed, result in a reasonable compromise between the conflicting interests of all concerned, but there are some general observations I would venture to make.

It is argued that the race power, given by section 51 (xxvi) of the Constitution, can be exercised only to enact laws which are beneficial to the race concerned, at least to the Aboriginal race. I cannot understand how any political party which hopes to form a government could support such an interpretation. Not only would such a construction require the High Court to depart from its traditional roles, but it would also have the result that a law which had mistakenly conferred an inappropriate benefit on the Aboriginal people, and which was universally regarded as harmful and unsustainable, could never be repealed, unless perhaps some other benefit were conferred in its place.

The "right to negotiate", upon which the supporters of the Aboriginal cause place so much value is, of course, not a traditional right. It is difficult to discover any valid reason for its continuance. In general, if the rights of an individual are adversely affected, that person may be entitled to compensation or legal redress, but will have no right to negotiate before the adverse action is taken. Of course, the power to compel a miner or land-holder to negotiate before taking action that is perfectly lawful provides a means of extracting a price – sometimes a very high price – for the exercise of a legal right.

The oppression that may result is enhanced when the Aboriginal claimant need not

prove the existence of any interest before requiring negotiation, and need not have had any physical connection with the land in question.

Two statements, which if not hypocritical are at least misleading, are often made in support of the present position. It is argued that the pastoralist has no problem, since the High Court has said that his (or her) rights prevail if there is a conflict with native title. The problem is that no one knows what the rights of the pastoral lessee are until the Court has declared them. Also, it is said that the Aboriginal people want nothing more than the right to go on their traditional lands for the purposes of hunting, gathering and visiting sacred sights. In fact, some want money, and a lot of it.

It is a defect in the law that the question who is an Aboriginal is undefined. If a person with one Aboriginal grandmother and no other Aboriginal ancestors wishes to claim cultural affinity with the Aboriginal people, he or she is perfectly entitled to do so, but it does not follow that such a person should be entitled to the special benefits that are made available only to persons of Aboriginal race.

It may be too much to hope that the public in general, and the media in particular, will accept that Aboriginals, who undoubtedly have special needs, should have those needs met simply because they are Australians; and that two sections of society cannot be reconciled, that is, brought into friendly and harmonious relations one with the other, when one of those sections demands a special place and special privileges unrelated to need.

May I mention briefly another matter. The proponents of a republic now are facing the difficult questions that have to be resolved before a republican Constitution could be drawn – particularly, how should a President be appointed and dismissed, what powers should a President have, and whether those powers should be codified or justiciable, and what should be the position of the States.

The Honourable Richard McGarvie, QC, who recognised more clearly than most the disadvantages of the selection of a President either by popular election or by parliamentary choice, would place appointment and dismissal in the hands of a committee of eminent retirees. This proposal raises further questions, particularly in relation to dismissal. Is the committee to have a discretion? Must it afford natural justice to a President faced with dismissal? Must it act immediately, or within a reasonable time, or when it thinks fit? Can it act by a majority, and if so is the minority view to be made public? The answers to these questions would have to be made clear in the Constitution if this proposal were accepted.

1998 should be an interesting year. Best wishes to you all.

Australia Day Message, 26 January, 1999

The approach of the end of a millennium, and also of the hundred years during which Australia has been a federation, gives me the excuse to make some observations regarding some principles of government which seem to me basic, but which are not always appreciated or applied in practice.

The efficiency of any government depends of course, in part, on the capability of the officials performing public duties, but there are two principles which, it seems to me, must be observed if any system of government is to be truly efficient. These are, first, that those entrusted with power should be responsible for its exercise, and second, that the boundaries between the areas in which power is exercised should be clearly defined.

It is not only in a federation that these principles apply. They do, however, have particular importance in a federation. That is because experience has shown that federations tend to be unstable; they sometimes become converted into purely centralised states, but more often disintegrate into their component parts, particularly if the population of one of the states in a federation differs from that of the others in race, colour, religion, or ideology, as was the case in Central Africa and the Caribbean, and more recently in the USSR, Yugoslavia and Czechoslovakia. Even a developed nation like Canada trembles constantly on the verge of dissolution because of the Quebec situation.

The importance of these two principles is little understood in Australia. The power to levy taxes is increasingly divorced from the responsibility for applying the moneys raised by the taxes. The boundaries between State and Commonwealth legislative and executive power are so blurred that it may be said with truth that they are impossible to discern. The result is that in many fields – health and education are only two examples – a division of responsibility has resulted in increasing inefficiency. The risk to Australia is that it may become a federation only in name; the prospect of disintegration would be likely to arise only if separate sovereignty over part of the continent were granted to the Aboriginal or Islander people.

