

The Toast “AUSTRALIA”

**Proposed by Sir David Smith at the Australia Day Dinner
of the Australia Day Council of Victoria at
Leonda By The Yarra, Melbourne,
23 January 2012**

First of all may I thank the Chairman, Mr. Shneider, and the members of your Organising Committee for inviting me to be your guest tonight and for giving me the privilege of proposing the toast to “Australia” once again.

I first came to one of these functions in 1979, when I accompanied the then Governor-General, Sir Zelman Cowen. My second occasion came ten years later, in 1989, when I accompanied the then Governor-General, Sir Ninian Stephen. In 1991, shortly after I had retired, I was invited back in my own right to propose the toast; in 2008 you invited me to do it again; and tonight your committee has invited me once more to propose the toast. As always, it’s a great pleasure for me to be with you, but as one of my sons might put it, perhaps I am being invited back until I get it right.

The day that we celebrate in three days time has its origins in the arrival of the First Fleet, under Captain Arthur Phillip, at Botany Bay on 18 January 1788, its transfer to a more suitable site at Sydney Cove on 26 January 1788, and the establishment of the colony of New South Wales. But the day itself has had several names – Anniversary Day, First Landing Day, Founding Day – before it came to be known as Australia Day.

Although the date of the holiday was given to us in 1788, the nation which gives the holiday its name – Australia – didn’t come into existence until 1 January 1901. On that date our predecessors “agreed to unite in one indissoluble Federal Commonwealth under the Crown.” The federation of the six Australian colonies came about because their people wanted it to happen, voted for it to happen, and approved the Constitution that enabled it to happen. We became the first nation in the history of the world to be formed as the result of a free vote of its people.

Two of our constitutional scholars, Sir John Quick and Sir Robert Garran, in their 1901 definitive work of constitutional scholarship, *The Annotated Constitution of the Australian Commonwealth*, wrote that the process of producing and voting for a new constitution was “unique testimony to the high political capacity of the Australian people. Never before have a group of self-governing, practically independent communities, without external pressure or foreign complications of any kind, deliberately chosen of their own free will to put aside their provincial jealousies and come together as one people, from a simple intellectual and sentimental conviction of the folly of disunion and the advantages of nationhood.”

Today, despite the fact that we like to think of ourselves as a young nation, we are one of the oldest parliamentary democracies in the world. Only Britain, the United States of America, Canada, Switzerland and Sweden are able to look back on longer periods of democratic rule, uninterrupted by dictatorship of the left or right, or by foreign conquest and occupation, than Australia. Of these six oldest continuous democratic nations in the world, four (including the United States) are British in origin, and four (including Sweden) are

monarchies. And no matter from where we or our forebears may have migrated – and we are all either immigrants or the offspring of immigrants – we have good reason to be proud of this country's British origin and traditions that gave us our language, our culture, our legal system and our system of government.

Over the last fourteen months we have seen a revolutionary wave of demonstrations and protests occurring in the Arab world. This so-called Arab Spring has seen revolutions in Tunisia and Egypt; a civil war in Libya; civil uprisings in Bahrain, Syria, and Yemen; major protests in Algeria, Iraq, Jordan, Morocco, and Oman; and minor protests in Kuwait, Lebanon, Mauritania, Saudi Arabia, Sudan, and Western Sahara.

These protests have been aimed at bringing about changes of governments, and have resulted in civil resistance in sustained campaigns involving strikes, demonstrations, marches and rallies, as well as the use of social media to organize, communicate, and raise awareness in the face of state attempts at repression and censorship. The demonstrations have met with violent responses from authorities, as well as from pro-government militias and counter-demonstrators. In all cases the aim of the demonstrators has been to produce a change of government, and many ordinary citizens have been killed or injured in the process.

By way of sharp contrast, let me take you back to the federal election that saw our last change of government, from the Coalition to Labor. On Saturday 24 November 2007 the Australian people changed our national government. We did this by writing numbers in pencil on pieces of paper. In the Arab countries that I have just listed, their citizens risk being thrown into prison or shot on the streets in attempting to do violently what we did peacefully and quietly that day in November 2007 with those pencils and pieces of paper.

