National Access to Justice and Pro Bono Conference, Sydney

18-19 June 2015

***The role of the Magna Carta in a modern constitutional democracy*:**
Discussion on the English and Aboriginal perspectives on the relevance of the Magna Carta in modern constitutional democracies

Justice Debbie Mortimer, Federal Court of Australia

1. I've chosen to explore three aspects of Magna Carta in its historical context, attempting to draw some connections to contemporary legal issues facing the Australian community, in particular issues of access to justice and equality.

2. I then also look briefly at some circumstances in which Magna Carta has been invoked in Australian domestic law, again as the basis for some observations about why we look to this 800 year old document for inspiration about fundamental rights.

3. The plethora of speeches, writings and presentations about Magna Carta in its 800th anniversary year mean that not only is it impossible to say anything very original, it's also quite a task to examine the spectrum of opinions about its significance.

4. I confess to my place on the spectrum being not too far removed from Lord Sumption, whose closing observations in a speech he gave about Magna Carta went like this:[1]

> *We are frighteningly ignorant of the past, in large measure because we no longer look to it as a source of inspiration. We are all revolutionaries now, controlling our own fate. So when we commemorate Magna Carta, perhaps the first question we should ask ourselves is this: do we really need the force of myth to sustain our belief in democracy? Do we need to derive our belief in democracy and the rule of law from a*

[1] 'Magna Carta Then and Now' (Address to the British Library, London, 9 March 2015).

> *group of muscular conservative millionaires from the north of England, who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not*.

5. I rather hope not too, especially when we live in a community governed by very different constitutional arrangements, whose community traces its heritage to all parts of the world and to the United Kingdom in increasingly smaller proportions. I rather hope that where our community has much older traditional law and customs in this very land, if we want to look to the past for inspiration, it might be time for the whole of the Australian community to become better educated and informed about the customs and traditions existing for thousands of years here in this nation, and to be inspired by those, rather than what happened, or didn't happen (depending on your level of skepticism) at Runnymede 800 years ago.

6. Having confessed to my place on the spectrum, there are three aspects of Magna Carta I've chosen to draw to your attention:
   - its character as a written document;
   - its exclusionary terms, and its focus on freemen; and
   - its recognition of consultation.

7. Much of what I say about Magna Carta in this part is based on a number of secondary sources, which I've noted in the written paper, whose authors display a level of scholarship and knowledge about this subject matter well beyond my own.[2]

Character of Magna Carta as a written document

8. Magna Carta was a written grant of liberties. The form which it took was a form of grant which had become familiar at least since the donation of land to the Christian Church had become

---

[2] See A Arlidge and I Judge, *Magna Carta Uncovered* (Oxford Hart Publishing, 2014); Lord Sumption, above n 1; E Jenks, 'The Myth of the Magna Carta' (1904) 4 Independent Review 260-273; Lord Neuberger, 'Magna Carta and the Holy Grail' (Address at Lincoln's Inn, London, 12 May 2015); P Brand, 'Magna Carta and the Development of the Common Law' (Paper related to a presentation given for the High Court Public Lecture series, at the High Court of Australia, Canberra, 13 May 2015); J Spigelman, 'Magna Carta in its Medieval Context' (Address at the Supreme Court of New South Wales, Sydney, 22 April 2015).

regular practice, with such grants being recorded in what was called in Anglo-Saxon a 'boc', and in Latin a 'carta'.

9. Several commentators have noted that it was eventually called the 'Great' charter, not because of its perceived importance, but because of its size in comparison to what was at the time another contemporary and significant document – the Charter of the Forests.[3] Issued on the same day as Magna Carta was reissued in November 1217, after the death of King John, the Charter of Forests dealt with the very large tracts of land held by the King as 'royal forests' and which were subject to regulation by the King himself, until the Forests Charter. Arlidge and Judge note[4] that like Magna Carta, the Forests Charter was reissued in 1225 and entered into the statute book in 1297: eventually parts of it became the *Wild Creatures and Forest Laws Act 1971* (UK) c 47.