Efficiency of government has no necessary relation to the liberty of the individual, and to secure that liberty another condition seems essential – namely, that governmental power should be divided, or at least that no power should be free from checks that ensure that it is balanced in its exercise.

Checks of those kinds may be informal and may have no constitutional protection – the influence of apolitical public servants was in the past an important restraint on ill-advised governmental action, and the scrutiny of an independent media provides something of a check today.

However, a division of power which is constitutionally imposed is obviously of greater efficacy, and in this regard the Australian Constitution, like that of the United States of America, is well provided – the States, the Senate (in spite of the inconvenience the nature of its present composition sometimes causes), and the reserve powers of the Governor-General (although rarely exercised) all serve this end.

The existence of a federal system, and of a bicameral legislature, often seem to be regarded as a nuisance rather than as a benefit in Australia. One aim of some of those who wish to convert Australia to a republic is to weaken some of these restraints on centralised power.

A Bill of Rights is no substitute for a division of power in imposing restraints on the ill-advised exercise of power. Whereas a society that values moderation (as Australia has traditionally done) seeks to balance the rights of one individual against those of another, under a Bill of Rights supremacy is given to the particular rights favoured by prevailing ideology, causing in some cases absurdity and injustice.

I extend my best wishes to all on this Australia Day.

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Our Constitution has now endured for a century – not many others have lasted so long – and Australia remains a constitutional monarchy. The system of constitutional monarchy has served us well and I can see no reason to change it, but even those who think that Australia should become a republic should be grateful that the referendum was defeated. The proposed amendments were ill-considered and defective, even though some distinguished commentators, who initially pronounced the republican model to be flawed, ultimately supported it.

Unfortunately the campaign leading to the referendum has deepened divisions on this issue. It was surprising to read, soon after the result of the referendum, that the Leader of the Opposition in Western Australia was working on a new republican model. If the Constitution is to be changed to a republican form, the necessary amendments should not be framed privately by a cabal, but should be considered carefully by a conference whose members are chosen, not for their populist appeal, but for their knowledge and experience of politics, the law and public affairs.

Although the unnecessary division caused by the referendum is behind us, familiar constitutional problems remain. We are likely to see an increase in the use of the external affairs power, which is one of the causes of the gross imbalance in our federal system. The large number of treaty obligations which have been entered into in the past – many of them unnecessarily – not only gives a wide scope for the use of the external affairs power, but also enables the organisations of the United Nations to interfere inappropriately in our domestic affairs. This latter question will be the subject of discussion in a special meeting of the Society to be held in Sydney on 26 February (preceded by a dinner on 25 February). I hope that many of you can attend.

A matter that is fundamental to any system of representative democracy is the manner in which the candidates for election are selected. Unfortunately it appears that on both sides of politics the selection of a candidate is likely to be affected by branch stacking and factional deals, thus tainting the process at its source. The political parties can themselves put an end to these practices but seem unable to do so. It might be thought that a system of primaries such as are held in the United States would provide more balance, although the cost might outweigh the benefits. The question warrants consideration by the legislatures.

Some States appear to be considering the prospect of constitutional reform. Unfortunately, this is likely to mean that there will be advocacy for the abolition of Upper Houses and for the introduction of a Bill of Rights. The past experience of Queensland, and the lengths to which New Zealand has gone to attempt to provide balance in the electoral system in the absence of an Upper House, should show that a second chamber provides a necessary check on the despotic power which a unicameral legislature can experience at times. If it is impossible for governments to resist the fashionable clamour for a Bill of Rights, at least it is to be hoped that no attempt is made to entrench constitutionally a Bill of Rights, thus giving to the judiciary a power greater than that of Parliament to decide matters of policy and in consequence politicising the judiciary.

The relationship between the Aboriginal people and other members of society remains a seriously unsettling issue. No person of goodwill could doubt that every effort should be made to improve the situation of those indigenous persons who are in a position of grave disadvantage. Why, as a matter of policy, we should give considerable benefits to persons, not because they are disadvantaged, but simply because they are (or even claim to be) of Aboriginal descent, is a question which future generations may dismiss as one of the inexplicable vagaries of the past. Reconciliation between people of Aboriginal descent and the rest of Australian society will have been achieved only when the members of each group treat

members of the other as they would treat their own, without consciousness of differences because of race and uninfluenced by old grievances and animosities.

I offer my best wishes to you all on this Australia Day.