Magna Carta in Australia 1803-2015: The Power of a Myth and an Idea.

State Library of New South Wales

7th May 2015

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Introduction

The question I shall consider today is how is it that a classic English medieval document written in Latin of just over 3000 words, more often referred to than actually read, has drawn us here today in a country then unknown in thirteenth century Europe. At first blush Magna Carta seemed doomed to have a short career since it was a document that survived a mere nine weeks before being annulled by the Pope on the 24th of August 1215[1], and in any case it confined itself to parochial medieval concerns.[2] Even William Blackstone thought that its provisions were of a trifling concern by the time he wrote about them in 1769[3] and Churchill noted that a person taking up the Charter for the first time 'will be strangely disappointed'.[4] As we shall see, although the great charter is substantively irrelevant to the modern law, yet it remains after eight centuries of enormous symbolic importance. It is also clear that one may examine the history of the Charter in its medieval context, but that is a task I leave to medievalists.[5] *Magna Carta* also had a history after 1215 down to our own time including in Australia.[6] I shall focus on this history.

The short answer to my question lies not in what was said or done in June 1215, but what was made of the document by subsequent generations.[7] Magna Carta was not the foundation of

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[1] *Selected Letters of Pope Innocent III concerning England (1198-1216)*(C R Cheney and W H Semple Eds)(1953) 212-219; Commonwealth, *Parliamentary Debates*, Senate, 11 September 1920, 1280.
[2] The best commentaries are by W S McKechnie, *Magna Carta: A Commentary* 2nd Edn (1914) and J C Holt, *Magna Carta*, 3rd Edn (2015).
[3] William Blackstone, 4 *Commentaries on the Laws of England* (1769)(reprinted 1979) 416.
[4] Winston Churchill, 1 *History of the English Speaking Peoples* (1956) xiv.
[5] See David Carpenter, *Magna Carta* (2015) for an account by a distinguished historian of medieval England.
[6] Scott Metzger, 'Magna Carta: Teaching Medieval Topics for Historical Significance', (2010) 43 *The History Teacher* 345, 353-354. The history of the Charter between 1300 and 1629 is covered in Faith Thomson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*(Minneapolis: University of Minnesota Press, 1948). Ralph Turner, *Magna Carta Through The Ages* (2003) takes the story up until the twentieth century.
[7] Commonwealth, *Parliamentary Debates*, Senate, 11 September 1952, 1281: '…the greatness of Magna Carta does not lie in what it meant to its framers. Its greatness emerges from what it has meant to political leaders and jurists

democratic government,[8] or of human rights,[9] as is sometimes supposed for two reasons. First, such notions did not exist in 1215. Neither King John nor his barons knew anything of the constitutional arrangements we now call the rule of law. They did not know of written constitutions, a bill of rights, federalism, the separation of powers and judicial independence, let alone universal suffrage and the secret ballot. These were all creations of later centuries and they form part of an inheritance to which Australia has made noteworthy contributions.[10] This was realized in Australia in 1952 when Prime Minister Robert Menzies, on the occasion of the arrival of a copy of the 1297 *Inspeximus* Magna Carta, explained to the Commonwealth Parliament that 'The Barons knew nothing of democracy, and it is not supposed that they thought that they were establishing some form of democracy…'.[11]

Second, the claim, often encountered, that Magna Carta laid the foundations[12] for these ideas is nonsense and involves a false analogy. When a builder lays the foundations of a house they know that these are foundations for they know what comes next when they follow the plan to complete a building. But the Barons did not know what came next and certainly did not envisage our current legal and political arrangements or anything like them. This sort of talk

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down the ensuing centuries, during which the civil and political rights of the people have developed, and the rule of law has been established.' (Senator O'Sullivan, Liberal from Queensland, and later Attorney General). See also Robert McClelland to the same effect in Commonwealth, *Parliamentary Debates*, House of Representatives, 1 May 1996, 197.

[8] Margaret Thatcher claimed as much in her speech in Bruges, 20 September 1988 at http://www.margaretthatcher.org/document/107332; *Canberra Times*, 16 June 1934 page 2

[9] Cf 'Magna Charta', *Goulburn Evening Penny Post*, 14 June 1929 page 6 that claims that the Charter was a noble ideal of human rights; and Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1985, 2753, 2758 where one member of Parliament likened it to a Bill of Rights. All newspaper references were accessed via the Digital Newspaper Collection at the National Library of Australia.

