

Magna Carta – Resonances in the Common Law of Australia

Spring Conversazione

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Three months before this year's celebrations of the anniversary of the sealing of Magna Carta, Lord Sumption, of the Supreme Court of England and Wales, staged a pre-emptive strike in an address to the Friends of the British Library. His Lordship had been asked to speak on the topic "Magna Carta then and now". He observed that it is impossible to say anything new about Magna Carta, unless you say something mad. And indeed, even if you say something mad, he suggested the likelihood is that it will have been said before and probably quite recently¹.

Six months later, the task of saying something new about Magna Carta has not become any easier. In Australia we have had learned addresses on the great charter from Professor Brand, a renowned medievalist², Jim Spigelman, former Chief Justice of New South Wales, himself no mean historian³, the Chief Justice of

¹ Lord Sumption, *Magna Carta then and now*, Address to the Friends of the British Library on 9 March 2015. Transcript available at <https://www.supremecourt.uk/docs/speech-150309.pdf>.

² Professor Brand, *Magna Carta and the Development of the Common Law*, High Court Public Lecture delivered at the High Court in Canberra on 13 May 2015. Transcript available at <http://www.hcourt.gov.au/assets/publications/speeches/lecture-series/Brand-Magna-Carta-and-the-Development-of-the-Common-Law-May15.pdf>.

³ The Hon James Spigelman AC QC, *Magna Carta in its Medieval Context*, Address delivered at the Banco Supreme Court of New South Wales, 22 April 2015. Transcript available at http://www.supremecourt.justice.nsw.gov.au/Documents/spigelman_22042015.pdf

Australia⁴, and the former Prime Minister⁵. And as I speak, Lord Igor Judge is delivering a public lecture titled "Magna Carta: Destiny or Accident" to the Magna Carta Society in the Federal Court in Sydney⁶. Suffice it to say, the octocentenary of Magna Carta has not passed unnoticed in the antipodes. This is fitting given that Magna Carta is widely viewed as the foundation stone of the rule of law in countries that share our common law heritage.

The charter sealed at Runnymede on or about 15 June 1215 contained 63 chapters, the great bulk of which are of interest only to the committed medievalist. It is chapters 39 and 40 that are accorded constitutional significance. Within two months of its execution, Pope Innocent III annulled the charter on the ground that King John's seal had been appended under duress. Nonetheless, after John's death in 1216, the charter was re-issued, albeit shorn of some of its more radical provisions, during the infancy of his son, Henry III. Importantly Chs 39 and 40 survived the cull. Successive reissues of the charter during Henry III's reign culminated in the charter of 1225, in which Chs 39 and 40 were amalgamated as Ch 29. And in this form the

⁴ The Hon Chief Justice Robert French AC, *Statutes and the Rule of Law in the 800th Year of Magna Carta*, Address delivered at the Law Council of Australia Business Law Section Workshop, 27 February 2015. Transcript available at https://www.one.lawcouncil.asn.au/BLS/images/Statutes_and_the_Rule_of_Law_in_800th_Yearof_Magna_Carta.pdf.

⁵ The Hon Tony Abbott, *Magna Carta Lecture*, Address delivered at Parliament House in Canberra, 24 June 2015. Transcript available at <https://www.pm.gov.au/media/2015-06-24/magna-carta-lecture-parliament-house-canberra-0>.

⁶ Lord Judge, *Magna Carta: Destiny or Accident?*, Address delivered to the Magna Carta Society in the Federal Court in Sydney, 1 October 2015, as yet unpublished.

charter re-issued by Edward 1 in 1297 assumed statutory force⁷. It is Ch 29 of the 1297 statute that forms part of the law of Victoria.

Chapter 29, as transcribed in the *Imperial Acts Application Act* 1980 (Vic), provides:

"No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties or free customs, or be outlawed or exiled, or in any way otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right."

In 1925, Justice Isaacs embarked upon his analysis of the lawfulness of the applicants' detention in *Re Yates* with the observation that it was essential even at "this advanced stage of our political development to bear constantly in mind certain fundamental principles which form the base of the social structure of every British community". These were not principles to be found in the Commonwealth Constitution - rather, they were inscribed in Magna Carta, that "great confirmatory instrument", then 700 years old, and all of them were to be found within Ch 29. Justice Isaacs took three principles from that chapter; firstly, the inherent individual right to life, liberty, property and citizenship; secondly, that these individual rights must yield to the necessities of the general welfare of the State; and, thirdly, that only by the law of the land may the State so declare its will⁸.

