Magna Carta
Its History and Enduring Relevance

The Seventh Sir Harry Gibbs Memorial Oration

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It is customary when delivering a memorial oration to mention the person in whose memory it is given and I shall do so only briefly, because Sir Harry was the founder of The Samuel Griffith Society in 1992 and is well known to you all. Some of you, like me, are old enough to have appeared before him on the Bench or to have been associated with him in other ways.

The Right Honourable Sir Harry Talbot Gibbs, GCMG, AC, KBE, QC was Chief Justice of the High Court of Australia between 1981 and 1987. He had a most distinguished career in the law as a Justice of the High Court from 1970, on the Federal Court of Bankruptcy and the Supreme Court of the ACT, on the Supreme Court of Queensland and as a Barrister practising in Queensland after the Second World War. In retirement from the Bench he remained active, contributing to Australian society in many significant ways. I note, however, that the two most significant events in his long life occurred in Sydney, NSW – his birth in 1917 and his death in 2005. So I am pleased to claim Sir Harry also for my State.

Sir Harry addressed this Society on three occasions, as I understand. The addresses are collected in a book he published with Sir Paul Hasluck in 1993: "Native to Australia – Three Addresses to the Samuel Griffith Society". I have not read the book, so I do not know what he said – but I think I am safe in saying that he did not speak about the Magna Carta. I have been asked to do so tonight. The invitation came to speak (as you can see from your conference program) about "The Magna Charta – its History and Enduring Relevance", but I am happy to drop the "h" which was a variation to be found in some publications at least from the 16th century. It was just another of many quirks that have contributed to the development of the myth of Magna Carta over the centuries.

As the British historian, G. M. Trevelyan, wrote of it in the 1920s:

> Pittites boasted of the free and glorious constitution that had issued from the tents on Runnymede, now attacked by base Jacobins and levellers; Radicals appealed to the letter and the spirit of "Magna Charta" against gagging acts, packed juries and restrictions of the franchise. America revolted in its name and seeks spiritual fellowship with us in its memory.

History of Magna Carta

First, the history of the document that has become many things to many people.

We have celebrated 15 June 2015 as the 800th anniversary of the sealing of the Magna Carta. But was it?

I am afraid we are jumping the gun so far as a document by that name is concerned (we are two years early); or a document containing the familiar 37 chapters (we are ten years early); or the first law in the Statute Roll of England (we are 82 years early); but it is the thought that counts

when dealing with the myths of history. Our myths are very important to us, of course, and the thoughts behind this one certainly do still matter.

All educated persons, especially (but not only) those in places with an English heritage, think they know what the Magna Carta is and why it is important to our lives. But it is helpful from time to time to re-examine objects and events that have passed into history and that over time have acquired significance and value that the originators and participants could never have foreseen. We undertook a similar exercise in April 2015, with the centenary of the landing at Gallipoli.

A common view is that King John made an agreement with the barons in 1215, that it contained new terms, that the document became "law", it created rights bestowed by the King, it has been construed and applied ever since and it is the source of much that is good in government and public administration – including constitutional guarantees, parliamentary democracy, the rule of law, the separation of powers, the independence of the judiciary, trial by jury, equality before the law and even *habeas corpus*.

Well, that is only partly true – and some is just wrong. The real story is much more interesting (although perhaps not as satisfying) and I can tell you some of it here.

A document was sealed by King John on 15 June 1215 at Runnymede on the River Thames. It was a place unnamed until this event and was sometimes an island, sometimes part of the riverbank, west of Staines. It is between Westminster, which was then occupied by the rebel barons and merchants and Windsor Castle, to which the King had been forced to retreat – so it was on neutral ground between the opposing parties. That document was the Charter of Liberties, *Carta Libertatum* (not the Magna Carta – we will come to that).

The document contained script that was very much later divided into 63 clauses or, more correctly, chapters. Such documents at that time were made on vellum (untanned calf or sheep skin), in continuous medieval Latin script and containing many abbreviations to save valuable space on that expensive writing material. (The bean counters were in operation even then.)

The first and most important chapter was not for the benefit of the barons, but granted liberties (in truth privileges, or freedom from royal control) to the English Church (being, of course, the Church of Rome at that time). That came about because a drafter and principal mover of the Charter was Stephen Langton, Archbishop of Canterbury. King John had opposed his appointment and had forced him into exile in what we now know as France and when the Pope did appoint him Archbishop in 1207, King John refused to recognise it. The services of the English Church were suspended from 1208 to 1214 and King John helped himself to Church property. (You may remember the A. A. Milne poem, "King John's Christmas": "King John was not a good man – he had his little ways. And sometimes no one spoke to him for days and days and days…")

In 1212 the Pope excommunicated England and the Royal Court and plotted to install a French Prince as King. From 1213 Langton and the barons worked together towards the 1215 Charter, Langton's motivation being the restoration of the liberties of the Church and in that he was successful – at least on vellum. The motivation of the barons was self-interest, at a time of very high economic development and wealth in England (at levels not to be seen again after the 13th Century until the 18th) – and they and their merchant friends wanted a part of that. They set out to prevent the King from helping himself to their riches.