[10] Terry Newman, 'Tasmania and the Secret Ballot', (2003) 49(1) *Australian Journal of Politics and History* 93-101; David Clark, 'Law Reform as a Legal Transplant: The South Australian Ballot in Australia and in the United States 1856-1910', (2009) 11 *Flinders Journal of Law Reform* 293-325.

[11] Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 1952, 381.

[12] *The Mercury* (Hobart), 30 June 1925 page 7; *Kalgoorlie Miner*, 24 January 1941 page 3. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 28 April 1915. 2657; 'Keystone of English Liberty' in *The Longreach Leader*, 28 June 1925 page 13; *Brisbane Courier*, 15 June 1922 page 13; 'the groundwork of all our Constitutions': *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36, 79(Isaacs J).

attributes to the actors of June 1215 either the gift of prophecy, or involves reading into the past present attitudes.[13] Take chapter 1 of the Charter that promised that the English church shall be free. This had nothing to do with freedom of religion in the modern sense, but was an assertion that the choice of bishops should be made by the English church not by the King.[14]

It is necessary therefore to distinguish between myth and substance and to notice that the attitudes of previous generations towards the agreement struck in June 1215 veered between adulation, sometimes amounting to outright fantasy, and dismissive irrelevance.[15] One writer described the Charter as 'a wilderness of arid phraseology relating apparently to a variety of local and temporary matters then in dispute between a grasping monarch and his indignant lords'.[16] The survival of the Charter arises chiefly because of its 'sentimental value' [17] and because it has inspired litigants and sometimes judges to attribute to it all manner of legal phenomena that are not warranted by the historical evidence.

As A Document

From the very beginning Magna Carta was not a static document and of course it came to be transformed in the course of its long history as it was put to new uses in later centuries, usually to justify changes not thought of in the thirteenth century. That many of these arguments were strictly false and involved historical falsification is to miss the point. After-all the history of the Charter after 1215 explains its survival and its ability to adapt to new circumstances. Change became the secret to its survival and was a characteristic of Magna Carta from the outset. There

[13] A bad habit of lawyers who dabble in history: F W Maitland, 'Why the History of English Law is Not Written', *Collected Papers* (H A L Fisher Ed) Vol 1(1911) 490-491; P G McHugh, 'The Common Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat The Past', (1998) 61 *Saskatchewan Law Review* 393, 429.
[14] W S McKechnie, *Magna Carta: A Commentary* 2nd Edn (1914) 191-195; J C Holt, *Magna Carta* 3rd Edn(2015) 285.
[15] McHugh J described it as a mere political ideal: *Essenberg v R* [2000] HCA Trans 385 at 7.
[16] 'The Bible of the Constitution', *The Mercury* (Hobart), 19 June 1915 page 4.
[17] New South Wales, Law Reform Commission, *Report on the Application of Imperial Acts*, Report No 4 (1967) 62.

were six versions of Magna Carta in the thirteenth century. The first four were charters and the last two were given status as statutes. Even the name came later in 1218[18] as did the practice initiated by Blackstone in 1762 of dividing the document into chapters.[19]

Magna Carta 1215 only lasted until the Pope annulled it on 24 August 1215. It was later reissued in a shortened form after John's death by his successor, the nine year-old Henry III in 1216 and again a year later in 1217. At the same time a version was created for Ireland.[20] The contents of these charters are different and it is possible to trace these differences thanks to the work if two Australian scholars in 1984.[21] None of these charters had statutory status until Magna Carta was enacted in 1225.[22] It was this version that appears in the statute book and in 1297 it appeared there again. [23]The enactment of 1297 is doubly important for Australia. Firstly,because in 1952 the Commonwealth purchased a copy of 1297 for the sum of 12,500 pounds.[24] It may be seen today in Canberra at the Parliament House.[25] Second, because, as we shall see, it remains part of the law in the states, including New South Wales.