⁷ 25 Edward III, c XXIX.

⁸ *Ex Parte Walsh; Ex Parte Johnson; In re Yates* (1925) 37 CLR 36 at 79.

Sir Isaac Isaacs holds an honoured place in the pantheon of common law jurists but, by 1925, his views on Magna Carta were out of sympathy with those of the Academy.

In 1904, Professor Edward Jenks, an eminent legal historian, exposed a number of misconceptions about the nature of the guarantees found in Ch 29⁹. Judgment by one's peers was not a guarantee of trial by jury - that institution had not emerged in recognisable form by 1215. Neither was Ch 29 a guarantee of the right to seek habeas corpus - that great writ had not emerged in recognisable form by 1215. And the reference to judgment by the law of the land was not a guarantee of the right to due process.

Professor Jenks, and those who came after him, source these misconceptions to Sir Edward Coke, the great master of the common law¹⁰. Coke is celebrated for his opposition to Stuart absolutism. Following his dismissal from the position of Chief Justice of the Court of Common Pleas, Coke was responsible for drafting the Bill of Liberties against the royal prerogative. The bill claimed ancient rights said to have been granted by Magna Carta. In 1628, the bill was presented to Charles I as the Petition of Right and in its statutory form it stands after Magna Carta as the second great constitutional document in English legal history¹¹.

In his address to the Friends of the Library, Lord Sumption nailed his colours to the mast of Magna Carta myth-busters. His

⁹ Jenks, *The Myth of Magna Carta*, Independent Review No 4 (1904) 260.

¹⁰ See, for example, Jenks, *The Myth of Magna Carta*, Independent Review No 4 (1904) 260; Radin, *The Myth of Magna Carta*, Harvard Law Review Vol 60 (1947) 1060.

¹¹ *Petition of Right* (1627) Regnal 3 Cha 1.

Lordship roundly blamed Coke for transforming Magna Carta from a "technical catalogue of feudal regulations into the foundation document of the English Constitution, a status which it has enjoyed ever since among the large community of commentators who have never actually read it". He was trenchantly critical of the acceptance by judges, parliamentarians, childrens' book writers, and others of Magna Carta as having paved the way for democracy, equality and the rule of law, which he viewed as a distortion of history serving an essentially modern political agenda. A distortion which Lord Sumption classified as "the worst kind of ahistorical Whiggism"¹².

At the risk of coming out as a Whig, which in twenty-first century Melbourne may well qualify as 'ahistorical' in any event, I favour the kindlier view of the significance of Magna Carta proposed by Lord Bingham in his monograph on the concept of the rule of law:

"It has been said that Chapter [29] 'has had much read into it that would have astonished its framers'. It would, moreover, be a travesty of history to regard the Barons who confronted King John at Runnymede as altruistic liberals seeking to make the world a better place. But, for all that, the sealing of Magna Carta was an event that changed the constitutional landscape in this country and, over time, the world."¹³

Something of the force of that observation can be seen in the petition for the statute passed in the forty-second year of the reign of Edward III, which sought that "no man be put to answer without

¹² Lord Sumption, *Magna Carta then and now*, Address to the Friends of the British Library, 9 March 2015 at page 4. Transcript available at <https://www.supremecourt.uk/docs/speech-150309.pdf>.

¹³ Bingham, *The Rule of Law*, (2011) at 10.

presentment before the justices ... and by due process and original writ, according to the ancient law of the land"¹⁴. King Edward's answer to the petition is recorded in these terms "Because this Article is an Article of the Grand Charter, the king willeth that this be done as the Petition doth demand"¹⁵.

The school of thought that sees Magna Carta as largely the invention of Sir Edward Coke is apt to overlook that from as early as 1300 Magna Carta was printed in the compendia of legal materials and from then until the mid-15th Century statutes contained, as their first chapter, provision that Magna Carta (together with the Charter of the Forest and the Charters of Henry III) should be firmly and duly held and maintained¹⁶.

