Last year was the bicentenary of the birth of Charles Darwin and the sesquicentenary of the publication of his great work *The Origin of Species*. These significant anniversaries were marked in Australia, with understandable emphasis on the significance for his theories of Australian flora and fauna. However, the Australian commemoration glossed over the fact that when he actually visited Sydney, Darwin was singularly unimpressed.

In his diary, now known as *The Beagle Diary*, Darwin wrote, as he was leaving Sydney on 14 March 1836:

“Farewell Australia, you are a rising infant and doubtless some day will reign a great princess in the South; but you are too great and ambitious for affection, yet not great enough for respect. I leave your shores without sorrow or regret.”
When I read this passage in the Darwin Exhibition at the National Museum of Australia in Canberra last year, I found it an insightful summary of the present dilemmas faced by a middle ranking power as Australia has become. There is, however, one significant change in values since the early Victorian era when Darwin wrote. Today, ‘greatness’ is not the only basis on which the people of one nation hold the people and institutions of another in respect. Australia’s success in various fields of endeavour is acknowledged and is the basis for respect. For example, notwithstanding the last Ashes tour, there is no doubt that our national cricket team receives respect, but not affection, wherever it goes.

In May this year I will have been Chief Justice for twelve years. During that period I have had numerous occasions to interact with judges and legal practitioners from many different nations and to initiate significant contact between our legal institutions and the institutions of other nations. In my experience, our legal system is widely admired. We produce lawyers and judges of the highest calibre. “Respect” is an appropriate word to
describe the attitude of most international commentary about our legal system. Indeed, there are even indications of affection.

As many of you in this audience have heard me say, probably more than a dozen times, the longevity of our legal institutions is one of the key determinants of our success in this field. However, that long history has been punctuated with, occasionally significant, changes to the legal system. This process of renewal has been essential to our success. However, it is necessary to emphasise that such renewal has always been based on an understanding of the value of the institutional traditions of the system.

The year 2010 may well become a significant year in terms of the development of the profession and of the judiciary, by reason of the currency of proposals to adopt a national framework for the profession and, to a lesser extent, for the judiciary. I wish to make some observations about some aspects of the proposals currently under consideration with respect to, first, the judiciary and, secondly, the profession.

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We have a unified system of law in Australia which is complicated by the multiplicity of jurisdictions. This is a manifestation of our federal system. Jurisdictional diversity is reflected throughout the legal system: from the structure of the courts to the structure of the profession. In these and other such matters I am and always have been more of a centralist than a federalist, although my career path has not recently afforded opportunities to manifest this predisposition.

Nevertheless, I recognise that government structures are path dependent. What works depends on institutional history. Institutional change must always be informed by both principle and experience.

King Arthur asserted the legitimacy of his authority on the basis of receiving Excalibur from the Lady of the Lake. However, as the Michael Palin character put it in *Monty Python and the Holy Grail*:

“Strange women lying in ponds distributing swords is no basis for a system of government.”
This may remind you of some of the deficiencies of our federal system.

In order to achieve the objective of reinforcing the national character of our legal system, one has to start with the court structure. Regrettably our unified legal system has never led to the establishment of a unified system of courts. The best proposal for doing that remains that of Sir Owen Dixon, who advocated such a system in a submission to the Royal Commission on the Constitution in 1927.

As Sir Owen put it in a subsequent address:

“Our conception of the unity of the law might naturally have led us to regard the courts of law as established to administer justice, not as agents either of State or of Commonwealth, but simply as the Kings Courts having jurisdiction in Australia and administering the law of the land independently of its source … In other words we might have established a judicial system which was neither state nor federal but simply Australian.”1
This remains as good a statement of a worthy aspiration for the future development of our judicial system: to repeat – “neither state nor federal but simply Australian”.

Our present system does not ensure that we make full use of our most talented judges, particularly those with highly specialised knowledge. Nor does it ensure that there is an optimal allocation of resources to the separate institutions which administer the single body of Australian law. Not does it ensure that the inevitable institutional tensions and intermittent turf battles are a creative form of competition. We can do better with a national judiciary.

