

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

800TH ANNIVERSARY OF THE SIGNING OF MAGNA CARTA

JUSTICE RICHARD REFSHAUGE

15 JUNE 2015

I acknowledge the traditional owners of the lands on which we are meeting and pay my respects to their elders past and present and to the continuing contribution they make to our culture.

Eight hundred years ago today King John of England affixed his seal to a large document of parchment beside a sodden Thames River at Runnymede. Thanks to years of unsuccessful foreign policies and heavy taxation, the King was facing a rebellion by the country's powerful barons. In short, the barons had had it. They threatened King John with war and captured London in May 1215.

King John, like most politicians, decided that negotiation was the idea of the day. He brokered a political compromise with the band of rebellious barons and entered into the treaty with them "in good faith and perpetuity". This parchment treaty became known by its Latin name as the Magna Carta because of its size, not its significance and to distinguish it from the shorter Charter of the Forest.

That description of what happened shows the falsity of one of the few jokes about Magna Carta, all very weak.

Question: Where was Magna Carta signed?

Answer: At the bottom.

It was, of course, not signed but sealed by the King's great seal.

Despite our octocentenary celebrations, the Magna Carta did not actually last very long. On 24 August, Pope Innocent III, at King John's urging, declared the Charter null and void on a basis that would be entirely unexceptional to a modern lawyer,

namely that it was entered into under duress (*Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 46).

That led to war and the war of the Barons lasted from 1215 to 1217.

God, however, did not smile on King John and he died just over a year later on 19 October 1216.

The annulment of the Magna Carta and the death of King John did not, however, see the end of the agreement or the ideas enshrined in it and John's eldest son, Henry, then nine years old, re-issued the Charter on 12 November 1216 as an affirmation of the new King's future good government. On this occasion, it was sponsored by a Papal Legate so acquiring explicit Papal approval. The text, however, had been significantly modified to remove, in particular, the chapters that most directly challenged royal sovereignty.

In 1225, Henry III confirmed the Charter but this version differed even more from the original, reducing the sixty-three chapters down to just thirty-seven. The 1225 edition was re-issued from time to time; it was re-issued in all forty-four times in the next 200 years. Most significantly it was re-issued in 1297 when it was the first to be copied on to the official "Statute Roll" thereby making it a statute and its thirty-seven chapters the definitive text under English law.

Edward the First, who affixed his royal seal to that latest version on 12 October 1297, made it an integral part of the law. Having affixed his seal, copies were distributed throughout the land and by Letters Patent he directed his justices to administer the Charter as common law. No judgements were to be given henceforth that were contrary to the Charter and so Magna Carta, whether as common law or as statute, entered the law of the land as part of the law of England from that time forward and became part of the law of all those Imperial colonies and possessions to which English law was carried. Despite the manifold references to the 1215 original, it is the 1297 edition which is the real statutory power in force in the UK and more widely in the Empire that England created.

As a result, it became Australian law inherited from the United Kingdom. What remains of the 1297 edition is now part of Australian Capital Territory law and can be seen on our Legislation Register.

Gradually over time, provisions of the Magna Carta, were repealed or fell into disuse. By 1965, only nine chapters remained in force in the UK as to which five were not applicable in Australia, four were obsolete or superseded leaving one, chapter 29 (originally chapter 39) as part of the law of Australia. By 2015, only three remained in force, in the UK itself, two not being applicable to Australia, the third being chapter 29.

In 1973, the then Law Reform Commission of the Australian Capital Territory considered that this chapter, alone of the provisions of the Magna Carta, should be preserved. It commented that “its value is ... said to be ‘chiefly sentimental’, but this may be an exaggeration; does not the Crown’s promise not to ‘defer’ justice or right to any man, make unlawful and unreasonable delay by the executive in rendering his due to his subjects? Whether that is so or not, we think that this provision should remain in force, and should not be restated in modern terms”.

By a rather convoluted legislative history, then, in our statute law, Magna Carta, 1297 now appears with the sole provision which, relevantly, provides in words that have been quoted many times over the years:

No free man shall be taken or imprisoned, or disseised of his freehold, liberties or free customs, or be outlawed or exiled or in any otherwise destroyed; nor will we pass upon him nor condemn him, but by lawful judgement of his peers or by the law of the land.

We will sell to no man, and we will not deny or defer to any man, either justice or right.

That, however, is by no means the sum total of Magna Carta. It is, as one commentator has it, a brand and, as such it is not just the sum of its parts. It is about

rights, freedoms and the rule of law, even though a textual analysis would not support that.

It is interesting that our celebrations this year are about an Act which deals with human rights. In recent history, the only other Act which has been celebrated in such a way was when, last year, we celebrated the tenth anniversary of the passing of the *Human Rights Act 2004* (ACT). Even when we celebrated the Centenary of Federation, the focus was on the creation of the Commonwealth and the coming together of the colonies rather than the Constitution.

This has, perhaps, much to say about the resonance of rights and liberties in the civic consciousness that these should be statutes which we specially acknowledge.

