Appendix II
Australia Day Messages, 2001-2005

Rt Hon Sir Harry Gibbs, GCMG, AC, KBE

Editor's Note

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

As explained in the Foreword to Volume 16 of these Proceedings, the opportunity has been taken, commencing with Appendix I to that volume, to record these messages in the Society's Proceedings. For reasons of space, that Appendix was confined to Sir Harry's messages for the years 1993 through 2000. The messages for the years 2001 through 2005 are now recorded here. Sadly, they will be the last to be received from him.

Australia Day Message, 26 January, 2001

As we all know, this Australia Day occurs at a time when we are celebrating the centenary of the adoption of the Commonwealth Constitution.

The federation of the Australian colonies had the incidental benefit that it could not have been achieved without a written Constitution which provided for a bicameral legislature and which entrenched the position of the States. These and other safeguards that the Constitution provides are not widely understood or valued. Politicians tend to chafe at the power of the Senate, which, it is true, sometimes acts capriciously, and businessmen sometimes assert that they would prefer the uniformity of a centralised system to the diversity caused by conflicting State laws and regulations. However, since nowadays the Executive so often controls the lower House of Parliament, with a unicameral legislature a government can readily become an elective dictatorship, whereas the existence of the Senate, and the division of power between the Commonwealth and the States, provide checks on the abuse of power.

The fact that our Constitution can be altered only by referendum has meant that no Australian government has been able to take advantage of a temporary majority in Parliament by altering the constitutional framework in a fundamental respect, without first obtaining the approval of the people. An Australian government could not follow the example so unconscionably set by the Queensland government, which in 1922 abolished the Legislative Council of that State, nor could it readily alter the nature of the Senate as the Blair Government in the United Kingdom has done with the House of Lords. The wish of a former Prime Minister to see the States done away with has remained a wish.

Our federation today is very different from that envisaged by the framers of the Constitution. That has been due largely to decisions of the High Court, which since the 1920s have generally favoured central power, but in part also, to the acquiescence of the States themselves, which have agreed to uniformity of action on a scale which would not be contemplated in the United States.

The competition policy, which all States and the Commonwealth have adopted, is an example of this uniform Commonwealth-State action. The insistence on competition no doubt is beneficial to trade and commerce, but that is no reason to require the policy to be applied to all human affairs. The application of the policy to the legal profession has caused nothing but harm; for example, lawyers now advertise and tout for business on a grand scale, and instigate class actions whenever persons suffer a common misfortune. It is almost beyond belief that bureaucrats should seek to extend this doctrine to the medical profession in a way which might lower the qualifications of medical specialists.

Although the nature of the federal compact has changed, the Constitution has enabled Australia to remain a free and democratic country, under the rule of law, during a turbulent century when much of the world suffered oppression, revolution or chaos.

Not to our surprise, the media has proclaimed that while celebrating our centenary we should feel shame for the way in which the Aboriginal people have been treated in the past and for the unfortunate situation of some of them at present. The white settlement of Australia was inevitably a catastrophe for the Aborigines, because the two cultures that came into conflict were millennia apart in point of development. It would be hypocritical, as well as futile, to

express regret or apology for the white settlement of Australia, which was of course the foundation of the existence of our nation.

There were individual crimes and blunders, as there have been in all societies. Aborigines were treated as an inferior race, which was an enduring humiliation for them, and some policies of the governments may seem unacceptable to those who apply the standards that attract popular support today; but it is absurd to judge the past in the light of present opinions.

A current matter of grave concern is the state of Aboriginal health, but governments have made considerable efforts, and expended large sums of money, in trying to ameliorate that situation, and in a great many instances Aboriginal health is the product of the manner of living which those affected have adopted. We may well feel pity or sorrow for the state of Aboriginal health, but not shame.

Surely we should be concerned when we consider what is likely to be the effect on the present generation of children of indoctrinating them with the belief that we are invaders, usurpers of the land of others, and that our history is a shameful one.

The truth is that our history is one of which we can be proud, and that we should feel nothing but gratitude to the framers of our Constitution.

I wish you all a happy Australia Day.

Australia Day Message, 26 January, 2002

I wish to say a few words about two issues of particular significance that fell for consideration during 2001 and that are likely to cause continuing controversy during 2002.