Within hours of the polls closing we knew that we had rejected the old government and had elected a new one. That same evening the defeated Prime Minister appeared on national television and made a gracious concession speech in which he congratulated the incoming government. The Leader of the Opposition followed soon after and made a gracious acceptance speech in which he promised to govern for all Australians. The speeches of both John Howard and Kevin Rudd included generous references to their political opponent.

That night some Australians went to bed pleased and happy, others disappointed and sad, but next morning life went on as usual for the vast majority of us. The Australian Electoral Commission resumed its counting of the votes, the Australian Public Service prepared to receive its new masters, and the Governor-General, Major General Michael Jeffery, prepared to take the steps which the Constitution required of him in order to install the new government.

On Monday 26 November 2007, two days after polling day, Prime Minister John Howard, in accordance with constitutional convention, resigned his commission as Prime Minister and advised the Governor-General to invite the Leader of the Opposition, Kevin Rudd, to form a government. The Governor-General asked Mr. Howard and his Ministers to continue in office in a caretaker capacity until a new government had been sworn in. The Governor-General then invited Mr. Rudd to form a government.

On Thursday 29 November 2007, five days after polling day, Mr. Rudd advised the Governor-General of his proposed government and received His Excellency's approval to announce it. Mr. Rudd and his wife Ms Therese Rein then called at the Prime Minister's Lodge in Canberra where they were warmly welcomed by Mr. and Mrs. Howard.

On Monday 3 December 2007, eight days after polling day, the Governor-General accepted Mr. Howard's resignation and swore in the new Rudd Government.

The processes and procedures that I have just described were all carried out peacefully, orderly, and in accordance with our Constitution, its inherent checks and balances, and its conventions. The task that was begun by those pencils and pieces of paper in polling booths around the country was put into effect by the Governor-General a few days later in a dignified ceremony at a happy family occasion in the Drawing Room at Government House, Canberra. We really are a fortunate country, and much of our good fortune is due to the Constitution that we have and the system of government that it gives us as a parliamentary democracy.

Since then, of course, we have had another change of Prime Minister. Regrettably, the Constitution and the people were not involved on that occasion. That change was brought about by some of the former Prime Minister's party colleagues. At the following election on 21 August 2010 the electorate responded by saying "A pox on both your houses" and we were left with a hung Parliament. The consequences of the removal of a Prime Minister mid term by his own party are still to work themselves out, so I shall say no more about that tonight.

In framing our Constitution, our Founding Fathers included a provision, in section 128, which ensures that it may be altered only with the consent of the people. This is a rare and precious provision in a world where almost every other national constitution may be altered by the parliament or even by the government, without the consent of the people. As Quick and Garran have reminded us, "These safeguards [in our section 128] have been provided, not in order to prevent or indefinitely resist change in any direction, but in order to prevent change being made in haste or by stealth, to encourage public discussion and to delay change until there is strong evidence that it is desirable, irresistible, and inevitable." But if the people are required to give their consent to constitutional change it must be an informed consent. The big question is "Are Australians well informed about their Constitution?"

Sadly, the answer to that question is "No, they are not." In 1988 the Hawke Government's Constitutional Commission reported that almost 50 per cent of all Australians were unaware that Australia has a written Constitution, and that in the 18–24 year age group the level of ignorance rose to nearly 70 per cent. In 1994 the Keating Government's Civics Expert Group reported that 82 per cent of Australians knew nothing about the content of the Constitution. As these reports have shown, we do not have a well-educated or a well-informed community when it comes to constitutional matters, and without some knowledge of our present system of government it is very difficult to understand and evaluate proposals for change.

As a democrat, I recognise the right of my fellow Australians to campaign for a change to our Constitution, to our system of government, and to our flag, so long as they recognise my right to defend our present Constitution, our present system of government, and our present flag. What all of us must realise is that, while it may not be perfect, our Constitution is still the best in the world, so any attempts to alter it must be, in the words of Quick and Garran, "desirable, irresistible, and inevitable".