It is to the Magna Carta, and its influence, that I then turn.

It is a daunting task. I am conscious of the implications of what Lord Sumption, of the UK Supreme Court, said earlier this year when he commented

It is impossible to say anything new about Magna Carta, unless you say something mad. In fact, even if you say something mad, the likelihood is that it will have been said before, probably quite recently.

As his Lordship continued, “You must not expect any startling new line from me, at least of all in a centenary year to which something portentous is said about Magna Carta every day”. That is indeed applicable to what I will say.

It seems to me that the most important thing about Magna Carta is a word that came into our lexicon of legal descriptions in 1997 with that fine docudrama “The Castle”. That is to say, “The Vibe”.

The continuing significance is not so much the text itself but what Sir Gerard Brennan called the “beneficial misinterpretations – indeed the myth” with which the Charter has been invested down the years. We Australians, with our no-nonsense and iconoclastic approach to life and, perhaps, the law, probably prefer “the vibe” to

“the myth.” So Magna Carta came to stand for the rule of law, limits on authoritarian rule, government subject to law and the rights and liberties of citizens.

Textually, the document was not a democratic document; indeed, in some ways it could be called reactionary. It was certainly thoroughly feudal.

Thus, from its heartfelt plea for “standard measures” of wine and ale “throughout the kingdom” (perhaps not too alien a plea to Australians) to its ruminations on what should happen to a man’s fortune should he die while in debt to the Jews, the medievalism of the document sings through its 63 chapters.

It had, however, an unintended genius. For all its medieval quiriness, the Magna Carta had a universalist heart that still beats today.

The principal effect was that it limited the sovereign’s power and this, more than perhaps anything else, has given rise to the enduring attributions to the Magna Carta as the source, at least in the underlying principles, of those subsequent institutions which have limited executive power: parliament, the writ of habeas corpus, trial by jury, freedom from summary arrest and imprisonment. It started the process of carving out space for what would become civil society. It may also be said to have begun the effort of codifying the law in a rational way.

It became a major influence on the making of the Bill of Rights 1689 which guaranteed freedom of speech, a free press, freedom from excessive bail and freedom from cruel and unusual punishments.

We owe much to one man for this, the judge and politician Sir Edward Coke who became Chief Justice of the Court of King’s Bench in the early 17th Century. Despite his prodigious learning, he had a rather irascible disposition and fell out with King James the First as a result of that king’s interference in the workings of the courts. He became an implacable opponent of the Stuart kings and their supposed Divine Right to Rule. Indeed, Lord Coke was dismissed in November 1616. Nevertheless, he is said to have transformed Magna Carta from a somewhat technical catalogue of feudal regulations into the foundation document of the English Constitution which

status it has since then largely enjoyed. He even regarded it as the source of those bulwarks that protect the citizenry from governmental autocratic oppression, namely the writ of habeas corpus and the right to trial by jury. That, historically, neither of these claims can be substantiated, does not dilute the importance of such mechanisms and to which a mere reference to “Magna Carta” is sufficient to establish. Thus, Lord Coke defined in the words of Magna Carta three enduring fictions:

1. He took the provisions which protected a man’s “liberties”, which actually meant his privileges and immunities, and treated them as referring to the liberty of the subject which, according to him, resulted in all invasions of personal liberty by the Crown being unlawful.
2. He suggested that Magna Carta was the origin of parliamentary sovereignty, although no parliament existed for half a century after it was sealed.
3. He asserted that Magna Carta prevented the exaction of money by the Crown without consent although the only chapters dealing with taxation in the Charter had been removed by 1297.

Similarly, it has been said to have affirmed the right to trial by jury when that did not then exist and trial by battle or ordeal was the order of the day.

Again, it has been said to be the source of habeas corpus, a writ, however, which did not exist for another 200 years.

Lord Coke would not have found much jurisprudential comity with the originalist school of constitutional interpretation so ably represented in the US Supreme Court of which Justice Scalia is so robust and effective a proponent.

Perhaps, overarchingly, the Charter legitimately did stand for the supremacy of the law over the Crown and, therefore, the other organs of government and, in this sense, it was a very important vibe.

There is no doubt that Magna Carta has had wide influence. Indeed, it has been called the foundation of human rights, the father of all constitutions, the basis of the civil liberties of a free and democratic society, the bedrock of democracy.

If that shows some signs of hubris, it accurately depicts the strength of the vibe that it has generated.

Even school children are infected by its vibe, though not always as accurately as we would perceive it. As one examinee explained “Magna Carta said that no man should be hanged twice for the same offence”. This is an interesting interpretation of the doctrine of double jeopardy, also apparently sourced to Magna Carta without a textual basis, but, no doubt, the same vibe.

Certainly, its tenor is well able to be seen internationally. It was the inspiration for the French Declaration of the Rights of Man and Citizen (1789). It was used by the founding fathers of the United States of America in drafting the constitution of that great nation and, in particular, its Bill of Rights (1791). It was influential in the creation of the Universal Declaration of Human Rights (1948). It was a basis on which was created the European Convention on Human Rights (1950). It has been seen as an important fundamental source of the Basic Law of Hong Kong (199).