[18] Albert White, 'Note on the Name Magna Carta', (1917) 32 *English Historical Review* 554-555.
[19] William Blackstone, 'The Great Charter and the Charter of the Forest',(1759) in William Blackstone, *Law Tracts*, Vol 2 (1762) xxvi note. Until 1946 the Charter was spelled Magna Charta: *British Museum Act 1946*(UK); 'Magna Charta Drops its Aitch', *The Daily News* (Perth), 10 May 1946 page 7.
[20] *Magna Carta Hiberniae* , 12 November 1216 may be found at http://ua_tuathal.tripod.com/magna.html (accessed 18 February 2015).
[21] Michael Evans and R Ian Jack (Eds) *Sources of English Legal and Constitutional History* (1984) 55-60.
[22] 1 Statutes of the Realm 22-25.
[23] *Magna Carta 1297*, 25 Edw I c 29; 1 Statutes of the Realm 114-119 or at http://bailii.org/uk/legis/num act/1297/1517519.html. For the text of the various versions including the articles of the Barons that preceded 1215 see Henry Rothwell (Ed) *English Historical Documents 1189-1327* (1975) 310-496.
[24] For the story see Harold White, 'Magna Carta's Long Road to Australia', *The Canberra Times*, 14 April 1988 page 17; Commonwealth, Department of the Senate*, Australia's Magna Carta* (2010); and its role in the celebrations: http://www.abc.net.au/news/2015-02-05/australia-magna-carta/6072830 (accessed 18 February 2015).
[25] http://www.magnacarta.senate.gov.au/ (Accessed 18 February 2015). The was a squabble in 1968 when the copy was removed to the National Library provoking an adjournment motion in Parliament: Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 1968, 353-355.

Once the Charter was sealed on 15 June 1215 it was then ordered to be published on the 20th [26] and despite its vicissitudes it survived in the early centuries by being enforced[27] as well as being confirmed over sixty times between 1225 and 1422 by English acts of Parliament.[28] It was also extended in the fourteenth century, especially in 1354 when the famous phrase due process of law was added to the statute book. [29]

Current status in Australian Law[30]

Despite its exalted status Magna Carta has not remained unchanged and as an English judge noted in 1920, in an allusion to Daniel 6: 15, that 'It is not condemned to that immunity from development or improvement which was attributed to the laws of the Medes and the Persians'.[31] Most parts of the statutes of 1225 and 1297 were repealed in England between 1863 and 1969 meaning that only three chapters of 1297 remain part of English law.[32] Of these two apply to England only: namely that the English church shall be free and the preservation of the liberties of London. The first of these chapters does not apply to Australia since we have had no

[26] I W Rowlands, 'The Text and the Distribution of the Writ for the Publication of Magna Carta, 1215', (2009) 124 *English Historical Review* 1422-1431.
[27] *Calendar of Patent Rolls, Edward IV, Edward V, Richard III, 1476-1485* (1901) 23.
[28] Faith Thompson, 'Parliamentary Confirmations of the Great Charter', (1933) 38 *American Historical Review* 659-672. Note: Magna Carta is an English document and Act and does not apply in Scotland. The point was also made in 'Magna Charta: Story of Its Origin', *Worker* (Brisbane) 30 April 1925 page 2.
[29] 28 Ed III c 3(1354), 1 Statutes of the Realm 345. An enactment that is still part of the law in New South Wales and elsewhere. See *Adler v District Court of NSW* (1990) 19 NSWLR 317, 352(CA).
[30] For discussion see Michael Blakeney, 'The Reception of Magna Carta in New South Wales, (1979) 65 Pt 2 *Journal of the Royal Australian Historical Society* 128-139; David Clark, 'Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law', (2000) 24 *Melbourne University Law Review* 866-892; David Clark, 'Magna Carta Unchained: The Charter in Commonwealth Law', in Daniel Magraw et al (Eds) *Magna Carta and the Rule of Law* (2014) 247-280.
[31] *Chester v Bateson* [1920] 1 KB 829, 832(KBD).
[32] Statute Law Revision Act 1863(UK) 26 & 27 Vic c 125 s 1 & Schedule.

established church here[33] and of course such an arrangement is prohibited by the Commonwealth Constitution.[34]