10. The Forests Charter concerned land holdings in the forests, passage through the forests, the rights to hunt for and kill animals, clearing for pasture, and punishments for poaching. It is at this point I could legitimately start talking about Robin Hood, but I refrain.

11. Although styled as a grant of liberties Magna Carta was, as many have pointed out,[5] a political settlement: a set of promises from a weakened King to appease and placate a set of barons who were powerful and angry enough to remove him from the throne. It has been characterized by some[6] not as a compact introducing a new world order governed by the rule of law but a compact to return to the way the rebel barons considered England was governed in Anglo-Saxon times before the Norman Conquest. Clause 61 embodied that aim:

> *We have granted all these things to God for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons and … we desire they shall be enjoyed in their entirety with lasting strength for ever*.

---

[3] Lord Neuberger, above n 2, at [18].
[4] Arlidge and Judge, above n 2, at 100.
[5] See for example Arlidge and Judge, above n 2, at 22.
[6] See for example Arlidge and Judge, above n 2, at 23.

12. The significance of a carta – as a grant – was in the act of writing something down, and signing or sealing it or putting one's mark on it, so as to provide evidence of a grant or gift, usually of land. The presence of an assembly of people identified as 'notables', who might 'recognize', 'witness' or 'advise' on the document was regarded as validating the gift.[7]

13. This is in contrast to the oral customs and traditions of the first peoples of Australia, but it seems to me if we want to examine the circumstances in which Magna Carta emerged, and was then reissued and preserved, eventually to become a statute, it is worthwhile emphasizing the symbolic and legal significance which was seen to attach to a gathering of persons with power and authority – the 'notables' – so as to witness and attest to the formal grant and recognition of laws, rights and interests.

14. A ceremony of that kind, culminating in a document or 'carta' was seen in 1215 as critical to the success of the political compact it represented. No less in 2015, when we are as a nation considering how we can do better in recognizing the first peoples of Australia and ensuring they, their culture, customs and traditions have a rightful place in our governance and in our lives, we should recall the importance that attached to the written instrument, and the witnessing of it by those on all sides recognized to have authority and speak for others.

Magna Carta's exclusionary terms and 'freemen'

15. Before we get too dewy eyed about Magna Carta it is as well to keep firmly in mind the parties to the political settlement it embodied – the King, the barons, with the English Church and its influential leaders as a key player in the political life of England at the time as the first entity acknowledged in cl 1. Magna Carta was an accommodation between those with power, in order to preserve their own interests. Many of the justice clauses were designed by the barons to preserve and protect their own rights and interests in the way claims they might have could be dealt with by the King.

---

[7] Ibid at 21.

16. Clause 1, which focuses on the freedom to be given to the Church , ends with:

> *We have also granted to all the free men of our realm for ourselves and our heirs for ever, all the liberties written below, to have and hold, them and their heirs from us and our heirs*.

17. The grant is to the barons themselves, and their heirs, for themselves. It was not an altruistic document. It is no Universal Declaration of Human Rights.

18. The reference to "freemen" reflects the prevailing situation in the 13th century that freedom or liberty was not available to all but was something to be granted. Many people were enslaved or in service, beholden in all ways to the dictates of others.

19. Writs existed to compel the apprehension and return to a lord of a person in bondage to the lord.[8] Many of the obligations of service, and the exercises of power and control, revolved around the use and possession of land. Some estimates have put 'freemen' at the time of the Charter, or thereabouts, at about 1/7th of the population.

20. The category of 'freemen' did extend beyond the barons, knights, earls or clergy, and there were men who fell into this category who were poorer, but nevertheless held land on a personal basis without being in a feudal relationship with another over the land.[9]

21. There was nothing seen as inappropriate or unjust about servitude. Bracton, who was writing at a time not long after Magna Carta was first issued, described and justified servitude in the following way:[10]

---

[8] Ibid at 48.

[9] See generally Arlidge and Judge, above n 2, at 46-47.