Nelson Mandela referred to it from the dock during the Rivonia trial of 1964 and German-born composer, Kurt Weill based a cantata on it. In Tianamen Square, some of the pro-democracy protesters sourced it as one of the western pillars of democratic freedoms.

Australia is, of course, fortunate to have a copy of one of the sealed copies of the Charter of Edward I, the one apparently intended for the County of Surrey. It is now to be found in Parliament House. On 12 October 1997, the 700th anniversary of that document, the commonwealth named Magna Carta Place, Langton Crescent in this city as another expression of the debt we owe to the principles attributed to and generated by Magna Carta.

If the politician who said that some of the people now born were to live to 150 years old is to be believed and if I am one of those people, I will be present in my last year at the celebration of the 800th anniversary of that document.

It remains a living document. Indeed, so far as the researches of the Chief Justice's associate have managed to uncover, it has been referred to in ten decisions of this Court since 1997 including as justifying a right not to be held or punished except according to law, a right to a fair trial, the powers of a sheriff and the right to due process, a fair hearing and a fair trial. One of the first of these references was made by Justice Gallop in *Paramasivan v Flynn* [1998] ACTSC 10 and I am delighted that the Honourable John Gallop has joined us for this ceremony today.

In none of those decisions was the reference to Magna Carta determinative, however, and it seems to me unlikely that it would be a sure foundation for many decisions for which, in any event, the common law and other statutes now would provide more definitive authority. This is not dissimilar to the experience in the United Kingdom where, since 1900, Magna Carta has been cited in nearly one hundred and seventy judgments but, in almost every case, it has been largely rhetorical and, Lord Sumption commented, "On the rare occasions when the court has been presented with a case in which it might actually make a difference, the judges have shied away".

It has been referred to in the High Court of Australia a number of times, but in none that I could discover was it used to decide a point in contention, mostly being used for historical purposes and to set out the kind of principles to which I refer below.

In America, however, perhaps because of the circumstances of its birth as a nation and the influence Magna Carta clearly had on that country's Constitution and Bill of Rights, it has had much greater effect. The due process clause of the fifth and fourteenth amendments are based on the surviving article as interpreted by Lord Coke. In 1991, it was calculated that Magna Carta had been cited in more than nine hundred decisions of State and Federal Courts to that date and in more than sixty Supreme Court decisions in the previous half century. I am not sure whether the originalists have contributed to this or not.

Nevertheless, it is the vibe which is so important. It is a catchcry for the protections that the law has given citizens from arbitrary oppression that attempts to stay the hands of overzealous politicians and governments rather than the actual provisions which are now better and effectively enshrined in more manageable legislation such as the *Human Rights Act 2004* (ACT). There can be no doubt that its influence has been the source of much common law and the incentive for many of the statutes that protect our human rights.

As Lord Bingham of Cornhill observed, when eschewing the possibility of enforcing a medieval statute in modern times

The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality.

Thus, it is important as an inspiration for a whole range of principles such as the supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, the separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

It is, therefore, appropriate that today marks also the start of Refugee Week where we pay attention to those who, by definition, have had the rights that we enjoy, stripped away, and who seek the protection of those nations that respect liberty, tolerance, democracy and the recognition of the dignity of each human being.

It seems to me that Sir Gerard Brennan when speaking at the naming of Magna Carta Place in Canberra on 12 October 1997, summed up in words that I could not better, the influence of Magna Carta. His Honour, said

Above all, Magna Carta has lived in the hearts and minds of our people. It is an incantation of the spirit of liberty. Whatever its text or meaning, it has become the talisman of a society in which tolerance and democracy reside, a

society in which each man and woman has and is accorded his or her unique dignity, a society in which power and privilege do not produce tyranny and oppression. It matters not that this is the myth of Magna Carta for the myth is the reality that continues to infuse the deepest aspirations of the Australian people. Those aspirations are our surest guarantee of a free and confident society.

It is appropriate that, with clear eyesight about what we now celebrate we should be ever grateful that we have a lodestar by which to ensure the health of our society by the virtue of a document which allows us to protect our freedoms, limit improper incursions on them, enshrine the rule of law in our thinking and our actions and to ensure that the rights of individuals are celebrated and nurtured.

We should, however, bear a warning amidst the excitement of our celebrations, for the rights and freedoms we celebrate are not necessarily secure. They require constant protection and support. As the eminent jurist, Sir William Blackstone, commented centuries ago, “the body of the charter has unfortunately been gnawed by rats” We must not let our fears, our alienation, our selfishness, our xenophobia, or our smugness allow our leaders to take up the task that the rats left unfinished.

It is entirely appropriate that this Court should celebrate and honour that for which Magna Carta stands. It is that for which this Court stands and which all of its judicial officers past and present have sought to deliver as day by day they toil in the provision of justice according to law.

I am honoured to have been a part of this important ceremony.