Three states,[35] including New South Wales,[36] have incorporated chapter 29 of 1297 into the statute law of the jurisdiction. The other three states adopted Magna Carta as it existed at the time of their foundation subject to the test that it only applied to the extent appropriate to local conditions. The problem with the approach of other three states is that their reception dates [37] are before the repeal of most of the Statutes of 1225 and 1297 in England and this means that the entirety these entire acts apply subject to the test of suitableness to local conditions.[38]

Chapter 29, which is still in force in England and in Australia, reads:

'No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not 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'.[39]

Chapter 29 of Magna Carta 1297 is an ordinary statute and may be overridden or superseded by subsequent Australian legislation as Parliamentarians during both wars were well aware.[40] It follows that Magna Carta does not have some special constitutional significance in the sense that it may invalidate any other law found to be inconsistent with it. Litigants who have

[33] Earl Grey, *The Colonial Policy of Lord John Russell's Administration* Vol II (1853) 104-105; *Ex parte Ryan* (1855) 2 Legge 876, 879(NSW SC).
[34] Commonwealth Constitution s 116.
[35] First in the *Imperial Acts Application Act 1922*(Vic) Pt 2 Div 13; then as *Imperial Acts Application Act 1980*(Vic); *Imperial Acts Application Act 1984*(Qld).
[36] *Imperial Acts Application Act 1969*(NSW).
[37] Western Australia: 1 June 1829; South Australia: 28 December 1836; Tasmania: 28 July 1828: Alex Castles, 'The Reception and Status of English Law in Australia', (1963) 2(1) *Adelaide Law Review* 1, 3.
[38] *MacDonald v Levy* [1833] NSWSupC 47 page 17; *Quan Yick v Hinds* (1905) 2 CLR 345, 356(HCA)(Griffith CJ).
[39] 25 Ed 1 c 1; 1 Statutes of the Realm 117.
[40] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 September 1915, 6872; 7 & 8 September 1939, 231; Senate, 21 July 1920, 2836.

sought to challenge Australian statutes on the ground that the legislation conflicts with Magna Carta have always lost the argument.[41] It is true that chapter 29 speaks of the law of the land but that means in a modern legal context the law of this land- Australia, not the law of thirteenth century England.[42] In a remarkable case from Queensland a parliamentary candidate tried disqualify his rivals by arguing that their deposits, paid in forms of currency other than coins, were invalid because the only lawful currency permitted by Magna Carta was coinage. Unsurprisingly Justice Wilson in the High Court rejected this argument both because it would make a modern financial system impossible, and because Australian legislation on legal tender replace anything said about currency in Magna Carta. [43]There is a view that Magna Carta should be seen less as a statute than as an expression of the common law[44] and in keeping with the character of the common law Magna Carta is something that is capable of change.[45]

Myths

The most persistent myth is that King John signed the Charter. This view was taught in schools in this country from the nineteenth century onwards[46] and is still a feature of current History textbooks.[47] Despite the ubiquity of this notion even this wrongheaded idea was sometimes misunderstood. One schoolboy thought in 1914 that the King was forced to sing the

[41] *Chia Gee v Martin* (1905) 3 CLR 649, 653(HCA)(Griffith CJ); *Krysiak v Carruthers* [2012] WASC 472[28](Beech J); *Merrin v Commissioner of Police* [2012] QCA 181[14](North J); *Markan v Bar Association of Queensland (No 3)* [2014] QSC 225[[53](Wilson J).
[42] *Westpac Banking Corporation & Ors* [2001] WASC 365[60](Hasluck J).
[43] *Re Cusack* (1986) 60 ALJR 302, 304(HCA). See also *Clampett v Kerslake (Electoral Commissioner of Queensland* [2009] QCA 104; *Pullen v O'Brien* [2014] QDC 92 [50]-[52].
[44] *R v Valentine* (1871) 10 SCR (NSW) 113, 130*; R v Wright, ex p Klar* (1971) 1 SASR 103, 108(Bray CJ); *Kintominas v A-G(NSW)* (1987) 24 A Crim R 456, 459(Rogers J).
[45] *The Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1972) 31 CLR 421, 438(Isaacs J),
[46] See the poem in *The Longreach Leader*, 27 July 1940 page 25 which ends with :
'Pointing to the parchment there;
Sign! Sign! Sign! They said.
Sign King John or resign instead' .Parliamentarians also subscribed to this notion: Commonwealth, *Parliamentary Debates,* Senate, 21 July 1920, 2836.
[47] David Clark, 'A Confederacy of Dunces: Magna Carta in the History 8 Textbooks', at http://www.onlineopinion.com.au/view.asp?article=16029 (accessed 19 November 2014).