Increasingly over recent years, a sense of national collegiality has emerged throughout the judiciary in Australia. The ease and frequency of interaction amongst judges from different jurisdictions has been transformed. We meet each other often in a variety of contexts, both educational and institutional, to a degree that did not exist even a decade or two ago. Of course it is important to acknowledge the inevitability of different practices in a nation as geographically large as Australia. Nevertheless, the personal foundation of a national judiciary is well established.
The difficulties of amending our Commonwealth Constitution are well known. However, in my opinion, if there is a political will to create a national judiciary, this can be done by political arrangements not requiring Constitutional amendment. Such a judiciary could emerge if two steps are taken: First, judicial appointments to each Supreme Court and to the Federal and Family Courts in each State, are made as joint appointments of both the Commonwealth and the relevant State government. Secondly, each such Court is jointly funded by the two levels of government. I put this model forward for debate.

It is not a necessary concomitant of a federal system that judges of courts, particularly courts at the level of the Supreme Court, must be appointed by the provincial or state government. The Indian and Canadian federations both operate on the basis that it is the centre that makes the appointments to the state Supreme Courts. Nevertheless, our system was and is different and the objective stated by Sir Owen Dixon requires a process of co-operative federalism.
It is entirely appropriate that each level of government should have some influence on the judicial system of the other. A significant part of the work of State courts involves the exercise of federal jurisdiction. A significant part of the work of federal courts involves co-operative legislation based on the reference of State powers or the exercise of accrued or ancillary State jurisdiction.

My views as to the desirable mechanisms for the appointment of judges are, perhaps, determined by the close collaboration I have had with respect to the selection of judges for the Supreme Court with each of three Attorneys who have served during my period of office. I have no complaints in this respect.

There is no single correct model for a judicial appointment procedure. Requirements vary from one jurisdiction to another. I have previously expressed my scepticism that the task of balancing and assessing the wide range of attainments required for judicial office is a task capable of being performed by a committee. I am not a fan of a so-called “independent” judicial appointments process.
My own experience emphasises both the validity and the utility of a democratic input into judicial selection. I realise that the experience of other chief justices has not been as benign as mine, leading some to prefer some kind of formal appointments procedure to ensure that inappropriate appointments are not made.

Human institutions are necessarily imperfect. There is no reason to believe that the occasions on which a political decision-making process goes wrong is likely to be more frequent than a committee process, with its tendency to compromise, proclivity for timidity and, in the long term, the inevitability of institutional sclerosis.

Requiring the concurrence of both the State and Commonwealth governments would establish an appropriate check on any particular Attorney acting in an inappropriate manner. However, from the point of view of the national judiciary, each judge appointed in this manner would take office with an understanding that s/he held office on a collaborative national basis, irrespective of the particular institutional structure of the jurisdiction in which s/he serves.
In my opinion, the risks of such a process, such as a stalemate by the exercise of a veto power, appear to me to be less than the risks of aberrant appointments by a single Attorney under the current arrangements.

The second step in the creation of a national judiciary would be an arrangement by which all courts at the Supreme Court level are jointly funded by Commonwealth and State governments. This entails difficulties with which our federation has had to cope in many areas of governance, primarily because of the fiscal imbalance which pervades all aspects of Commonwealth/State relations. I do not under-estimate the complexity of such negotiations. Nevertheless, acceptable arrangements can be made.

The establishment of such a system would, in my opinion, lead to the creation of a national judiciary, in which Sir Owen Dixon’s objective can be attained, to repeat again: a judiciary which is neither federal nor state, but simply Australian.
Some tentative steps in this general direction were taken last year. The Standing Committee of Attorneys General adopted a judicial exchange scheme, to which all States, except Queensland, have committed. Enabling legislation for the judicial exchange between Australian courts was enacted in New South Wales last year. Furthermore, the Attorneys of the Commonwealth and of New South Wales and Victoria have raised the possibility of joint commissions.