[10] Ibid at 48, quoting H de Bracton, *The Laws and Customs of England*, (S Thorne trans, Belknap Press, 1977), at 30 [trans of: *De legibus et consuetudinibus Angliae*].

> *an institution of the jus gentium (law of the peoples, universal to all) by which contrary to nature one person is subjected to the dominion of another … from ancient times it was the practice of princes to sell captives and thus preserve rather than destroy them*.

22. By 1225 Magna Carta is reissued for the fourth time and becomes a statute in the law of England, issued in perpetuity under the seal of the young Henry III, in return for confirming the King's security over certain territory (Gascony) and the payment of levies for the defence of the realm in the enormous sum of 40,000 pounds[11] – thus securing revenue to the Crown in exchange for the promise of freedoms.

23. The 1225 Charter, in its *Preamble*, grants the liberties contained in it to all men, not just freemen. But still, in the *operative* cl 1, the liberties are granted only to freemen. We thus have, as between a preamble and the operative text of an instrument, a constructional choice.

24. By the mid-14th century, with the development of the great council to advise Henry III (reigning as a minor) and the beginnings of Parliament, and with that body bargaining for the supply of money to the King through securing liberties and freedoms in various Charters, including Magna Carta, protections such as trial by peers (in cl 29 of the 1225 Charter) were extended to all men, not just freemen.

25. It is unnecessary for me to make the obvious point that, even with this extension, the legal rights and interests available to those living in the 14th century varied with land holdings, class and no doubt other matters.

26. It is worth asking, it seems to me, why when our own laws have equality of treatment for all people before the law as an operating principle, we need to find comfort in a document which, while it may well also speak to the importance of the rule of law, does so in such an unequal fashion. For my part, I think we can do better when we look for inspiration.

---

[11] See generally Arlidge and Judge, above n 2, at 106.

27. That is before we reach the subject of women, to which I now turn. We need stay only briefly on this topic because women were almost absent from Magna Carta. One can accept, as some commentators have pointed out, that certain clauses mention widows. Indeed some commentators, such as Professor Paul Brand, have said this is indicative of Magna Carta being generally intended to benefit women as well as men – for my part, I would take some persuading about that.

28. Dr Carolyn Harris has pointed out [12] that in 1215, an Englishwoman could be betrothed at seven and married at twelve. While betrothal in 1215 was void unless the bride gave her consent when she reached puberty, Dr Harris points out (with examples) how familial and social pressure had a strong influence on whether a woman consented to a marriage. We do not have to go so far from here in 2015 to find examples of that still occurring.

29. As Dr Harris points out, once a thirteenth century Englishwoman married, her property legally belonged to her husband, though the bridegroom was expected to provide a marriage portion for the maintenance of his wife throughout her lifetime. The sharing by a woman of her husband's legal identity meant a married woman could not testify on her own behalf in court in the majority of circumstances. The widows' provisions in Magna Carta were, as Dr Harris points out, related to noblewomen and were necessary because King John and King Richard had repeatedly interfered with the marriages of heiresses and wealthy widows so as to increase their incomes and reward their supporters. Dr Harris continues:

> *During the months Richard spent in England raising funds for the Third Crusade in 1189-1190, guardianship of noble heiresses were sold to the highest bidder to finance his expedition to the Holy Land. These guardianships were bought by ambitious men who intended to marry the heiresses themselves. John also sold the guardianship of noble heiresses to*

[12] See C Harris, 'Women and Magna Carta' (9 December 2013), http://www.magnacartacanada.ca/women-and-magna-carta/.

> *pay his military expenses, as he spent much of his reign at war with King Philip II of France.*

30. Now of course, we can say – well, that is simply one aspect of the historical context of this document that you must put to one side. My question, in a similar vein to Lord Sumption, is why do we need to look back to, rely upon, and admire, a compact that embeds such inequality? Can we not do so much better than that by appealing to values, including legal and normative values of equality, which have been stated and restated in the 20th and 21st centuries?