In any event, it may be beside the point to castigate those who see Magna Carta as the foundation for constitutional rights and immunities. Frederic Maitland, acknowledged as the father of modern legal history, distinguished the uses of history by historians from its uses by lawyers. For lawyers, the latest authoritative interpretation of a statute is more valuable than earlier, and possibly historically more accurate, interpretations¹⁷:

¹⁴ 42 Edward III, c 3.

¹⁵ 42 Edward III, c 3.

¹⁶ Professor Brand, *Magna Carta and the Development of the Common Law*, High Court Public Lecture delivered at the High Court in Canberra on 13 May 2015. Transcript available at <http://www.hcourt.gov.au/assets/publications/speeches/lecture-series/Brand-Magna-Carta-and-the-Development-of-the-Common-Law-May15.pdf>.

¹⁷ Maitland, *Collected Papers*, "Why the History of English Law is Not Written", Vol 1, 481 at 491 cited in *Adler v District Court of New South Wales* (1990) 19 NSWLR 317 at 346 per Priestley JA.

"It is possible to find in modern books comparisons between what Bracton [a 13th century legal commentator] says and what Coke says about the law as it stood before the statutes of Edward I, and the writer of course tells us that Coke's is 'the better opinion'. Now if we want to know the common law of our own day Coke's authority is higher than Bracton's and Coke's own doctrines yield easily to modern decisions. But if we are really looking for the law of Henry III's reign, Bracton's lightest word is infinitely more valuable than all the tomes of Coke. ... The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems to me a contradiction in terms."

As to the authority of Sir Edward Coke, Chief Justice Best summed it up in this way in a decision in 1824¹⁸:

"The fact is, Lord Coke had [often] no authority for what he states, but I am afraid we should get rid of a great deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any court of justice."

Sir Edward Coke's understanding of Magna Carta as the foundation of the liberties of Englishmen was the understanding that the colonists brought to Australia. It was an understanding that all subjects under the British Crown enjoyed ancient rights dating to Magna Carta including those of due process, trial by jury, and habeas corpus.

In its first year, the Supreme Court of the Colony of New South Wales was required to determine whether persons charged on

¹⁸ *Garland v. Jekyll* (1824) 2 Bing 296 at 296-297.

indictment before the Court of Quarter Sessions were to be tried by jury. In the case of trials before the Supreme Court itself the statute, in express terms, provided for trial otherwise than by jury. That circumstance did not stand in the way of Chief Justice Forbes' conclusion that trial in the Court of Quarter Sessions must be by jury because Magna Carta conferred that right¹⁹. From the earliest days of the Colony case notes indicate that the Charter was invoked with some frequency by counsel and litigants alike²⁰. The rhetorical power of Magna Carta in the Colony is evident in Justice Willis' description of a legislative provision as being as "much the birth right of an Englishman as the Magna Carta"²¹.

We live in a rights-conscious age. Public discussion in Australia in recent years has often focused on whether we should have an entrenched bill or charter of rights.

The United States' Bill of Rights gives constitutional recognition to rights that are understood to derive from Magna Carta: the guarantee against deprivation of life, liberty or property without due process of law (Amendment V) and the obligation of the States to accord due process and equal protection of the law (Amendment XIV)²².

The United States' and the Australian Constitutions were framed in very different circumstances. The Constitution of the United

¹⁹ *R v The Magistrates of Sydney* [1824] NSWKR 3; [1824] NSW Sup C 20.

²⁰ See, for example, *In Re Edward Abbott v The Commissioner of the Caveat Board* [1841]; *MacPherson v Municipal Council of Shanghai* 1891.

²¹ *Ex parte Nichols* [1839] NSW Sup C 76.

²² *United States Constitution*, Amendments V, XIV.

States and the amendments comprising the Bill of Rights were framed in the aftermath of a war waged against a regime that was perceived as tyrannous. Our Constitution was framed in peacetime by colonists who were proud of their British heritage. The form that our federal compact was to take was worked out in a series of Conventions held over nearly a decade. Those who attended the Conventions had a sophisticated understanding of the Constitution of the United States and they chose to model much of our Constitution upon it. The decision not to adopt the Bill of Rights was deliberate. It reflected the thinking of James Bryce, whose commentary on the United States' Constitution was influential²³.