Over 15 years ago Chief Justice Gleeson, when Chief Justice of New South Wales, convinced the Council of Chief Justices to adopt an exchange system. However, the only exchanges actually carried into effect were between the Supreme Court of New South Wales and the Supreme Court of the Northern Territory.

The revival of interest in exchanges was in part prompted by Chief Justice Robert French, when a judge of the Federal Court. His Honour put forward a detailed proposal for judicial exchange outlining the numerous advantages that would accrue from a systematic programme of exchanges between the courts. He said, and I agree, that such a system could lead to:
• “Improvement of individual judicial performance in terms of the efficiency and quality of the judicial officer’s work;
• Improvement of the overall functioning of courts procedurally and by reference to the efficiency and quality of the work of their members;
• Improvement of the morale of judicial officers and associated retention of experienced officers for longer periods;
• Improvement in the attractiveness of courts for prospective appointees;
• Effective allocation of judicial resources between courts;
• Enhancement of the standing of the courts within the legal profession and the wider community;
• Improvement awareness between courts of the development of the law in areas of common jurisdiction;
• A more consistent body of national decision-making in areas of common jurisdiction;
• Mutual awareness and acceptance of the respective functions of trial judges and intermediate appellate judges; and
• Improved quality of decision-making and efficiency of appellate judges.”²
The New South Wales Court has continued to encourage such interchange. Tony Fitzgerald from Queensland and David Ipp from Western Australia became Judges of Appeal. Other judges from Queensland, Victoria, South Australia and Western Australia have served as acting judges of the Supreme Court of New South Wales. I have particularly sought to promote such exchange in criminal appeals for Commonwealth offences. Last year two Victorian judges sat on our Court of Criminal Appeal.

I look forward to further exchanges under the new uniform system. Any process of judicial exchange can only work on the basis of reciprocity between the respective courts, so that the courts deal with each other on the basis of equality. I have no doubt that this can exist between State Courts.

There are constitutional restraints on exchanges between the Federal Court and a State Supreme Court. The view has been taken in the Federal Court that there is no restriction on a Federal judge accepting an appointment to a State Supreme Court, in much the same manner as the judges have served in Territory
courts. It is by no means clear to me that this is permissible and there is a substantial risk involved in proceeding on this basis.

The same may be true of the proposal that was raised last year for judges to hold dual commissions in State and Federal courts, a proposal which I support. However, this process can also only work on the basis of reciprocity, reflecting equality between the courts. If constitutional restrictions are of a kind which prevent such equality, then the scheme will not work. This cannot be a one way street.

The final matter raised last year relevant to a national judiciary are the consultations, proceeding under the auspices of SCAG, with respect to the possibility of a national scheme for judicial complaints. This is a case of the tail wagging the dog. If one wishes to promote a national judiciary this is the last thing one would turn one’s mind to. It is not clear to me why it has become the first.

Attorney General Hatzistergos has made it quite clear that this State will not be part of the process, because we have a well-established system of dealing with judicial complaints which has
been operating successfully for over two decades. One of the reasons why other States and the federal system have not developed an equivalent mechanism is because of longstanding judicial resistance. That resistance has, so far as I can see, quickly evaporated, at least at a leadership level.

In my twelve years as President of the Judicial Commission of New South Wales I have had occasion to closely examine many hundreds of complaints. Although some of them arose in the course of the courts of New South Wales exercising federal jurisdiction, I do not recall one having anything remotely like a national element.

Complaints are essentially local. The complainants are all concerned with a local manifestation of the judicial process. Furthermore, assessment of the conduct of a particular judicial officer also involves, and usually only involves, local information. It is possible to envisage complaints which would give rise to cross-jurisdictional considerations but, on the basis of the experience of the Judicial Commission, these would be few and far between.
Desirable as I think a national judiciary would be, I am strongly of the view that the handling and determination of complaints needs to be decentralised. I suspect this would also be true if, as seems to be the most likely end result of the current process, an equivalent of the Judicial Commission’s procedures is established for Federal judges.