Opinions differ widely as to what should be done with respect to the hundreds of people who, claiming to be refugees, seek to be smuggled, by boat, onto the remote islands, reefs and shores of Australia. The “Pacific Solution” – the interception of the boats and the transport of the boat people to various Pacific islands – has been adversely criticised in terms that sometime verge on the hysterical. One criticism, that the policy of the Government is racist, is quite ill-founded. Most of the boat people have come from central Asia, but that is not the reason for their exclusion; whatever their race, they are prevented from making an unauthorised intrusion into Australia, particularly since their attempt is made in pursuance of a conspiracy to which each of them is necessarily a party.

To acknowledge, as the *Convention Relating to the Status of Refugees* provides, that there should be no discrimination against refugees on the ground of race, does not mean that it would be in any way wrong in principle for a government to adopt an immigration policy that is racially based so far as persons other than refugees are concerned. While it would be grossly offensive to modern standards for a state to discriminate against any of its own citizens on the ground of race, a state is entitled to prevent the immigration of persons whose culture is such that they are unlikely readily to integrate into society, or at least to ensure that persons of that kind do not enter the country in such numbers that they will be likely to form a distinct and alien section of society with the resulting problems that we have seen in the United Kingdom. However, the “Pacific Solution” does not discriminate against the boat people on the ground of race.

The criticism that the policy of the Government was in breach of its international obligations, raises more difficult questions. The 1951 *Convention Relating to the Status of Refugees* (which has been extended by the 1967 Protocol to apply to all refugees, no matter when they attained that status) forbids a state from expelling a refugee lawfully within its territory, save on grounds of national security or public order. A refugee is defined as a person who has left the country of his or her nationality with a well founded fear of persecution for reasons of race, religion, nationality or membership of a particular social group or political opinion. A person is a refugee if he or she satisfies that criterion, and this will necessarily be before his or her status has been formally determined. The Convention does not prescribe how, when or where a formal determination of refugee status is to be made, indeed it does not expressly require that any such determination should be made, although an obligation to make a determination might well be implied.

Obviously not all persons who claim to be refugees will in truth answer the criterion prescribed by the Convention. Literally millions of people in the Third World seek to escape from their homelands and to settle in developed countries like Australia. Some do so because of a well founded fear of persecution, others to leave a society which is in a state of collapse, and others simply because they wish to enjoy the economic and social benefits which a developed society offers. Many, even if refugees, wish to choose their preferred place of refuge, and pass

through several countries where they would be free from persecution to seek to enter a country such as Australia, where they hope to enjoy the advantages offered by a liberal society. The Convention recognises that penalties may be imposed on refugees who are present in a state without authority and who have not come directly from a territory where their life or liberty is threatened, unless such persons have presented themselves to the authorities without delay and have shown good cause for their illegal entry and presence. However, it does not seem to me to make clear whether such persons may be expelled.

If a boat person transported to (say) Nauru proves to have been in fact motivated purely by a desire for economic or social benefit, it will be clear that there has been no breach of the Convention. If however, he or she is determined to be a refugee, the question then does become whether Australia has acted in breach of the Convention. That will depend on whether the Convention requires that when a person claiming to be a refugee is apprehended in Australian territorial waters or on an Australian ship, the formal determination of the status of that person must be made in Australia. The Convention does not expressly so require; whether it implicitly does so is an arguable question.

Two things are however clear. One is that the "Pacific Solution", although it may serve as a deterrent, cannot forever protect Australia from unauthorised entry; considerations of cost and practicality mean that the policy is unlikely to be continued indefinitely. The second is that the Convention needs to be rewritten or entirely abrogated. The Convention is ill suited to the conditions of today, when thousands of people are moving across state boundaries in search of a better life.

The plight of the boat people may evoke sympathy, but the immigration policies of a government must be determined by the national interest, rather than by sympathy for individuals.