Bryce observed that the Bill of Rights (adopted over a century earlier) had been meant to protect the citizens against the abuse of legislative power. He went on to say:

"The English, however, have completely forgotten these old suspicions, which, when they did exist, attached to the Crown and not to the Legislature.

Parliament was for so long a time the protector of Englishmen against an arbitrary Executive that they did not form the habit of taking precautions against abuse of the powers of the Legislature; and their struggles for a fuller freedom took the form of making Parliament a more truly popular and representative body, not that of restricting its authority."²⁴

²³ Patapan, *The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia* (1997) 25 Federal Law Review 211 at 216-217; Gageler, *James Bryce and the Australian Constitution* (2015) 43 Federal Law Review 177.

²⁴ Patapan, *The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia* (1997) 25 Federal Law Review 211 at 218 citing J Bryce, *Studies of History and Jurisprudence* at 502-3.

On the eve of the twentieth century our founding fathers saw no need to limit the powers of a democratically elected parliament by the entrenchment of rights which were accepted as a given. On the other hand, a proposal to abolish the right of appeal to the Privy Council led Mr Dibbs, a former and future Premier of New South Wales, to protest the attempt to "take from us, as British subjects, the chartered right which we possess of appeal to the Crown"²⁵. There is little doubt that to his audience the chartered right of which Mr Dibbs spoke would have been understood to be sourced in Magna Carta and affirmed in the Petition of Right, the Bill of Rights and the Act of Settlement.

To return to Justice Isaacs' invocation of Magna Carta in 1925, after his Honour distilled the principles embodied in Ch 29, he went onto to explain that the courts had evolved "two great working corollaries" without which the principles would be "merely pious aspirations"²⁶. The first working corollary is the presumption in favour of liberty, so that whoever claims to imprison or deport another has cast upon him the obligation of justifying the claim by reference to the law. The second working corollary is that the courts demand this obligation is strictly and completely fulfilled before they hold that liberty is lawfully restrained²⁷.

Australian courts have on occasion gone back to Ch 29 of Magna Carta when applying Justice Isaacs' first working corollary. In 1991, Justice French, then a member of the Federal Court of Australia and now Chief Justice of the High Court, granted bail to a person who

²⁵ *Official Report of the National Australasian Convention Debates* (Sydney), 1891 at 305.

²⁶ *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 79.

²⁷ *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 79.

had been held in custody for 12 months awaiting the determination of his appeal against extradition²⁸. The statute conditioned the power to grant bail on the existence of "special circumstances". Justice French considered it could never be regarded as other than a special circumstance that a person should spend a year in prison unconvicted of any offence. His Honour drew on the presumption in favour of liberty running through the common law back to Ch 39 of the original charter²⁹.

Five years ago, the Supreme Court of Victoria ordered the release of a woman from restraints imposed on her under the *Mental Health Act 1986 (Vic)*³⁰. She claimed relief by way of habeas corpus. Justice Kevin Bell cited Justice Isaacs for the principle of liberty³¹. His Honour said that Magna Carta, the Habeas Corpus Acts and other ancient imperial statutes protecting personal liberty, all in force in Victoria, formed an important part of our constitutional heritage expressing fundamental principles and values which continue to influence the development of the common law³². In particular, his Honour saw Ch 29 as the expression of the principles of formal equality before the law and freedom from arbitrary and unlawful interference with personal liberty³³.

²⁸ *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70.

²⁹ *Schoenmakers v Director of Public Prosecutions* (1991) 30 FCR 70 at 74-75.

³⁰ *Antunovic v Dawson* (2010) 30 VR 355.

³¹ *Antunovic v Dawson* (2010) 30 VR 355 at 362 [24] citing *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 79.

³² *Antunovic v Dawson* (2010) 30 VR 355 at 362 [25].

³³ *Antunovic v Dawson* (2010) 30 VR 355 at 366 [45].