From time to time constitutional questions have been raised about such a mechanism. Save in one respect I am not convinced that there is any constitutional barrier to adopting the New South Wales system at a federal level. The respect in which there may be such a difference is that in New South Wales the Parliament is not entitled to take steps to remove a judge from office unless it has received a report from the legislatively created Conduct Division of the Commission. I doubt that the Commonwealth Parliament could be so restrained.

I realise that the High Court has adopted a strict approach to Chapter III of the Constitution – much more rigid and inflexible than the approach of the United States Supreme Court with respect to the equivalent Article III of the United States Constitution.
Nevertheless, I can see no reason why legislation could not make provision for an investigation of complaints against Federal judges.

If my proposal for Commonwealth/State joint appointment and financing were adopted, then it would be appropriate to adopt a joint mechanism for dealing with judicial complaints. The core of the Judicial Commission consists of the heads of jurisdiction of each of the State courts. There would be no difficulty in adding to this body the heads of jurisdiction, or the most senior member in New South Wales, of each of the three Federal courts. I have no doubt such a joint body could work effectively in the context of a national judiciary established in the manner which I have put forward for consideration.

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The national project of particular interest to members of the Law Society of New South Wales is the National Legal Profession Reform Project. This has involved a series of draft papers and extensive consultations, intended to culminate in a formal proposal in a few months. This is an ambitious project which, I wish to make clear, I wholeheartedly support. The ability to practice nationally in a seamless manner is an important objective.

Nevertheless, it must also be recognised that the overwhelming majority of legal practitioners operate only locally and, accordingly, the overwhelming majority of practitioner/client interactions are local. This is a perspective that must not be lost when longstanding institutional arrangements are to be fundamentally changed. The legal profession cannot be organised exclusively for the commercial benefit of the large national firms and the senior barristers who practice nationally.

As this audience is well aware, after many years of negotiation, a uniform legal profession statute was, more or less, adopted by all States save, for local political reasons, South Australia. Nevertheless, the range of differences, many of a quite minor character, that appeared in the respective statutes was such
that uniformity was not in fact achieved. The cumulation of, often irritatingly small, variations was such as to make national, seamless practice impossible.

This is the kind of problem that has long bedevilled attempts at uniform legislation in our federation. The new Project is designed to overcome these difficulties by ensuring uniformity, not only of the statutory text, but also of institutional structures.

There is a comparison with the various permutations of our national corporations law. I, together with other commercial lawyers of my vintage, originally cut my teeth on the Uniform Acts of 1961, which were in fact uniform. What was not uniform was the process of administration and of implementation. State Corporate Affairs Commissions still existed. There were three successive regimes designed to establish a new uniform scheme extending to regulatory institutions: first with the 1981 co-operative scheme, in the form of the Companies Codes, creating the National Companies and Securities Commission; then the 1991 co-operative scheme of the Corporations Law, creating the Australian Securities Commission and, finally, the Corporations Act
2001, based on a referral of powers, creating the Australian Securities and Investments Commission.

What has happened with the legal profession is that we have attempted a scheme equivalent to the Uniform Companies Legislation of 1961, which has failed. The issue now is what kind of national institutional structure can be created, along the lines of one of the 1981, 1991 or 2001 corporations schemes.

The general thrust of the proposals by the National Taskforce is commendable: uniform legislation and regulation with national standards and practices permitting national practice. However, I was particularly concerned when the original discussion draft of the Taskforce proposed that the new National Legal Services Board should be appointed by the Standing Committee of Attorneys General. I was even more concerned when the Law Council of Australia proposed, in its response to this discussion draft, that the Board should be appointed by the Commonwealth Attorney General after consultation with other state Attorneys and professional associations.
In various deliberations, I expressed the view that a vocation structured in this manner had no right to call itself a profession. The regulation of a profession cannot be conducted by a body appointed by the executive arm of government. There has never been such a structure in any common law system of which I am aware. The National Legal Services Board should consist of a majority of members appointed by professional associations and a chair appointed by the Chief Justices Council. Any other kind of structure would, in my mind, disentitle legal practitioners from describing themselves as professionals.