The attempt at a consultative body

31. A fleeting but important attempt was made in the 1215 charter by the barons to create a body which could enforce what the King had promised through Magna Carta.

32. This 'community of the realm', embodied in cl 61 of Magna Carta was to operate thus:

> *The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.*
>
> *If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us – or in our absence from the kingdom to the chief justice – to declare it and claim immediate redress. If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured*

> *such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us.*
>
> *…*
>
> *In the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these were all present or some of those summoned were unwilling or unable to appear.*

33. This mechanism disappeared in the 1216 Charter and was not revived.[13]

34. There were other clauses in the 1215 Charter which envisaged the need for authorisation by a body (comprised of course of the powerful – the barons, the earl, the Church) before payments in lieu of military service[14] could be imposed or before other forms of taxes could be levied (cll 12 and 14). Clause 14 contemplated written summonses to the barons, on notice, to convene meetings to approve the payments in lieu or taxes.

35. Clause 14 did not appear again in express terms in the reissued charter, although as James Spigelman notes[15] in Edward I's Confirmation of 1297, in cl 6, there was express statement that certain kinds of taxation, including aids (of which cl 14 spoke) would not be imposed unless there was 'common consent of all the realm and for the common profit thereof'.

36. However it was only a few years after the 1215 Charter and after the death of King John and the ascension of Henry III, still a minor, that great councils of the realm were summoned by the regent William Marshall in order to approve decisions, and over the next few decades a more representative form of the council developed,[16] although still held on an ad hoc basis until at least the 14th century.[17]

---

[13] Brand, above n 2, at 9.

[14] Namely: scutage.

[15] Spigelman, above n 2, at 38.

[16] See Arlidge and Judge, above n 2, at 105.

[17] Professor Brand describes it thus (above n 2, at 16): "the continuing bargain between the ruler and his (or her) subjects (initially extorted at the point of a

37. James Spigelman[18] characterizes the restrictions in Magna Carta of the King's rights to generate revenue, and restrictions in the Forests Charter, as the major constitutional contribution of these charters, in that they laid the foundation for the notion of consent, or at least assent, from an assembly of people – admittedly far from representative certainly at the start, but nevertheless acting as a control on prerogative power, and importantly establishing the bargain of the promise of supply for expenditure by the King through taxation, in return for the promulgation of enforceable rights and liberties available to the people. Or at least, some of the people.

38. This focus on the contribution of the 1215 Magna Carta to the development of the convention, at least, of consultation with a representative body before important decisions for the nation are taken could lead into general endorsement of the importance of Magna Carta, and other events in the 13th and 14th centuries, to the development of parliamentary democracy. So much can be recognized.

39. More appropriately in terms of current debate in Australia, what this aspect should also lead into, in my opinion, is to an understanding of how fundamental the notion of consultation and assent – if not consent – is to good governance.

40. As the Australian community asks itself what is the right way to recognize and give voice to our nation's first peoples, we should remind ourselves that, in 1215, the start of new relationships between those who would exercise power, and those affected by its exercise, involved consultation and assent. It involved recognizing that to expect allegiance, and loyalty, a seat at the table should be given.

---

sword from an unwilling King John but subsequently freely granted by his son and his grandson in return for their subjects' loyalty and taxes) which placed the king and his officials (the government) under the control of the law and of legislative restraints on their power. And within a generation of 1215 there had begun the slow process towards making all taxation and all legislation matters requiring parliamentary approval … and towards giving the representatives of local communities … a say in parliament."

[18] Spigelman, above n 2, at 35-36.

Use of Magna Carta in Australian law

41. It is not difficult to find references to arguments relying on Magna Carta in a variety of Australian jurisdictions, including in very recent times. In some of the discussions, the proposition that only three articles of Magna Carta remain on the English statute book – cl 1 (securing the freedom of the Church); cl 9 (securing the freedoms and liberties of the City of London) and cl 29 (now the most famously invoked, combining the original cl 39 and cl 40) – has been a little lost.