The second of Justice Isaacs' working corollaries – that the courts demand strict compliance with the obligation to show the lawfulness of deprivation of liberty – has come to be known as the "principle of legality" in the context of the interpretation of statutes. If the Parliament is to abrogate fundamental rights, the courts require that it do so in language of unmistakable clarity, thereby accepting political responsibility for that abrogation. Chief Justice Gleeson has explained the principle in this way³⁴:

"A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament."

The argument can fairly be made that fundamental rights sourced in instruments dating back to Magna Carta have been preserved as effectively in Australia as in those liberal democracies that have chosen to enshrine them in a bill or charter of rights.

Something of the symbolic power of Magna Carta may be discerned from the fact that in 1980, when the parliament tidied-up the application of Imperial legislation in Victoria, it chose to maintain Ch 29 in force. Why would any parliament bring down upon itself the opprobrium that would inevitably attend its abolition of Magna Carta? New South Wales, Queensland and the Australian Capital Territory have also chosen to continue Ch 29 of the 1297 charter in force under

³⁴ *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [2]; [2004] HCA 37.

their *Imperial Acts Application Acts*³⁵. At least Ch 29 of Magna Carta was part of the English law received in the Colony under the *Australian Courts Act 1828 (Imp)* and at the time of reception of English law in the province of South Australia³⁶. To this extent Magna Carta remains the law throughout the Australian jurisdictions.

In an analysis of the status of Magna Carta in Australian and New Zealand law, Professor David Clark suggests that it is a legitimating myth that serves to support fundamental legal principles³⁷. This seems to me to capture it well.

Magna Carta is certainly one of the oldest documents that is still occasionally referred to by Australian courts. It has a unique status in the popular imagination. When invoked in legal proceedings it is considered in the same way as any other legal source. References to Magna Carta can be found in decisions of the High Court throughout its life. Well in excess of half of them are in cases decided since 1987. The High Court has written more about Magna Carta in the last quarter of its history than in its first 80 years. Perhaps this is another reflection of our rights-conscious age.

The recourse to Magna Carta has arisen in a variety of contexts. Some, perhaps, predictable – a speedy and fair trial, and

³⁵ *Imperial Acts Application Act 1969 (NSW)*, s 6 and sch 2 Pt 1; *Imperial Acts Application Act 1984, (Qld)* s 5 and sch 1; *Imperial Acts Application Ordinance 1986 (ACT)*, sch 3 Pt 2.

³⁶ *The Australian Courts Act 1828 (Imp)* 9 Geo 4, c 83, s 24; Clark, *The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law*, (2000) 24 *Melbourne University Law Review* 866 at 871.

³⁷ Clark, *The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law* (2000) 24 *Melbourne University Law Review* 866 at 869.

the acquisition of property. Others are more surprising – native title, and trade and commerce.

An issue before the Court in 1905 was whether a police constable could justify his arrest of the plaintiff on the ground of his reasonable suspicion that the plaintiff had committed a felony in South Africa. The starting point in Justice O'Connor's analysis was that all arrests made without warrant derogate from the provisions of Magna Carta³⁸. Treason, felony, and actual breach of the peace constituted exceptions of necessity to Magna Carta. None of these exceptions extended to justifying the plaintiff's arrest. It followed that the constable had no defence to the plaintiff's claim for damages for false imprisonment³⁹.

That case was concerned with the tort of false imprisonment. More recently, the Victorian Supreme Court was required to trace the history of the *crime* of false imprisonment⁴⁰. Prosecutions for false imprisonment are rare and the history of the offence is obscure. The accused's prosecution, for the false imprisonment of his wife, was the product of unusual facts. He and three confederates had imprisoned her and carried out a series of exorcisms on her. Regrettably the final exorcism proved fatal. The difficulty for the prosecution was that each accused honestly believed that the deceased had been possessed by the devil and none intended to cause her serious injury or death. Hence, the prosecutor's decision to proceed with charges of false imprisonment. The paucity of case law led Justice Ormiston back to

³⁸ *Brown v Lizars* (1905) 2 CLR 837 at 867.

³⁹ *Brown v Lizars* (1905) 2 CLR 837 at 867.

⁴⁰ *R v Vollmer* [1996] 1 VR 95 at 175-185.