charter. [48] Apart from doubts that John could write,[49] Kings did not sign such documents. In 1924 John Fox examined the four surviving copies of 1215 and showed that three had a seal attached, while the fourth copy lacked a seal but there was an incision in the vellum where the ribbon would have gone.[50]

A second misconception is that habeas corpus was somehow created by Magna Carta despite the fact that the term habeas corpus does not appear in the charter at all.[51] Actually there is evidence of writs of habeas corpus in 1206[52] and in 1214[53] and the history of the writ shows that it really expanded later in the thirteenth century and in its modern form as a writ of habeas corpus ad subjiciendum especially from the 1580s onwards.[54]

There was also a view that Magna Carta 1215 created a right to trial by jury when it referred in chapter 39 to legal processes… 'except by the lawful judgment of his peers.'[55] Actually the modern jury did not then exist; rather persons were tried in the thirteenth century either by ordeal, battle or compurgation. The latter involved summoning oath helpers who were usually neighbors of the accused.[56] The view that Magna Carta either created or guaranteed trial by jury in the modern sense was forcefully asserted in the campaign for civilian juries in New South Wales in the 1820s and early 1830s, by linking the rights of Englishmen to trial by jury to Magna Carta. This use of the Charter to support a modern argument was a common practice in

[48] *Newcastle Morning Herald and Miners' Advocate*, 22 August 1914 page 7,
[49] Claire Breay, *Magna Carta: Manuscripts and Myths* (2010) 38.
[50] John C Fox, 'The Originals of the Great Charter of 1215', (1924) 39 *English Historical Review* 321-336. See also *The Australasian* (Melbourne), 8 June 1929 page 6; *Northern Argus* (Clare, SA), 30 May 1946 page 1 and *The Advertiser* (Adelaide) 22 May 1947 page 4 who notice that the Charter was not signed by the King as did Gough Whitlam in Commonwealth, *Parliamentary Debates,* House of Representatives, 20 August 1968, 294.
[51] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1987, 1281.
[52] *Tebbaldus de Bilton v Wiltelmun fratem suum*, Trin 8 John 1, 4 *Curia Regis Rolls* 153 r 41 m 8(1206).
[53] *Baldwin Tyrell's Case* (1214) in 1 *Select Pleas of the Crown* (F W Maitland Ed)(1887) 67.
[54] Paul Halliday, *Habeas Corpus: From England to Empire* (2010) 4-5.
[55] Lay litigants often assert this and are rebuffed: *Stearman v Taylor* [2014] WASC 247[14].
[56] Walter Clark, 'Magna Carta and Trial by Jury', (1923) 2 *North Carolina Law Review* 1, 2; *Essenberg v R* [2002] QCA 4(McPherson JA); *R v J, SM* (2013) 117 SASR 535, 541-542[36]-[39](Blue J); *Stearman v Taylor* [2014] WASC 247[15](Corboy J).

both political and legal writing from the early seventeenth century onwards. Although the great Jacobean Chief Justice Sir Edward Coke did much to create the mythology surrounding Magna Carta, he was right when he wrote of Chapter 39 that 'Upon this chapter, as out of a roote, many fruitfull branches of the law of England have sprung'. [57]

In a sense then by the seventeenth century Magna Carta had come to stand for two main propositions. The first was that the King was bound by the law, even though in the thirteenth century no effective mechanisms to enforce this existed. The 1215 Magna Carta contained a provision for 25 Barons to monitor the King's compliance with the Charter but that went with the annulment of the Charter by the Pope in August 1215. Second, that the Charter came to be seen as emblematic of the rights of an Englishman to liberty and property. In his *Essay on Toleration* in 1667 John Locke attacked supporters of the divine right of Kings by writing that 'tis to be suspected that they have forgot what country they are born in, under what laws they live, and certainly cannot but be obliged to declare Magna Charta to be downright heresy'. [58] Certainly the second view was alive and adhered to in Australia, especially in the 1820s.