Another matter which raises serious questions for consideration is the war against terrorism. Terrorism to achieve a political result within a particular society is not uncommon, but what is new is the use of terrorism to damage or destroy a foreign society for ideological reasons . After the eleventh of September, [2001] it was argued by some that the United States was not justified in going to war; it was said that the proper response to the criminal actions committed on that day was to seek the extradition of the criminals and put them on trial. The impracticability of seeking to extradite Osama Bin Laden has been made clear by subsequent events. The atrocities of the eleventh of September made it clear that American society was threatened by men ruthless and capable enough to inflict immeasurable damage if they could obtain nuclear or biological weapons, as it appears they planned to do. The United States was entirely justified in taking extreme measures to counter this threat, and it was prudent for Australia, which sorely needs the United States as an ally, to support the United States, whether or not the terrorists directly threatened Australia.

In the emergency situation created by war, governments tend to adopt drastic measures in the mistaken belief that they contribute to national security. For example, in the early days of World War II in Australia, persons were interned simply because they had Italian names. Similarly, in the United States, American citizens of Japanese descent were unnecessarily incarcerated. It is not surprising that the security services now are seeking to be given extraordinary powers to arrest persons on suspicion and to hold them for some

days incommunicado for questioning. Powers of that kind are quite unnecessary, and we would undermine, rather than strengthen, our free society by resorting to such absolutist measures.

In spite of the tribulations of 2001, life has continued on its common way for most Australians, and we have escaped the social disruption and economic uncertainties that have affected many other parts of the world.

Australia Day Message, 26 January, 2003

During the year the Society held another successful conference, which was notable for the fact that the opening speech was delivered by the Chief Justice of Australia, the Honourable Murray Gleeson, AC. Appropriately, the vote of thanks was proposed by the Honourable Mr Justice Dyson Heydon, who,we were very pleased to learn, has been appointed to the High Court. As one expected, his appointment provoked expressions of regret that a woman was not appointed, since Mr Justice Heydon will take the place of Justice Mary Gaudron.

There are a number of reasons why appointments to judicial office, particularly to the High Court, should be made on merit – i.e., on learning and proved ability in the working of the courts – and, subject of course to character, on no other consideration. The High Court decides questions of great moment, and not infrequently does so by a majority of one, so that there is no room on the Court for any except those who are best qualified.

Further, the Court is not a representative body – its duty is to apply the law, and not to favour sectional interests – and indeed it would be impossible for the Court to represent all sections of society. It is true that there are some very able women in the legal profession, but it is no disrespect to them to say that none has the learning, ability and experience of Mr Justice Heydon.

For Australia the year ended unhappily, with the nation threatened by terrorism and by war. Those threats require difficult decisions to be made. We now know that the terrorist gangs, which exist in various parts of the world, and are united at least by a fanatical adherence to the more extreme doctrines of Muslim ideology, are capable of patient and skilful planning to achieve their murderous purposes, and are willing to include among their innocent victims Australians, or indeed any others they regard as infidels, even if their preferred targets are Americans and Israelis. What we do not know is how likely it is that these zealots will attempt to commit an atrocity on Australian soil.

Notwithstanding that uncertainty, the Government must (as it has done) take steps to avert a possible catastrophe of the terrorists' making. It is obvious that in peacetime it is impossible to guard every vital installation and every place where people congregate. Great reliance must therefore be placed on our intelligence services to discover in advance the terrorists' plans so that they may be aborted.

The intelligence bodies must accordingly be given the powers necessary to perform their vital functions. This must, however, be done with the minimum detraction from the freedoms which we value. This is particularly so since experience has shown that some members of the intelligence services (like other people) may act with excessive zeal – remember, for example, the many harmless citizens who were interned for no sufficient reason in the two World Wars.

The proper balance is not easy to achieve – among the controversial questions as to the extent of the proposed powers are three that may be mentioned. Should ASIO or the police be given the power to require persons who are suspected of having knowledge of terrorist activities to answer questions, and to detain them for questioning? It might be thought that such a power would justifiably be conferred in the interests of society as a whole, provided that the power is hedged about with safeguards sufficient to prevent its abuse.

Should a person so detained be held incommunicado? Many would think

that although terrorists lurk in the shadows, the agents of government should work in the open, to make them more readily accountable.

Should children be detained for the purpose of questioning? Unfortunately it is notorious that evil persons do not scruple to use children as their agents. Questions such as these will have to be considered carefully by Parliament, and perhaps ultimately by the Courts.