Coke and Blackstone. These and other commentators traced the offence of false imprisonment to Ch 29 of Magna Carta⁴¹. Justice Ormiston was mindful of the doubts about Coke's analysis of Magna Carta, nonetheless for 350 years it had been understood there was such an offence, and if Coke's account of its development was erroneous, it was a case of *communis error facit jus* (common error makes law)⁴².

In the midst of World War II, Justice Rich saw the guarantee under our Constitution that property will not be acquired on other than just terms⁴³ as "an affirmance of a great doctrine established by the common law for the protection of private property ... in accordance with Magna Carta"⁴⁴. The subject matter of the case, somewhat prosaically, was the acquisition of apples and pears. A similar connection between the Constitutional guarantee and the provisions of Magna Carta has since been drawn by six Justices of the High Court⁴⁵.

Justice Kirby linked the prohibition on the arbitrary acquisition of property to Ch 52 of the 1215 Magna Carta⁴⁶:

⁴¹ *R v Vollmer* [1996] 1 VR 95 at 178.

⁴² *R v Vollmer* [1996] 1 VR 95 at 179.

⁴³ Constitution, s 51(xxxi).

⁴⁴ *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 104 per Rich J; [1942] HCA 37.

⁴⁵ *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; [1984] HCA 65.

⁴⁶ *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 659; [1997] HCA 38.

"To any man who we have deprived or dispossessed of lands, castles, liberties or rights, without the lawful judgment of his equals, we will at once restore these."

I should observe the note of caution sounded more recently by Justice Heydon, that statements about Magna Carta's commitment to just compensation upon the acquisition of property may have been exaggerated⁴⁷.

Among the less well-known provisions of Magna Carta is the chapter concerned with preservation of "public rights of fishing". It is referenced in the judgments in the *Seas and Submerged Lands Case*⁴⁸, which concerns sovereign rights to the territorial sea. The common law right of the public to fish, rooted in Magna Carta, was affirmed 14 years later in *Harper v Minister for Sea Fisheries*⁴⁹.

In native title cases where the claimed native title rights include a right to fish, it has been relevant to observe that the prerogative rights of the Crown in relation to tidal waters are restricted by Magna Carta's preservation of the public right to fish⁵⁰. Fishing rights have not been the only intersection between Magna Carta and native title.

⁴⁷ *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 209; [2009] HCA 51.

⁴⁸ *New South Wales v Commonwealth* (1975) 135 CLR 337 at 419 per Stephen J, 489 per Jacobs J.

⁴⁹ (1989) 168 CLR 314 at 329 per Brennan J; [1989] HCA 47.

⁵⁰ *Yarmirr v Northern Territory* (2001) 208 CLR 1 at 56 per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2001] HCA 56; and see *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24; [2008] HCA 29.

In 1988, in *Mabo v Queensland*⁵¹ (not the celebrated 1992 decision of *Mabo v Queensland (No 2)*⁵²) the Murray Islanders challenged Queensland's claims over the Murray Islands on the ground of inconsistency with the Commonwealth Racial Discrimination Act. In his dissenting reasons, Justice Deane wrote of long-established notions of justice that can be traced back at least to Magna Carta's guarantee against the arbitrary disseisin of freehold⁵³.

Chapter 30 of Magna Carta provides for the safe and sure conduct of foreign merchants in, out and through England during peacetime. In 1917, a question arose as to the right of a foreign commercial ship to leave an Australian port with its cargo. Justices Barton, Isaacs and Rich cited Ch 30 for the proposition that "[i]nternational commercial intercourse by sea ... is always understood to imply a right to depart with the vessel"⁵⁴. Three years later the same provision was taken into account in the consideration of the meaning of "trade and commerce" as it appears in s 51(i) of the Constitution⁵⁵.

It must be said that in none of these cases has the recourse to Magna Carta been determinative. At the risk of being a killjoy, I feel bound to point out that, on the one occasion Magna Carta has been

⁵¹ (1988) 166 CLR 186; [1988] HCA 69.

⁵² (1992) 175 CLR 1; [1992] HCA 23.

⁵³ (1988) 166 CLR 186; [1988] HCA 69 at 226.

⁵⁴ *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 181; [1917] HCA 77.