19th century Australia

Magna Carta was used both in legal cases and in political arguments to criticize government policies and to assert rights that the colonialists thought they deserved, but which they thought had been infringed or withheld by the British controlled executive.[59] This style of argument began early with Jeremy Bentham penning a critique of the government of New South Wales in 1803 in which one of the his most damming observations was that the British had

[57] Edward Coke, *The Second Part of the Institutes of the Laws of England* (W Clark Ed 1817) 45. For his mythology see W H Dunning, 'Truth in History', (1914) 19 *American Historical Review* 217, 224-225.
[58] John Locke, *Political Writings* (Mark Goldie Ed)(1997) 136.
[59] *Ex parte Nichols* [1939] NSWSupC 76 page 5.

denied Magna Carta to the inhabitants of the colony.[60] In the 1820s and 1830s the Charter was regularly invoked to criticize the imposition of new taxes, restrictions on the press, to thwart attacks on the protection of private property, to raise objections to banishment and to criticize the denial of a right to trial by jury. [61]

On occasion the Sydney Magistrate's deployed the Charter in somewhat fanciful circumstances. One unfortunate guest at a wedding in 1827 was assaulted after singing a song that aroused others to an altercation. After the wedding singer was rescued by the bride and groom the attackers were charged with assault. The Magistrate who heard the case thought that the whole affair was an attack on the liberty of the subject. According to the press report 'His Worship gave it as his firm opinion that, by Magna Charta and the Bill of Rights, an Englishman had an undoubted right to sing, and he who attempted to abnegate or even abridge this admirable privilege, could be no true friend to the constitution, and must be a radical from top to bottom'.[62] The magistrate then committed the accused to be tried at the quarter sessions after expressing his opinion on the virtues of the songs that had provoked the attack. Clearly matters had moved on from the transactions at Runnymede and of course, by now, the Charter stood for an idea of general liberty rather than as a document.

This use of Magna Carta to fashion or underpin contemporary arguments reached a crescendo during the debates over the demand for responsible government in the late 1840s and early 1850s. In 1848 a resolution was moved in the New South Wales Legislative Council in favor of responsible government that included the assertion that the Crown was attempting to

[60] Jeremy Bentham, 'Plea for a Constitution', in Commonwealth Parliament, *Historical Records of Australia*, Series IV, Vol 1, 896-897(1922).
[61] *The Monitor* (Sydney) 11 May 1827 pages 3,4; *R v Sullivan* [1832] NSWSupC 78; *O'Connell v Bell* [1839] NSWSupC 74; *Walker v Hughes* [1839] NSWSupC 71.
[62] T*he Sydney Gazette and New South Wales Advertiser,* 10 August 1827 page 3.

deprive the colony of the elective franchise, which, it was claimed, was an immemorial right 'asserted in Magna Charta'.[63]References to Magna Carta as part of a larger argument in favor of responsible government during this period were evidence of a style of argument, an appeal to history, however inaccurate, and a testament to the power of Magna Carta as emblematic of English liberties that the colonialists thought that they had brought with them to Australia.[64]One would be poet in Tasmania, for instance, saw the Charter as a touchstone of freedom and called on the present generation to 'Prove-prove, that you are worthy to be free'.[65]

The Charter was also sometimes invoked for less idealistic reasons when Catholics and Protestants cited the Charter in arguments against each other that went on and off between the 1840s and the early 1950s. The issue was whether the Catholics could take credit for Magna Carta given that the Archbishop Stephen Langton led the barons at Runnymede and, of course, in the thirteenth century England was still a Catholic country.[66] Protestant controversialists tried refute the claim of credit by arguing that the Pope had actually annulled the Charter and that Langton was in reality a patriotic Englishman.[67] The squabble did no one any credit and involved much distortion on both sides as each strove to prove that they were the true friends of liberty and that the other was its enemy.