The decision whether Iraq will be invaded will not be made by Australia. The only justification for an invasion, which would result in what is euphemistically called “collateral damage” to many innocent citizens, as well as the inevitable military casualties, and which would be likely dangerously to inflame opinion in the Muslim world, would be that war was necessary as a reasonable measure of defence.

Since it is highly improbable that Iraq would attack any of the Western powers except in its own defence, an invasion of Iraq could be justified as a defensive measure only if Iraq has chemical, biological or nuclear weapons and is likely to provide them to terrorists. No doubt if it has weapons of this kind, it would not hesitate to allow terrorists to use them, but many remain to be convinced that Iraq has these devastating weapons. The report of the weapons inspectors is due, I think, tomorrow (27 January) and may make the position clearer.

It is to be hoped that a wish to remove Saddam Hussein from power, or a mere suspicion that he has destructive weapons, will not be regarded as a sufficient cause for war. If a war is commenced, and the Australian Government is convinced that its commencement was justified, one question will be whether the United Nations has given sanction to it, and another whether it is in Australia’s interests to take part. In considering the latter question, it would be relevant to take into account the fact that there are good reasons for acting in support of so valuable an ally as the United States, and the possibility that destructive weapons if supplied to terrorists might be used against Australian interests, or even within Australia.

One wonders whether North Korea is as threatening to peace as Iraq.

Let us hope that Australia Day will be the commencement of a time which is safer and happier than the omens would at present indicate.

However that may be, I offer best wishes to you all, and I hope to see you at our next Conference, to commence in Adelaide on 23 May, 2003.

Australia Day Message, 26 January, 2004

You will have received the proceedings of our Conference held last year in Adelaide which discussed, amongst other matters, some of the proposals that were to be put to the South Australian Constitutional Convention later that year. One of those proposals, which is of particular interest, namely for the introduction of citizens' initiated referenda, is due to be considered by the South Australian Parliament. Another matter discussed, about which I wish to say a few words, concerns the need for, and the role of, Upper Houses in our constitutional systems. This is particularly relevant, because a Commonwealth Committee has been examining the power of the Senate to obstruct legislation passed by the House of Representatives, and in particular, whether there can be devised an acceptable alternative to the provisions contained in s.128 of the Constitution for a double dissolution.

Under our system, unlike those of the United States and France, except in the most exceptional circumstances, the party, or coalition of parties, which has a majority in the House of Representatives, chooses the members of the executive government. The will of the Executive usually dominates the House of Representatives, so that, unless there is a party revolt, the legislation introduced by the Executive will be passed by the House. This combination of legislative and executive power would, particularly if a radical Government held office, be likely to result in the passage of partisan legislation, and to pose a threat to the rights and liberties, not only of minorities, but also of sections of society not in favour with the Government, unless the power was subject to an effective check. One such check is at present provided by the Senate. The judiciary provides another, but its powers are limited.

Of course, an Upper House that can review, but not ultimately reject, legislation serves a useful purpose. But a Chamber with such limited powers could not prevent the passage of extreme or ill considered legislation. The House of Lords in the United Kingdom now is no more than a house of review, and has been unable to prevent the passage of legislation which it considered undesirable, including legislation radically affecting the composition of the House of Lords itself. In Queensland, where the Legislative Council was abolished in the 1920s, there have been occasions in the past where hastily conceived legislation has been rushed through the Legislative Assembly, on occasion under cover of darkness.

For the Senate to operate as an effective check on the combined power of the Executive and the House of Representatives, it must be able to do more than delay or review legislation. It must be able (and it is at present able) to reject legislation without the House of Representatives having power to over-ride the rejection. Of course, it may choose not to do so when the party which controls the House of Representatives also has a majority in the Senate.

The power of the Senate can be abused. The Senate may sometimes reject legislation that is desirable or even necessary, simply for political reasons or out of a stubborn desire to obstruct the Government. Is there a way, other than by the procedure of s.128, of resolving a deadlock caused when the Senate obstructs legislation, without depriving the Senate of its essential power? Certainly this could not be done by enabling the House of Representatives to over-ride the Senate within one sitting of the Parliament. It will not be easy to suggest a procedure, alternative to s.128, which preserves the power of the Senate, but in

any case, the history of referenda suggests that an amendment to s.128 will be difficult to procure, and impossible if it lacks bi-partisan support. Changes to the electoral laws might make it more likely that a Government would have a majority in the Senate, if that is considered desirable.