On 29 October 1999, one week before the 1999 referendum on the republic, Sir Guy Green gave *The Sir Robert Menzies Oration* on the subject of "Governors, Democracy and the Rule of Law". Sir Guy, who was Governor of Tasmania when he gave the oration, has

also held office as Chief Justice of the Supreme Court of Tasmania and as Administrator of the Government of the Commonwealth of Australia on three occasions, during absences of the Governor-General. In the course of his oration Sir Guy said “Constitutional reform is a serious matter. Unlike ordinary law reform whose effects are confined to specific areas and which may be modified or repealed if it turns out to have been ill-advised, constitutional reform impacts upon the entire system of law and government and is virtually irreversible. It follows that we have an obligation not only to ourselves but to our descendants to consider any proposals to change the constitution of the Commonwealth or a State rationally, deliberately and with a complete understanding of the nature of that which is being changed and of what the consequences of the change will be.”

In February 1998, at a Constitutional Convention held in Old Parliament House, Canberra, Prime Minister John Howard gave republicans the opportunity to draw up a constitutional model that could be put to the Australian people, as required by section 128 of the Constitution. For two weeks republican and monarchist delegates argued and debated, but in the end the republicans were allowed to choose their preferred republican model – constitutional monarchists abstained from voting because we believed it would not be honourable to use our votes to choose a model that we would subsequently campaign against. On the final day of the convention the Keating/Turnbull model, as it came to be known, received the votes of only 73 of the 152 delegates, or 48 percent, even though 89 of the delegates, or more than 58 percent, were republicans.

As history has recorded, the subsequent constitutional referendum, held on 6 November 1999, saw the republican model comprehensively rejected by the Australian people. It was rejected in all six States and in the Northern Territory – only the ACT voted for it. It was rejected by 55 percent of the voters and by 72 percent of all federal electorates in a landslide. The main arguments for the republic were that it would give us our independence from Britain, and that it would give us an Australian Head of State.

The first argument that a republic will give us our independence from Britain is not true, because we already have our independence, and have had it for a very long time.

In 1985 the Hawke Government set up a Constitutional Commission consisting of three very distinguished constitutional lawyers and two former heads of government, namely former Prime Minister Gough Whitlam and a former Premier of this State, Sir Rupert Hamer. The Commission was advised by an advisory committee on executive government, chaired by former Governor-General Sir Zelman Cowen. In response to its first term of reference requiring it to report on the revision of our Constitution to “adequately reflect Australia’s status as an independent nation”, the Commission traced the historical development of our constitutional and legislative independence, and concluded “It is clear from these events, and recognition by the world community, that at some time between 1926 and the end of World War II Australia had achieved full independence as a sovereign state of the world. The British government ceased to have any responsibility in relation to matters coming within the area of responsibility of the federal government and Parliament.”

The second argument that we need to become a republic in order to have an Australian head of state is also untrue, for we already have one in the Governor-General.

I realise that the head of state question is not so clear-cut as the independence question, not least because the words “head of state” do not appear in our Constitution, nor were they even mentioned by any of the delegates to the constitutional conventions of the

1890s at which our Constitution was drafted. Never-the-less, there is a long list of evidence, consisting of judicial pronouncements by Britain's Lord Chancellor in two constitutional cases before the Privy Council; legal opinions by Australian Solicitors-General to Australian Governments on both sides of politics; and decisions by those Australian Governments in acting on those legal opinions, that lead us to the view that, under our unique Constitution, the Queen is our Monarch and the Governor-General is our head of state.

I put that long list of legal matters on the public record many years ago. Tonight is neither the time nor the place for me to go into that list in any detail, but a few examples will illustrate the point I am making.

It is true that the Governor-General is the Queen's representative – section 2 of the Constitution says so – but that is not the Governor-General's only role. If we read on to section 61 of the Constitution, which is in Chapter II of the Constitution headed "The Executive Government", we find that the Governor-General has another quite separate and independent role.

Section 61 reads "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." In this section the words "as the Queen's representative" are descriptive, not prescriptive, but the important word in this section is the word "exercisable". Its effect is to confer the executive power of the Commonwealth, not on the Queen, but on the Governor-General, and on him or her only.