"Free men" (perhaps up to 40 percent of the population of England of somewhere up to four million people at that time) then had their liberties declared in subsequent clauses, once the Church and the barons had been satisfied. Some later chapters do speak of all men of the kingdom and the document did refer to women.

King John sealed (not signed – there were no signatures) the charter under duress and there seems little doubt that he had no intention of ever honouring it. Pope Innocent III was affronted that his vassal, John, had been forced to the table and he annulled it on 24 August 1215. King John repudiated it at the latest on 5 September – so it survived for about 9 weeks.

Perhaps 30 copies of the Charter were made and they were still being copied in July. They were taken to the counties to be read aloud in Latin and French. The whereabouts of only four of the 1215 documents are known and they were exhibited together for the first time in the British Library and House of Lords in February this year. The copy with the King's seal has been lost.

King John died in October 1216 in Nottinghamshire, the country being in a state of civil war. Prince Louis of France had been proclaimed (although not crowned) King of England in June 1216 at Westminster, but it was not to last. John's son and heir, Henry III (then only 9 years old but supported by the barons in preference to Louis), reissued the Charter of Liberties in that year (by now down to 40 chapters) and again under his own seal in 1217 (with 43 chapters). Those chapters most onerous to the monarch had been removed. One of those (not surprisingly) was chapter 61 which gave to a group of 25 barons, to be selected by the barons, the power to enforce the charter even against the King. (Why the number 25? It is thought that the Pentateuch, the first five books of the Bible, held great significance and five times that number would be even better.)

Because a smaller (but very significant) Charter of the Forests was issued at the same time as the reissue in 1217, that Charter of Liberties became known as the Magna Carta, the big charter (actually, Magna Carta Libertatum), to distinguish it from the other, smaller, document. So it has remained, although centuries later the "magna" rather tendentiously became interpreted as signifying the importance of its contents.

Magna Carta was reissued in 1225 (a fairly definitive version of 37 chapters that we recognise now), 1234, 1237, 1253, 1265, 1297 and 1300. The 1297 text, almost identical to the 1225, is the most commonly quoted version and it became "law" in England, being entered on the Statute Roll. Australia owns one of the surviving four 1297 originals and the story of its acquisition is worth telling.

In the 1930s the small and then (but not now, I understand) impoverished King's School in Bruton in Somerset in the English West Country acquired an original 1297 Magna Carta. In 1951 they took it to the British Museum for authentication with a view to sale to raise money. It was formally identified as an original of the 1297 Magna Carta, at that time one of only two known to exist (two others were discovered later). There is uncertainty about how it came into the school's possession, but the best account seems to be that in the decades before, the school's solicitor, who had been keeping the document for someone else whose family had probably acquired it from Easebourne Priory in Sussex and had forgotten about it, put it into the school's documents box by mistake.

The British Museum was prepared to offer £2,000-2,500. The school had it independently valued at £10,000 (£12,500 with seller's commission), but the British Museum would not move

and the school engaged Sotheby's. After much manoeuvring (a story in itself, told in a fine booklet published by the Australian Senate, now in its second edition, price $10) the Library Committee of the Australian Parliament purchased it in 1952 for £12,500 (15,672 Australian pounds) and the document is now on display in Parliament House, Canberra. An area in Canberra near Old Parliament House has been designated Magna Carta Place.

The United States of America has another original of the 1297 charter, purchased in 1983 by Ross Perot for $US1.5 million from the Brudenell family of Deene Park in Northamptonshire. In 2007 Perot sold it to David Rubenstein, who has since provided it on certain terms to the US National Archives. Mr Rubenstein paid $US 21.3 million. (It can only be hoped that our government does not discover our document's true worth.)

So the reality is that the name Magna Carta dates from 1217, not 1215, and the surviving content of 37 chapters dates from 1225 and 1297 (reaffirmed in 1300). There are many such documents spanning 85 years of the 13th Century and not all identical. It did not create much that was new but rather declared existing laws and usages which the King had been flouting and it became "law" of the land in 1297. (Only three chapters are still in force in England and one in NSW, chapter 29 of the 1297, being 39 and 40 of the 1215). Its principal other party was the Church, not the barons. For several centuries after 1300 it was virtually forgotten (although dragged out and reconfirmed by Kings from time to time in gestures of goodwill towards their subjects when extra taxation was required) until Sir Edward Coke brought it back to prominence early in the 17th Century for his own purposes in his posthumously published Institutes of the Laws of England as the "Magna Charta" and divided it into chapters. It received another push along from Sir William Blackstone in the 18th Century and has been cited in many places ever since.