The war in Iraq has had little or no effect on the lives of most Australians, although it has stirred the emotions of some. Whatever views are held concerning the reasons for the war in Iraq, or the planning for the administration of Iraq when the war was concluded, it is too soon to know whether the United States' apparent strategy will eventually succeed. However, there is certainly reason to be proud of the skill and discipline displayed by Australian service men and women not only in Iraq, but also in the Solomons, and before that in Bougainville and Timor.

There remains the threat of terrorist activities. There is no doubt of the ruthless determination of terrorists in various parts of the world, including South East Asia. We simply cannot tell how high is the risk of serious terrorist activity on Australian soil, but prudence requires that steps be taken to guard against the possibility. Such steps have been taken, and the considerable expense and inconvenience caused by those measures means that the terrorists have already caused damage to Australia.

Since the main defence against terrorism is good intelligence, the present situation requires that sufficient powers be given to our intelligence agencies to make their work effective, but this should entail the least possible interference with ordinary rights and liberties. The powers that have been given to ASIO, to detain for questioning persons believed to be able to assist the collection of intelligence important in relation to a terrorism offence, are drastic. However, they are hedged round with safeguards, including the need for a warrant by a judge or magistrate, and the requirement that the questioning be conducted in the presence of a prescribed authority, who is usually a retired judge. Only experience will show whether these safeguards are sufficient. In one respect, however, the provisions go too far. They forbid lawyers and some other persons from communicating information relating to questioning or detention. The object of these provisions is clear enough, but the result would be to prevent publication of the fact that an abuse of power or a serious error of judgment had occurred.

More controversial is the United States' expedient of detaining over 600 persons of various nationalities, including two Australians, at Guantanamo Bay in Cuba for an indefinite period, during which they have been kept virtually incommunicado and are subject to questioning, and during which the United States Government has contended that they have no right of access to the ordinary courts. It is said that the detainees will either be released, when they are no longer of law enforcement, intelligence or security interest, or will be tried before a military commission. The legal justification claimed for holding them in this way appears to be that they are unlawful enemy combatants.

Of course, ordinarily enemy combatants captured in battle are entitled to be treated as prisoners of war, which means that they are to be treated humanely, and cannot be subject to interrogation, and that the circumstances in which they may be tried and punished are strictly limited by international conventions. The detainees are obviously not being treated as prisoners of war. On the other hand, not all enemy combatants are entitled to the protection afforded to prisoners of war. Certainly a spy or saboteur in civilian clothes

would not be protected. Indeed, to obtain protection under the Geneva Conventions, military personnel must be identified by a uniform, or, in the case of militia or volunteers, by a fixed distinctive sign recognisable at a distance. Also, a soldier in uniform who has broken the laws of war, e.g., has committed a war crime, is not protected. Unprivileged belligerents of these kinds would be subject to trial by a military tribunal.

We simply do not know, because the Government of the United States has not disclosed, what (if any) acts of the detainees meant that they lack the protection of the Geneva Conventions or indeed even whether they were belligerents at all. A person who is not a combatant, but who commits an act of terrorism, should be tried for his criminal acts in the ordinary criminal courts, and not before a military commission. Attempts have been made to litigate, in the United States' courts, the question whether the ordinary courts have jurisdiction to pronounce on the validity of the detention; these proceedings have had varying results, but the question will not be resolved unless and until the Supreme Court pronounces on it.

It must be said that some of the criticisms of the suggested procedure before a military commission are exaggerated or theoretical. Anyone who has had experience of courts martial knows that it is not necessarily true that an accused will not be properly defended by a military officer. The admission of hearsay evidence does not offend against fundamental principles of justice. It may be unfairly insulting to the members of the military commission to say that they will not endeavour to give the accused a fair trial.

There are, however, some obvious objections to trial in these circumstances. In particular, it is not known what is the nature of the charges, or what is their legal basis. Speaking generally, the accused is not entitled to be given access to all the prosecution material, and discussions between the accused and his lawyer are to be monitored, although apparently these disabilities will not be applied to the trial of one of the Australians, Mr Hicks. If the evidence intended to be produced against the detainees includes that obtained by questioning at Guantanamo Bay, it will have been obtained in violation of fundamental rights. In any case, it is contrary to ordinary notions of justice and to the principles of the rule of law that the detainees should be denied the opportunity to test in the ordinary courts the question whether they are rightly classed as unlawful enemy combatants, and whether their detention and proposed trial are lawful.