42. Magna Carta has been used to challenge the making of a sequestration order in bankruptcy proceedings on the basis that the Registrar had no authority to make the sequestration orders because he did not adhere to a principle established by cl 29 of Magna Carta that a person was entitled to lawful judgment by their peers.[19]

43. It has been used to defend charges of unlawful trespass, willful obstruction and obstruction of a police officer by an argument to a WA Magistrate that the Magistrate should afford the accused a trial by jury as was his right under cl 29 of Magna Carta, which had been received in WA law.[20] While accepting the reception of Magna Carta in WA law as part of the statutes of the Parliament of the United Kingdom of general application in force on 1 June 1829 which were inherited into the law of Western Australia if they were suitable for local conditions,[21] you may not be surprised to hear that Commissioner Sleight of the WA Supreme Court found the provisions of the *Criminal Code* (WA) to have overridden cl 29, even if it was to be construed as the accused suggested.

44. In 2013 a man was convicted in the Magistrates' Court of Victoria and subsequently in the County Court of Victoria of driving in excess of the speed limit on two occasions, the first on 11 April 2008 and the second on 16 April 2008. On both occasions, the speeding was detected by a traffic camera and

---

[19] *Ledger Acquisitions Australia MB Pty Ltd v Kiefer* [2014] FCCA 2216 at [60] ff.
[20] *Jackson v Police (WA)* [2014] WASC 72.
[21] *Jackson v Police (WA)* [2014] WASC 72 at [20]-[21], relying on *Quan Yick v Hinds* (1905) 2 CLR 345 at 356 per Griffith CJ and *Rogers v Squire* (1978) 23 ALR 111 at 116.

infringement notices were issued. Although the man was not the owner of either car (both were rental vehicles), he was identified by the rental car owner as being in charge of the vehicles at the relevant times. Having lost his appeal in the County Court of Victoria, he pressed on to the Supreme Court of Victoria.[22] He had many arguments against his conviction, against the use of speed cameras and against the issue of infringement notices. Among them however was a contention that the County Court judge had not allowed him to present his defence based on Magna Carta.

45. He wanted to say that cl 38 of Magna Carta which provided:

> *(38) In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.*

meant that he could not be convicted by production of a speed camera photograph and a certificate verifying the accuracy of the photograph.

46. This, I note, is one of the clauses that has dropped off the statute book, but perhaps that is one of these technical lawyerly points one should avoid.

47. The part of the exchange with the County Court judge the man complained about went like this:

> *APPELLANT:* *I'd assert that within section 38 or Part 38 or Charter 38 of the Magna Carta*
> *HIS HONOUR:* *Don't start quoting the Magna Carta that's ...*
> *APPELLANT:* *I think it's relevant.*
> *HIS HONOUR:* *There's a lot of illusions about the Magna Carta and one of them is that it's some sort of constitution that still has application and it's long since not the case.*

---

[22] *Macdonald v County Court of Victoria* [2013] VSC 109.

48. The Supreme Court found, quite rightly in my respectful view, that this extract together with what came before and after meant in fact the man had been *heard* on his Magna Carta defence. Clause 38 did not take this particular litigant any further in his appeal.

49. Magna Carta has been considered in the context of native title claims to possess land below the low watermark, said to be the point since which, by 'accepted law', the Crown cannot by executive act grant an exclusive fishery in tidal waters, nor can an exclusive fishery arise by prescription or custom after 1215.[23]

50. It has been relied on by McHugh JA as his Honour then was for the proposition that that Magna Carta recognized a common law right to a speedy trial,[24] a proposition relied on by the appellant in the High Court in *Jago v District Court of NSW*,[25] but not endorsed by Brennan J,[26] nor by Toohey J,[27] although that proposition was not entirely dismissed by Gaudron J.[28]