⁵⁵ *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530 548 per Knox CJ, Isaacs and Starke JJ; [1920] HCA 77.

relied upon for a right not sourced elsewhere, the endeavour failed. The concluding words Ch 29 are commonly translated from the medieval Latin as "to none will we sell, to none will we deny, to none will we delay right or justice". These words were invoked in support of the asserted right to what the Americans unattractively describe as a "speedy trial". The claimed right was to be tried without delay regardless of whether the delay in fact occasioned any prejudice to the accused⁵⁶.

In 1986, the New South Wales' Department of Health laid complaints against three doctors arising out of the administration of "deep sleep therapy" at a private hospital. The therapy, designed to relieve psychiatric distress, was attended by a high risk of fatality. The allegations related to events that had occurred between 1973 and 1977. The doctors brought proceedings in the Court of Appeal of New South Wales seeking to stay the proceedings before the Disciplinary Tribunal⁵⁷. I was junior counsel for the Department of Health. I recall being dispatched to the Law Courts Library at lunchtime after the bench queried which iteration of Magna Carta the claimants were relying upon.

The leading judgment was given by Justice McHugh. His Honour accepted that the common law recognised the importance of the speedy trial of civil and criminal proceedings in Ch 29 of Magna Carta. However, Magna Carta dealt only with delay between arrest or commencement of an action and the hearing and for that reason did

⁵⁶ *Herron v McGregor* (1986) 6 NSWLR 246.

⁵⁷ *Herron v McGregor* (1986) 6 NSWLR 246.

not govern the doctors' case⁵⁸. In the event, the complaints against the doctors were stayed because in all of the circumstances continuation of the proceedings would have been oppressive.

At around the same time, the District Court of New South Wales stayed proceedings on an indictment holding that their continuation would breach the accused's "constitutional right" sourced in Magna Carta to be tried without delay⁵⁹. The Full Court of the Supreme Court of South Australia also appeared to accept the existence of such a right⁶⁰.

The nascent right to a speedy trial was laid to rest by the High Court in Mr Jago's case. Justice Brennan was prepared to accept Coke's theory that "the statute of *Magna Charta* is but a confirmation or restitution of the common law"⁶¹. However, his Honour considered that Coke was describing qualities of justice to which the courts aspire – free, full and speedy – but not the existence of a legal right giving effect to that aspiration⁶². The existence of a discrete right to a speedy trial whether derived from the earliest origins of our legal heritage or from some immediate source was rejected by the majority⁶³.

⁵⁸ *Herron v McGregor* (1986) 6 NSWLR 246 at 252-253 per McHugh J.

⁵⁹ *R v Climo* (1986) 7 NSWLR 579 at 583.

⁶⁰ *Clayton v Ralphs & Manos* (1987) 45 SASR 347 at 369.

⁶¹ *Jago v District Court (NSW)* (1989) 168 CLR 23 at 41-42 citing *Institutes*, Bk 2, Ch 4, s 108, p 81a.

⁶² *Jago v District Court (NSW)* (1989) 168 CLR 23 at 42.

⁶³ *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34 per Mason CJ, 53-54 per Brennan J, 62 per Deane J, 63 per Toohey J, 78 per Gaudron J.

The restrained references to Magna Carta in the Commonwealth Law Reports are an incomplete account of the role of Magna Carta in the day to day work of the courts. No document is more beloved by self-represented litigants, albeit the claims made for it by them are almost always legally and historically flawed.

Among the repeated claims made for Magna Carta is that the parliament cannot repeal it or enact a law inconsistent with it. In law, Magna Carta has no status protecting it from repeal. In England, almost every chapter has been repealed. So, too, in those Australian jurisdictions which have enacted Imperial Acts Application Acts. Nonetheless, the belief in the inviolability of Magna Carta holds fast. The argument was first rejected by the High Court as not calling for serious refutation in 1905⁶⁴. More recently, it was rejected by Justice Hayne in 2000⁶⁵.

A close second to the cases in which laws are challenged on the ground of their inconsistency with Magna Carta are the cases in which self-represented litigants assert that paper currency is invalid. The argument is founded on the references in Magna Carta to money made before the appearance of paper currency. The claims arise in a variety of ways and, again, their repeated rejection does not deter their proponents. In the 1980s, when one Mr Cusack sought to lodge his nomination as a candidate for election to the Commonwealth Parliament the returning officer explained the requirement that candidates lodge \$250 with the nomination. Mr Cusack commenced

⁶⁴ *Chia Gee v Martin* (1905) 3 CLR 649; [1905] HCA 70.