Although it is too much to expect that we shall soon see an end to terrorism generally, I am sure that we all hope that during 2004 we shall continue to be free from acts of terrorist violence within Australia.

Best wishes to you all. I hope that distance will not deter you from attending the next Conference in Perth from 12th –14th March, 2004.

Australia Day Message, 26 January, 2005

This is the fourteenth Australia Day since the foundation of the Society. During the year, we have again held a successful Conference – this time in Perth. The papers delivered at the Conference are collected in Volume 16 of *Upholding the Australian Constitution*, but it should not be thought that the Conference papers are read only by the members of the Society. They are available on the internet and our website has recorded a pleasing number of "hits."

2004 ended with the tsunami and its catastrophic consequences, which were of such enormity as to eclipse all earlier events. We should not forget that throughout the year death and destruction on a large scale have been caused by war, terrorism and (particularly in Africa) genocide. On the other hand, Australia has remained secure and prosperous, and has played an increasingly important part in international affairs. We have reason to be proud of the actions of Australian troops and civilians who have served or who are serving in the conduct of the war, or in peace-keeping operations in countries in the region where law and good government have failed or are under threat, or in efforts to restore some normality to those parts of Indonesia which were devastated by the tsunami.

We remain threatened by terrorism. The threat is made particularly difficult to avert by the facts that terrorists are elusive, ruthless and fanatical to such an extent that they are prepared to commit suicide in order to perpetrate their crimes. In these circumstances it is understandable that measures should be taken which would be unacceptable in normal times. It is important, however, that such measures should infringe as little as possible the rights long recognised by the law, and should not allow those who carry them out to act in a way that would offend the ordinary standards of humanity.

In this regard, it has been a matter of concern that the United States has, in combating terrorism, resorted to "interrogation" measures which deny the long standing principles of liberty to which the United States is dedicated. In particular, it proposes to establish prisons in a number of countries and to incarcerate there some alleged terrorists without trial for an indefinite period, possibly for life. If many reports are correct, the treatment of some prisoners at Guantanamo Bay can only be described as torture, and United States officials have connived at the removal of suspects to other countries, such as Egypt, with the expectation that they will be tortured in an attempt to obtain information concerning terrorists and their activities.

Even viewed in the light of the momentous happenings of the year, it must surely be agreed by supporters of all political parties that the recent federal election and its results were of considerable significance to all Australians. The fact that the Government has control of the Senate as well as the House of Representatives is both an opportunity and a temptation. The Government now has an opportunity to ensure the passage of necessary legislation which the Senate had previously prevented, sometimes on grounds of mere caprice. On the other hand, unfettered power tempts holders of that power to abuse it by, for example, enacting legislation that unduly favours one section of society or is otherwise oppressive or unfair in its operation. It is, of course, hoped that the Government will seize the opportunity and resist the temptation.

During the campaigns that preceded the election, both major parties laid emphasis on their respective policies concerning matters of health and

education. When the Constitution was first accepted by the Australian people and passed into law, it was intended that health and education should be matters within the exclusive jurisdiction of the States. That has long since ceased to be the case; the influence of the Commonwealth in those fields has been largely due to the interpretation and use of s.96 of the Constitution, under which the Commonwealth makes grants of finance to the States on conditions which enable the Commonwealth to achieve results otherwise beyond Commonwealth power.

The trend towards centralism was, during the election, pushed a little further. It was announced as government policy that the Commonwealth itself would establish technical colleges and would make grants directly to school bodies. It would appear that these things could not be done by the use of s.96, which refers to financial assistance to any State. Perhaps the scope of the appropriation power will fall for consideration if the Commonwealth's actions are challenged.

Further, Ministers, not expressing government policy, have suggested that the Commonwealth should assume sole responsibility for hospitals and universities. There is no doubt that the division of functions in these fields has proved to be far from satisfactory. Besides the difficulty of avoiding conflict between the demands of different bureaucracies there is the fact that when power is divided so is responsibility, so that each blames the other for deficiencies in the system.

