

REMARKS OF THE HON. MARILYN WARREN AC
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ON THE OCCASION OF

The Great Australia Day Breakfast 2011
Australia Day Address
Queen's Hall, Parliament House, Melbourne
26 January 2011

Celebrating Justice

On Australia Day we visualise images of our wonderful land: brilliant blue skies, golden sands, sparkling oceans with rolling waves, native forests, dry rich red deserts and vibrant cosmopolitan cities. We think of Australians at leisure: playing cricket or tennis, enjoying a picnic or a barbeque, or generally messing about in a backyard or on a balcony. These are strong, colourful images. The mood is spacious and free. We can pretty much come and go and do as we like without feeling frightened, intimidated or constrained.

If we think about it, in Australia we are a world away from places where citizens live in fear of political and religious persecution. We have a strong sense of safety. We are safe to come and go and celebrate our national day. We do not fear abduction, torture or death.

Australia Day is a time when we stop quietly for a moment to reflect on where we have come from, who we are now and what might we achieve in the future.

We also talk at this time about our quintessential values – what it is that makes us Australian, what makes us special and proud of ourselves as a people and our land as a nation.

We talk about our values of fairness and fair go, helping the disadvantaged, resilience in the face of adversity, friendship, mateship and loyalty.

One special Australian value we do not talk about very much and mostly take for granted is justice. Without justice we would not enjoy the strong democratic nation that Australia is. In the last part of 2010 Australia, and then Victoria, experienced two democratic elections for government. The lead up to both elections was tense and hard-fought. After the initial counting of votes the result was unclear in both elections. After knife-edge delays governments were formed and the governing of the people by duly elected federal and state governments

continued. No blood was spilled. No gun was fired. No citizen was imprisoned without trial or placed under indefinite house arrest. No citizen was killed. The public service turned to the newly elected government and asked: how might we serve?

Underpinning the political, constitutional, electoral and administrative processes was a judicial system. If a challenge had arisen to the declaration of the election of a candidate in a seat then the courts would have determined the outcome. In both elections, as the result came down to the narrowest of margins, the presence of the courts was crucial. They were there, if needed, constituted by judges who would have determined the outcome impartially, without political adherence and devoid of corruption. The Australian and Victorian citizen could be confident that justice in its true sense would have been achieved.

So how does justice play out as a value in Australian society? What is its connection to the celebration of our great national day? How does the ordinary citizen become a participant in the delivery of justice?

Over the last hundred years, the evolution of Australian society has been underpinned by our civic involvement. Public participation is both a check on arbitrary power and a source of the democratic dynamism which renews and invigorates our country and our states. It is most obvious in our democratic system of government and the Australian Constitution which requires the Parliament to "be directly chosen by the people".

The maintenance of these democratic rights is constantly renewed. Only last year, the High Court in the GetUp! case held invalid laws that reduced the time in which people could enrol to vote once an election was called. The High Court ordered the electoral rolls for the federal election to stay open for at least seven days to allow people to update their enrolment or enrol for the first time. This meant that about 100,000 people – mostly young people – were able to exercise the democratic right to vote and choose the members of the federal parliament.

Equally important to the right to vote is the right to sit on and have one's criminal guilt decided by a jury of one's peers. The jury is not simply part of the legal system, but

a critical part of the "structure of government adopted by, and for the benefit of, the people of the federation as a whole" (Justice Deane).

The jury system in Australia was an offshoot of the great English tradition of jury trials whose origins can be traced back almost one thousand years to Magna Carta. It is part of our constitutional pedigree. The jury trial has been described as "the lamp that shows that freedom lives" (Lord Devlin) because the first object of any tyrant would be to reduce or abolish parliament and next to overthrow trial by jury. No tyrant would want a person subject to the independent judgment of twelve peers.

The connection between the right to vote and the right to trial by jury is something we should celebrate. It is no coincidence that juries are selected from those whose names appear on the electoral roll. It is also no coincidence that during the nineteenth century, jury trials in Australia operated as an important safeguard for those who were unable to express themselves through the democratic process when their rights and liberties were threatened.

Victoria was one of the great crucibles of Australian federation. The wealth generated by wool and particularly gold in the second half of the nineteenth century made Melbourne one of the colossal cities of the British Empire. Whilst the gold rush brought wealth and importance to the colony, it also brought social and political instability and eventually civil unrest, culminating in the Eureka Stockade. The crisis point was the treatment of the enormous influx of miners by the oppressive government regimes that prevailed on the goldfields. The miners were denied the right to vote. Ultimately, they built the Eureka Stockade, unfurled the famous Southern Cross flag and then spilled their blood. Twenty-two miners and six soldiers were killed. Martial law was declared and 155 miners were arrested. The Victorian public, rejecting the heavy handed and unjust position of the authorities, protested. Ultimately, only 13 of those arrested were sent to trial, all charged with the capital crime of high treason. They were transferred to await trial in the Old Melbourne Gaol and held in dreadful conditions.

Despite evidence against them that could justify a conviction, the 13 accused of the Eureka Stockade trials were acquitted.

The verdicts were applauded both inside and outside the courtroom in the old Supreme Court building in LaTrobe Street. In the words of the accused, Raffaello Carboni, after the words "not guilty" were uttered by the foreman and Carboni's chains "sprang asunder" the good news was sent to the crowd outside the court and "Hurrah!" rent the air. Carboni said

"I was soon at the portal of the Supreme Court, a free man, I thought the people would have smothered me in their demonstrations of joy."

In a climate of government heavy handedness, these 13 Eureka juries were a circuit breaker that rejected the interest of executive power in securing convictions and thus suppressing any further civil disobedience. The Eureka juries replaced it instead with a sense of justice.

The Stockade itself, and the trials remind us as Australians and Victorians, of a number of things. They remind us of the inherent sense of justice which underpins Australian society. They remind us of the value of the jury system as a check on arbitrary power.

Our contemporary Australian society has become sophisticated, cosmopolitan and modern. We sometimes see footage on news screens of war-zones, soldiers, homeless peoples and destroyed towns. We hear of a chief justice being sacked and placed under house-arrest and armed soldiers barring entry to courts and parliaments. Sometimes we might be desensitised to these places and their circumstances. We cannot take our democracy for granted. Just imagine, if a judge arrived at court one day to find a notice on the court door announcing that persons of a certain ethnic origin could no longer work in that court. What if the judge felt compelled to flee the country as a refugee? In places many judges have been killed and their courthouses bombed for political reasons. These events have occurred around the world.

In its essential way justice plays out as an Australian value to be nurtured and loved. The fact we have justice as a value allows us to unite as Australians in full recognition of our individual differences. Let us celebrate Australia Day and our just and free nation. Let us participate in the

processes of justice as a juror, an observer or as a person who just talks about justice. We are so lucky to have it.