When our founding fathers set about drafting our Constitution they had the Canadian Constitution to guide them. The distinctions they made in the Australian Constitution were quite deliberate. For example, we know, because two of our Founding Fathers involved in drafting our Constitution, W. Harrison Moore and A. Inglis Clark, told us so in 1901, that, under our Constitution, the Governor-General was given powers not given to any other Governor or Governor-General in the British Empire. The Canadian Constitution, and later the New Zealand Constitution, name the Queen as head of state – ours does not. Ours is unique, in that it acknowledges the Queen as our Monarch or Sovereign but gives the head of state powers to the Governor-General.

In confirmation of what I have just said, in 1947 King George VI signed Letters Patent transferring all head of state powers from himself to the Governor-General of Canada. In 1983 Queen Elizabeth II signed Letters Patent transferring all head of state powers from herself to the Governor-General of New Zealand. No such transfer has been necessary in the case of Australia because our Governors-General received their powers, not from the Crown but from the Australian people via the Australian Constitution in 1901.

Many of you will recall that, in November 1975, following the Governor-General's dismissal of the Whitlam Government, the Speaker of the House of Representatives wrote to the Queen to ask her to restore Mr. Whitlam to office as Prime Minister.

In the reply from Buckingham Palace, the Speaker was told "As we understand the situation here, the Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General as the representative of the Queen of Australia. The only person competent to commission an Australian Prime Minister is the Governor-General, and the Queen has no part in the decisions which the Governor-General must take in

accordance with the Constitution. Her Majesty, as Queen of Australia, is watching events in Canberra with close interest and attention, but it would not be proper for her to intervene in person in matters which are so clearly placed within the jurisdiction of the Governor-General by the Constitution Act.” Since the defining head of state power under our system of government is the power to appoint or remove the Prime Minister, that reply confirmed, if confirmation were needed, that the Governor-General is indeed Australia’s head of state.

This view of the role of the Governor-General was further confirmed by the Hawke Government’s Constitutional Commission in its 1988 report, to which I have already referred. “Although the Governor-General is the Queen’s representative in Australia, the Governor-General is in no sense a delegate of the Queen. The independence of the office is highlighted by changes which have been made in recent years to the Royal instruments relating to it.” The Commission was of course referring to the action taken by the Queen on 21 August 1984, on the advice of Prime Minister Hawke, to amend the Royal Letters Patent relating to the office of Governor-General in order to reflect the Governor-General’s true constitutional role.

So, to summarise the position – under section 2 of the Constitution the Governor-General is the Queen’s representative and exercises certain royal prerogative powers and functions; and under section 61 of the Constitution the Governor-General is the holder of a quite separate and independent office created, not by the Crown, but by the Constitution, and empowered to exercise, in his own right as Governor-General and not as a representative or delegate of the Queen, all the powers and functions of Australia’s head of state.

Nothing that I have said should prevent republicans from continuing to argue for a republic. That, as I said at the beginning of this speech, is their right, just as it is my right to argue for the retention of our present system of government as a constitutional monarchy. But it behoves all of us, monarchists and republican alike, to ensure that all Australians are well informed, not only about proposals for change, but also about our present constitutional arrangements, for they have given us one of the best systems of government in the world, and a great country in which to live and work and bring up our children.

I should like to end my remarks tonight with the same words with which I ended my remarks at your Australia Day dinner four years ago by quoting again the late Rufus Davis, foundation professor of politics at Monash University from 1962 to 1984, who died here in Melbourne on 23 September 2006, at the age of 89. It was his view that “The Australian Constitution has proved a remarkably flexible and adaptable document. Under it, we have preserved our liberties, we have achieved a lifestyle that is respected by the world; we have cultivated the arts, sciences and culture of 20th century society; and under it we have developed, and continue to develop, a vast continent. Neither the present constitution, nor any other constitution, can protect us against unwise government ... [but] to replace a known constitution that has served us well with an unknown, in the belief that the new will be better than the old, is to gamble with the future of a nation in the name of a disintegrating philosophy of centralised power that has been found wanting everywhere in the world.”

Mr. Chairman, ladies and gentlemen, will you please join me in a toast?

I give you the toast “Australia”.