The Law Council of Australia modified its original proposal and recommended that the majority of the National Legal Services Board be members of the legal profession appointed independently of government. Importantly, as I understand the position, there will be a modification of the proposal by the Taskforce, but there is not yet a written identification of an alternative appointment structure. I understand that a Draft Bill will be available soon and I look forward to its contents.

The Chief Justices Council adopted my proposal that that Council should appoint the Chair of the National Legal Services
Board. Chief Justice French conveyed the views of the Council to the Taskforce. He emphasised that the independence of the legal profession is a corollary of independence of the judiciary. Accordingly, the majority of the members of the Board should be members of the legal profession appointed independently of executive government. The issue of professional independence, he noted, was particularly acute with respect to the setting of ethical standards.

My principal concern in this matter has been the institutional integrity of the legal profession. Legal practice is a profession. It is not simply the provision of services to the consumers. The consumer/service provider model of economic activity has become a feral metaphor. Its unthinking application to the legal profession could have serious consequences for the rule of law in this country, unless the centrality of independence of the profession is kept firmly in mind throughout the process.

I realise that some people believe that claims to professional status amount to no more than rent seeking. As I have emphasised on many occasions, that kind of approach is fundamentally corrosive of the rule of law and threatens to
undermine the basic institutional arrangements of our society. The approach is based on an inadequate understanding of the role the legal profession plays in the preservation and operation of the legal system. The legal profession is not and cannot be treated as if it is merely an economic activity which requires a centralised licensing regime.

In our common law adversary system the profession and the judiciary have a symbiotic relationship. Judges rely on the integrity and competence of practitioners. As a result, many of the tasks performed by judges in civil law countries are performed by the profession in our system. Furthermore, the principal training for the judiciary occurs when judges were practitioners: I refer not only to knowledge and experience of substantive and procedural law, but also to the inculcation of the capacity for detachment and of the habit of independence of mind.

These are reasons why Germany has about ten times the number of judges per 100,000 of population than the United Kingdom. Anything which could undermine the traditional professional status or the independence of lawyers would threaten the efficient operation of our legal system. In the long term it
would impose significant additional burdens on taxpayers. Furthermore, in my opinion, it would also prove corrosive of the rule of law.

From the outset the Taskforce has accepted that the respective Supreme Courts will retain the right to admit legal practitioners, irrespective of the creation of the new national mechanism. This reflects the existing position in the States, including with regard to the Legal Profession Admission Board in New South Wales. Existing State legislation, including the national uniform legislation now proposed, creates an institution for admission but reserves the powers of the Supreme Court in this regard.

This does not constitute a concession. Chapter III of the Commonwealth Constitution would prevent any Parliament establishing a scheme that wholly replaces the courts in this respect. A national scheme cannot take away the right of the courts to control admissions if they chose to do so. That is quite clear in terms of appearances in court and is also true, albeit somewhat less clearly, with respect to the full range of legal practice.
In New South Wales there has never been a proposal for the courts to establish any kind of parallel system. There has been no call to do so in this state because of the influence the court retains in the Legal Profession Admission Board, albeit not majority representation. The Court’s powers have, however, often been invoked to strike practitioners off the roll, as an alternative to the statutory system.

Suffice it to say that the worst possible outcome of any national reform would be if there were two parallel regimes for admission and discipline. If called upon to do so, the Supreme Courts, acting through the Chief Justices Council, could establish a parallel regime, but of course it is no one’s interest for that to happen. It is necessary for those involved to ensure that the new structure maintains both the reality and the appearance of an independent legal profession.

Let me conclude with some observations from Confucius. When asked about politics, the Sage said:

“Do not try to hurry things. Ignore petty advantages. If you hurry things, you will not reach your goal. If you
pursue petty advantages, larger enterprises will not come to fruition.”

There is much wisdom in these words.