The remedy, however, is not to transfer to the Commonwealth all power to deal with health and universities. It is anomalous that although the central authorities seem whole-heartedly committed to a policy that values competition above most other considerations in relation to business, they fail to recognise that competition between the States may be equally valuable. Health and education very closely affect every citizen, but the needs of the inhabitants of one State would not necessarily be the same in every respect as those of another State. It is not too much to hope that in the field of medicine, for example, the advances of technology, efficiency, or standards of care and compassion in one State may provide a model for others. Perhaps one role of the Commonwealth would be to enact and enforce uniform minimal standards.

The balance originally provided by the Constitution, between the powers of the Commonwealth and those of the States, has largely broken down, but has not been replaced by any coherent division of powers. It would be a great achievement if the Commonwealth and the States could reach an agreement as to the extent of their respective powers in relation to health and education in a way that would avoid the deficiencies of the present system. No doubt questions of finance amongst others would make it difficult to reach agreement. It would be for the good of the nation if these difficulties could be overcome.

There are many matters that obviously appear to call for reform in the interests of the nation and which will no doubt require the attention of the government. Many of these matters will give rise to controversy – for instance, the reform of industrial relations is likely to attract the opposition of the unions, and the achievement of a Commonwealth-State plan to ensure the continued flow of water in our inland rivers will probably cause some States to hold back because of the financial consequences. There is, however, one reform which, if successfully implemented, should (in Macbeth's words) buy "golden opinions from all sorts of people", even one hopes from the officials of the

Treasury and the Australian Taxation Office. This reform may at first sight seem insignificant compared with other matters of great moment that will be considered by the government, but in fact would be of very great benefit to business, trade and the community generally.

The reform to which I refer is the re-writing of the income tax legislation. This does not necessarily involve issues concerning levels of taxation. The laws relating to income tax are a disgrace. There is nothing new in that reproach – it has been true for at least a decade, the only change being that the situation is getting worse. The legislation is absurdly voluminous compared with our own earlier legislation, and with other tax systems, and the volume increases rapidly from year to year.

Much of the legislation is obscure to the point of being incomprehensible. It gives the Australian Taxation Office unacceptably wide discretionary powers, including those given by the anti-avoidance provisions of part IVA, which were inserted in an over-reaction to some earlier decisions of the High Court. It is, I think, true to say that many practicing accountants no longer try to unravel the mysteries of the legislation by reading its provisions – rather they rely on the various documents and rulings issued by the Australian Taxation Office – a subordination of the rule of law to the opinions of the Executive. The uncertainty of the law is an impediment to business generally.

What is needed is a completely new statute of manageable size and clearly drafted. By clarity of drafting, I do not suggest that there should be a repetition of the ill-fated attempt to put the income tax law into "Plain English". Without clarity of thought, there can be no clarity of expression. If the present obscurities of the law were removed, there would be no need to confer on the Taxation Office discretionary powers that are offensively wide.

Such a task, if undertaken, could not be left to the Treasury and the Australian Taxation Office, although officials from those bodies might of course provide invaluable assistance. The undertaking should, I think, be carried out under the supervision of a body including representatives of business, the legal and accountancy professions and academia, and if thought necessary experts from the United States and the United Kingdom. It would not be an easy task, but its successful completion would be a lasting achievement to the credit of the government and something of lasting value for Australians generally.

I have said that this proposal would not necessarily entail any considerations of taxation levels. One would hope that the taxation scales will be reviewed. However, that review should be a separate exercise from the re-writing of the legislation and should be kept separate from it because, whereas there are likely to be widely differing views as to what scales are appropriate, there should be general agreement that the tax law should be rendered clear and accessible. The re-writing of the taxation law could provide simplicity; the achievement of equity is another question.

At this rather restless time, when it has become common to urge us to make unnecessary changes (although necessary changes are often resisted), there have been suggestions that the date on which Australia Day is celebrated should be altered. The intention of Australia Day is to mark the foundation of what Australia is today, and the foundations of what has become modern day Australia were laid on 26 January, 1788. The 26th January is an appropriate date on which to celebrate the achievements of the nation.

I would remind you that our next Conference will be held at Coolangatta

from the 8th to the 10th April, 2005 and hope you will be able to attend.