20th century

[63] New South Wales, *Votes and Proceedings of the Legislative Council 1849*, 681 internal page 9 Enclosure A1.
[64] For example, 'Representative Government-Public Meeting', *Australasian Chronicle*, 17 February 1842 page 2; 'The New Constitution-Public Meeting', *The Maitland Mercury and Hunter River General Advertiser*, 12 February 1848 page 4.
[65] 'Magna Charta', *Colonial Times* (Hobart), 11 February 1851 page 2. For other poems extolling Magna Carta see *The Australian* (Sydney), 19 July 1833 page 4; Rudyard Kipling, ' Reeds of Runnymede' (1915) in *Verse* (1940) 719-720.
[66] *South Australian* (Adelaide), 11 November 1845 page 3; *The Catholic Press* (Sydney) 23 May 1912 page 52; 18 October 1928 page 15; *Catholic Freeman's Journal*, 26 November 1936 page 10.
[67] *Sydney Morning Herald*, 28 March 1884 page 3; *Watchman* (Sydney) 18 March 1915 page 2, 7 October 1915 page 5; *Castlemaine Mail*, 6 October 1917 page 2.

In the aftermath of the 700th anniversary a distinctly sceptical view of Magna Carta emerged based on modern scholarship. In one of the most influential Australian contributions Ernest Scott penned an article in a Melbourne newspaper entitled the 'Myth of Magna Carta' in which he argued against the modern myths about the origins of our liberties and in favor of an understanding of the medieval circumstances at the time the Charter was concluded.[68]

Notwithstanding this, in the 1920s an international Magna Carta day to be celebrated on June 15th each year was launched in the United States and the movement quickly spread to other English speaking countries including Australia. [69]The celebration of the day survived until the 1950s and often entailed special classes in schools. Thus a class at a school in Newcastle in 1950, for example, put on two plays about Magna Carta, including one broadcast over the school's public address system. [70]

By now, as Justice Isaacs pointed out in 1925, Magna Carta had developed beyond its medieval roots to stand for three major principles: 'Namely, (1) primarily every free man has an inherent individual right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at the will of the State; (3) the law of the land is the only mode by which the State can so declare its will.'[71]Justice Isaacs went on to notice two corollaries of these propositions: that there is always an initial presumption in favor of

[68] *The Argus* (Melbourne) 27 November 1920 page 6. This provoked a reply by J.J.K Mills, *The Argus*, 4 December 1920 page 4 and a riposte by Scott: *The Argus*, 6 December 1920 page 9. See the earlier 'Common Errors about Magna Charta', *Westralian Worker* (Perth), 19 February 1915 page 1. For other critical views see Fred Alexander, 'Myth Makes History', *The West Australian* (Perth), 29 June 1929 page 4; L C Dodd, 'Magna Carta: The Critical Viewpoint', *Sydney Morning Herald*, 16 June 1934 page 11; *Northern Territory Times and Gazette* (Darwin), 25 October 1921 page 2.

[69] *The Advertiser* (Adelaide), 11 September 1924 page 23; *Queensland Times* (Ipswich) 27 February 1926 page 8; The *Maitland Daily Mercury*, 15 June 1929 page 6, *Gippsland Times*, 5 January 1939 page 5.

[70] 'Magna Carta Day as Signpost', *Newcastle Morning Herald and Miners' Advocate*, 15 June 1950 page 5.

[71] *Ex parte Walsh and Johnson, In re Yates* (1925) 37 CLR 36, 79(Isaacs J). See also *Clough v Leahy* (1905) 2 CLR 139, 157(Griffith CJ)'We start, then, with the principle that every man is free to do any act that does not unlawfully interfere with the liberty or reputation of his neighbor or interfere with the course of justice. That is the general principle'. Sheller JA agreed with this statement but thought it was not 'necessary to invoke an event which occurred in 1215 to support them': *Prisoners A-XX (Inclusive) v State of NSW* (1995) 38 NSWLR 622, 634F-G(CA).

liberty and that it is the duty of the Courts to see that this obligation is strictly and completely fulfilled.