51. It has been extensively referred to recently by Bell J of the Victorian Supreme Court in *Antunovic v Dawson*,[29] a case concerning a challenge by a woman with a mental illness to her confinement under a community treatment order under the *Mental Health Act 1986* (Vic). In this case Bell J had no hesitation in describing cl 39 of Magna Carta as 'in force in Victoria' and as expressing 'the fundamental principle of the rule of law, formal equality before the law and freedom from arbitrary and unlawful interference with personal liberty.'[30]

52. In *Jago*, Toohey J made reference to the views of William Sharp McKechnie in his book, *Magna Carta: A Commentary on the Great Charter of King John* (2nd ed, 1914), at 395, one of

---

[23] *Commonwealth v Yarmirr* (1999) 101 FCR 171; [1999] FCA 1668 at [216]-[218] (Beaumont and von Doussa JJ); [525]-[543] per Merkel J.
[24] *Herron v McGregor* (1986) 6 NSWLR 246 at 252; *Aboud v Attorney-General (NSW)* (1987) 10 NSWLR 671 at 691-692, see also at 681-682 per Kirby P.
[25] (1989) 168 CLR 23.
[26] (1989) 168 CLR 23 at 29-32.
[27] (1989) 168 CLR 23 at 62-67.
[28] (1989) 168 CLR 23 at 78.
[29] (2010) 30 VR 355; [2010] VSC 377 at [25]-[45].
[30] (2010) 30 VR 355; [2010] VSC 377 at [45].

the commentators who sought to introduce a level of realism to examinations of Magna Carta, and depart from what such commentators see as the mythologizing of the charter by, preeminently, Sir Edward Coke. The passage quoted by Toohey J was:

> *This chapter ... has had much read into it that would have astonished its framers: application of modern standards to ancient practice has resulted in complete misapprehension.*

53. This is but a small part of what appear to be hundreds of cases where judges have had to deal with arguments, of rather astonishing breadth, based on Magna Carta.

54. I've spent some time on a sample of cases where Magna Carta has been raised, because it tells us a number of things.
    - The course of English legal history about Magna Carta, including the role played by Sir Edward Coke (about which I express no current view) has meant that the document, in one or more of its forms, has been seriously, and recently, considered as advancing arguments about the content of Australian law. Some judges see it as having continuing legal relevance.
    - That said, what has been written in judgments about Magna Carta might bear further scrutiny given the amount of scholarship produced about the Charter around the 800th anniversary – perhaps we are now better informed about the complications in understanding its meaning and significance.
    - A tangible number of people in the Australian community consider themselves entitled to resort to what they see as its protections in advancing claims in Australian courts.

55. For my part, what is interesting is why we feel it appropriate to look back to a 13th century document as a source of law in 21st century Australia.

56. One obvious answer is because it ***is*** a source of law. That is a consequence of the way this country was colonized by the English.

57. The second is perhaps equally obvious: a characteristic of common law systems is a search for continuity through precedent. Looking back to statutory statements from historical times serves a similar purpose. We look for enduring values and principles, and we do so by looking backwards. We see an ancient pedigree, and continuity, as assisting the legitimacy of the propositions we wish to rely on.

58. The harder questions are: do we need to? Should we? Just as in 1215 there were large parts of English society not touched by Magna Carta and whose lives changed not a jot because of it, so today, there is much work to do in order that people without power, without influence, who struggle to make ends meet, can access the law.

59. We won't solve those problems by looking backwards. Some of our access to justice problems are hindered, and not helped, by our predilection for looking backwards – to how a justice system used to work, to rules which used to be applied, in other ages and for other times.

60. Rather, we'll solve issues of access to justice, and the enforceability of the rule of law for all (not just the wealthy and the powerful) by drawing on the strengths, values and traditions of those who make up our community today – whether they be indigenous, Islamic or Buddhist or secular, rainbow or straight, or from one of the 200 birthplaces identified by people in the 2011 Australian census.[31] And by really listening to them, resourcing all sectors of our community well enough to tailor access to justice to contemporary needs.

61. Especially so when, unlike the barons, we are aiming to improve a justice system for all.

[31] http://www.racismnoway.com.au/about-racism/population/index.html