Enduring Relevance

So much for its history – what of its enduring relevance?

To seek out statements of the rights of humankind one needs to look well beyond the Magna Carta, to such documents as the Liberty of the Subject Act (1354), the Petition of Right (1628), the Habeas Corpus Act (1679), the Bill of Rights (1689), the Act of Settlement (1701), the French Declaration of the Rights of Man (1789), the US Bill of Rights (the first ten amendments to the Constitution of the United States – 1791), the Reform Act (1832), the Universal Declaration of Human Rights (1948) and so on into the modern era.

The significance of the document we call the Magna Carta lies not so much in the text (or any of the many versions of it and of drafts that were prepared) but in the principles behind the text – the values and concepts that support it, the idea of Magna Carta itself. The myth.

The rule of law is one of those concepts and its modern meaning may conveniently be described in the words of the Secretary-General of the United Nations, Kofi Annan, in 2004:

> For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law,

separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

The Magna Carta has provided inspiration and support for progressive development in governance world-wide since at least its 17th Century resurrection. It has been invoked in the context of more modern charters of rights as we now understand them – in 1948, in the United Nations, Eleanor Roosevelt, the champion of the Universal Declaration of Human Rights, described that instrument as a "declaration that may well become the international Magna Carta for all men everywhere".

The Americans have possibly taken the old document to their hearts even more strongly than the English (as Trevelyan noted), given that Paul Revere engraved the words on the Liberty Bowl in 1768 and that Massachusetts currency at that time had "Magna Carta" on it. Much earlier, in 1606, Coke was Chief Justice of England and he drew up the Royal Charter granted by King James I for the Virginia Company of London, which established the colony in Jamestown, Virginia, in that year. This charter declared that "The persons which shall dwell within the colonies shall have all the liberties as if they had been abiding and born within this our realm of England or any other of our dominions." These "liberties", including those in the Magna Carta, appeared in one form or another in the founding charters of Massachusetts (1629), Maryland (1632), Maine (1639), Connecticut (1662), Rhode Island (1663) and Georgia (1732). William Penn published the Magna Carta in Philadelphia in 1687, only five years after that city was founded.

From the Virginia charter of 1606 to the Charter of Massachusetts Bay of 1629 to the Constitution that William Penn wrote for the colony of West New Jersey, and his charters for his own settlement of Pennsylvania, immigrants were guaranteed that English law dating back to Magna Carta would follow them to the colonies.

The aims of The Samuel Griffith Society include the defence of the Australian Constitution and the defence of the independence of the judiciary. There are at least two provisions of the Magna Carta that connect with those aims.

More broadly, however, the idea of Magna Carta as it has developed stands for:

- **continuation of basic law** – of a framework for order and peace fashioned by and from the people – upon which contemporary laws are made and rest and which is innate and inalienable;
- **the triumph of liberties over tyranny and limits upon sovereign power**;
- **the rule of law itself** (as I have mentioned) – that no one is above the law, no matter how powerful, even a monarch, and that justice will be done according to laws that are certain and knowable in advance. That is particularly significant in modern times where the executive very often needs to be kept in check and reminded that it must operate within legal bounds;
- **the value of democratic processes in the government of the people** (although it did not create democracy);
- **independence and professional competence of the judiciary** – an aim of The Samuel Griffith Society;
- **equality before the law and due process without corruption (including the presumption of innocence and burden of proof on the prosecution)**;
- **"no taxation without representation"**, the catchcry of the American independence movement;

- **rights to property and to compensation for its seizure** – acquisition on just terms, to be found in section 51(xxxi) of the Constitution; and
- **freedom from arbitrary punishment and proportionality in sentencing (even back then the evils of mandatory sentencing were well understood)**.

It is also said to have been the origin of the law of trusts and an early example of the protection of women's rights (in that widows were not to be forced to remarry and would take their portions and inheritances). It also dealt with a multitude of local and temporal regulations that are of less enduring significance but which secured common freedoms that King John had been denying to the people.

It had nothing to do with parliamentary democracy, *habeas corpus* (not legislated until 1679 but to be found in other forms at earlier times), trial by jury (which did not begin in a form we would find familiar in criminal cases until after the Church withdrew support for trial by ordeal, coincidentally in 1215), the separation of powers, universal suffrage, freedom of religion or much else that is claimed for it – especially by unrepresented litigants.

Magna Carta, as Sir Gerard Brennan has said, lives in the hearts and minds of Australian people, having been brought with the first English settlers. As it has come to be understood and called upon over 800 years (or even 798 or 790 or 718 years), it operates as a shield against tyranny, abuse of power and oppression of the governed. It has become the talisman of a society in which the spirits of tolerance and democracy reside. In the English common law system, it is the touchstone of the rule of law and a continuing inspiration to all, well beyond its terms.

The Samuel Griffith Society may like to keep it in mind as it pursues its aims – and to remind others of its lessons.