The appreciation of Magna Carta was kept alive in the second half of the twentieth century in Australia largely because of the acquisition in 1952 of a copy of the 1297 Magna Carta. It was kept on display in the Parliament building and many members of parliament used to show it to visiting constituents, especially school children. In 1988 the Lincoln Cathedral copy of Magna Carta 1215 was sent to the expo in Brisbane[72] and in 2001 the Lord Chancellor opened the Magna Carta Memorial in Canberra.[73]

Contemporary Influence

Many recent uses of the Charter have been in aid of contemporary legal submissions where it is claimed that an idea originated in Magna Carta, but the argument ultimately stood on an Australian legal basis. While as we have seen Magna Carta did not found the right to a trial by jury it has often been invoked as a starting point for modern claims to such a right. Thus Aboriginal defendants have several times sought to argue that the phrase in Chapter 29 'unless by the lawful judgment of his peers' referred to a jury of Aboriginal peers.[74] This argument has always been rejected as in Australian law there is no requirement as to the ethnic or gender composition of a jury. Moreover the judges have adapted medieval terms to suit modern circumstances. A Queensland judge pointed out in a case where an Aboriginal defendant sought

[72] *Canberra Times*, 5 March 1988, 1.
[73] Commonwealth, *Annual Report of the National Capital Authority 1999-2000*, (2001) 37. For his speech see Lord Irvine of Larg LC, 'The Spirit of *Magna Carta* Continues to Resonate in Modern Law', (2003) 119(2) *Law Quarterly Review* 227-245.
[74] *R v Grant* [1972] VR 423, 425*; R v Walker* [1989] 2 Qd R 79(CA); *R v Badenoch* [2001] VSC 409[5]; *R v Buzacott* (2004) 149 A Crim R 320, 327[27](ACT SC).

a jury of his Aboriginal peers the term 'peers' in modern Australia refers to one's fellow citizens.[75]

A second use of the Charter is to repackage an idea in modern dress. Thus Chapter 39 of 1215 promised not to delay justice, and although this term was not repeated in Chapter 29 of 1297, it finds expression in both the Victorian Charter of Rights and Responsibilities Act 2007(Vic) s 25(2)(c) and the Human Rights Act 2004(ACT) s 22(2)(c). In one case from the ACT a judge linked contemporary values such as due process and personal liberty to Magna Carta and cited a line of earlier Australian cases in support of these views. [76]

A third use is to label as a Magna Carta any foundational document. Thus the Constitution was described as the 'Magna Carta of Australia',[77] a financial agreement between the Commonwealth and the States was named a 'Financial Magna Carta',[78]while the Refugee convention was described as the 'Refugee Magna Carta' in 1954,[79] and a major tariff agreement in 1961 was written about as a 'Magna Carta for World Trade'.[80]

Conclusion.

A legal or constitutional instrument may remain an animating presence and a source of inspiration long after the particular details of the document have either been removed from the law or have faded with the change of historical circumstances. In the case of Magna Carta our interest lies in what was made of the document in later centuries and its relationship to a wider constitutional tradition that has grown up since 1215. Most of the elements of the rule of law,

[75] *R v Walker* [1989] 2 Qd R 79, 85-86(CA)(MacPherson JA). The term peers in the sense of equals was also used in *R v Davidson* [1827] NSWSupC 52.
[76] *Lukatela v Birch* [2008] ACTSC 99[5](Rares J).
[77] *The Sydney Morning Herald*, 1 March 1911 page 12.
[78] *Kalgoorlie Miner*, 23 August 1909 page 2.
[79] *Cairns Post*, 20 February 1954 page 2.
[80] *The Canberra Times*, 2 December 1961 page 5.

itself a combination of law, constitutional practice and political ideas, simply did not exist in the thirteenth century, but we are heirs to that tradition and are also its beneficiaries. It represents an historic achievement that was hard won and, though not now a rarity, it is an achievement that Australia may claim to have both added to and to have improved upon. In the course of the last eight centuries Magna Carta was transformed from a medieval document into a set of malleable ideas whose very flexibility enabled it to survive to become part of our political and constitutional arrangements. In a world where there are peoples and states that have not mastered the arts of civil peace, as we have, it is fitting to reflect on the past and to appreciate in a clear-eyed way the results of the eight centuries of constitutional and political struggles since 1215.