⁶⁵ *Fyffe v Victoria* (2000) 172 ALR 336; 74 ALJR 1005; [2000] HCA 31.

proceedings contending the requirement was unlawful. He argued that the *Reserve Bank Act* 1959 (Cth) and the *Currency Act* 1965 (Cth) were invalid because each was inconsistent with Magna Carta, or the Bill of Rights, or both. The argument was rejected as like arguments had been on earlier occasions⁶⁶. Nine years later, Justice Dawson rejected a similar argument which was invoked on that occasion by way of resistance to an order to pay costs⁶⁷.

The range of claims constructed on Magna Carta by litigants who are without legal representation is eloquent of its emblematic place in our collective consciousness. A few years ago, a bench of five judges of the Court of Appeal of Victoria was constituted to determine whether the ancient institution of the Grand Jury should be summonsed to inquire into whether Freemasons were conspiring to administer unlawful oaths. It is the stuff that excites the imagination of legal studies classes at school. In the event, the proceeding was dismissed as hopeless; despite the extensive reference to Magna Carta on which the argument was founded⁶⁸.

The attachment of persistent, querulous litigants to a view of Magna Carta that is wholly divorced from history and precedent is apt to make judges start at the very mention of it. Nonetheless, as a community we are right to celebrate Magna Carta as "a foundation stone of our democracy". That is how Prime Minister Abbott described the Magna Carta in a speech given at Magna Carta place in

⁶⁶ *Re Cusack* (1985) 60 ALJR 302 at 303-304 per Wilson J.

⁶⁷ *Re Skyring* (1994) 68 ALJR 618.

⁶⁸ *Re Shaw* (2001) 127 A Crim R 440 at 447[16].

Canberra on the occasion of the 800th anniversary of its sealing⁶⁹. The fact that we have a Magna Carta Place in our national capital is a reflection of the constitutional significance which we attribute to the document and the value we place on our common law heritage.

The Prime Minister's focus was upon the charter as a watershed in England's history establishing the rule of law, upon which all human rights depend.

Historians will explain that Magna Carta was not purporting to do more than to restore rights that were understood to have existed since time immemorial. And they will explain that it was not novel, its drafting reflected provisions of the coronation charter of Henry II. And they will explain that comparable charters were issued by princes in other European states in the medieval period⁷⁰. Acceptance of this history does not detract from the symbolic power of Magna Carta or the correctness of the Prime Minister's view of its constitutional significance.

Unlike the European charters, the Magna Carta did not cease to have force over time. Lawyers in Tudor England may have seen little upside in invoking Magna Carta before the royal courts, but it

⁶⁹ The Hon Tony Abbott, *Magna Carta Lecture*, Address delivered at Parliament House in Canberra, 24 June 2015. Transcript available at <https://www.pm.gov.au/media/2015-06-24/magna-carta-lecture-parliament-house-canberra-0>.

⁷⁰ Professor Brand, *Magna Carta and the Development of the Common Law*, High Court Public Lecture delivered at the High Court in Canberra on 13 May 2015. Transcript available at <http://www.hcourt.gov.au/assets/publications/speeches/lecture-series/Brand-Magna-Carta-and-the-Development-of-the-Common-Law-May15.pdf>.

remained part of the fabric of the common law. Its muscular invocation in the early seventeenth century, albeit based upon an incomplete appreciation of history, was nonetheless part and parcel of the orthodox development of the common law.

As Lord Bingham has observed, sometimes the myth is more important than the actuality. Lord Bingham was approving of the myth of Magna Carta as one that serves as a rallying point when governments propose some curtailment of rights understood to be rooted in it⁷¹. As I hinted at the outset, I am in Lord Bingham's camp. To my mind it is no bad thing that we take as part of our common law heritage the understanding that ours is a polity which accords rights, the legitimacy of which can be traced back over eight centuries, to all within the reach of its courts.

⁷¹ Bingham, *The Rule of Law*, (2011) at 12.