

## **Sydney University Conferring of Law Degrees**

**The Great Hall, The University of Sydney**

**Thursday 30 April 2015**

### **Occasional Address by the Honourable Justice Ruth McColl AO**

- 1 Chancellor Hutchinson, Professor Riley, members of the academic staff, graduates, ladies and gentlemen.
  
- 2 I acknowledge the traditional owners of this land: the Gadigal people of the Eora nation and their elders, past and present.
  
- 3 May I offer my warmest congratulations to the graduates and also to their families. Sometimes it's hard to work out who has travelled the hardest road to a graduation ceremony: the graduates or the members of their families who have held their hands through thick and thin during the academic journey.
  
- 4 However, today is not the occasion to think of those hard times studying. Today you can celebrate together. That academic journey is over for most of you. You are now starting the next phase of your life journey: as a law graduate.
  
- 5 What path or paths will that take you down? What path have you chosen or will you choose to follow?
  
- 6 Whichever course you take, you will remember today as the milestone you had to pass in order to embark on that journey.
  
- 7 As Chancellor Hutchinson has written in today's programme, "your graduation is a celebration of your significant achievements in attaining your degree" and as Vice-Chancellor Spence has written, graduation ceremonies are "a rite of passage signalling the end of one phase of your life and the beginning of another".

- 8 So achieving this milestone of course makes your graduation ceremony memorable.
- 9 Such an occasion may also be memorable because of other signal events or circumstances.
- 10 Let me give you an illustration. It concerns the evolution in the way I came to remember my graduation. 40 years, one month and 8 days ago on Saturday 22 March 1975 I was sitting where you are now. I was graduating after completing what was then the six year Arts Law course. I can be so certain of the date because just over a month ago our 1975 graduating year celebrated the 40th anniversary of the occasion.
- 11 Our graduation ceremony was particularly memorable because the Occasional Address was delivered by the Prime Minister, the Honourable Gough Whitlam QC, BA, LL.B. The Prime Minister was also a graduate of this University. He had been in power for almost 2 and a half years at that stage, since 2 December 1972.
- 12 The Prime Minister shared the stage with another distinguished guest: the Governor-General, Sir John Kerr AK, GCMG, GCVO, QC. He, too, was a Sydney University graduate. No-one could have appreciated on that sunny day that 8 months later on Remembrance Day, 11 November 1975, Sir John would dismiss the Prime Minister and his Government and install Malcolm Fraser as caretaker Prime Minister pending the holding of a Federal Election. Ironically, Malcolm Fraser had successfully challenged the previous Leader of the Opposition, Billy Snedden, for the leadership of the Liberal Party on 21 March 1975, the day before my graduation.
- 13 Of course I never forgot that the Prime Minister had delivered the Occasional Address. And "The Dismissal" as it came to be known, highlighted the significance of the distinguished guests present on the occasion.

- 14 But my memories of the content of the Prime Minister's address had faded. No doubt I was slightly overwhelmed by the joy of the occasion.
- 15 However, as part of our 40<sup>th</sup> anniversary celebrations we found a copy of the Prime Minister's Occasional Address in the archives of the Whitlam Institute. Its contents are instructive. It reminded me that our cohort graduated into a new legal environment, shaped to a significant extent by legislation passed in the few years Labor was in power prior to our graduation.
- 16 You will not be surprised to hear that in his Occasional Address, the Prime Minister was not shy in outlining the ambitious legislative programme his government had undertaken. This included "[l]egislation ... to provide effective control of restrictive trade practices, to afford protection to consumers, to regulate the securities industry, to eliminate racial discrimination, to protect the environment and to review the exercise of administrative discretions".
- 17 The Prime Minister assured our young graduating class that his new legislation would afford us "many opportunities for the creative application of the talents and skills you have learnt in this faculty". We had, he told us, by reason of this legislation, the "chance to participate in a great process of social change and reform".
- 18 And so it came to pass. The reforms the Prime Minister acclaimed were of the black letter law type which changed the face of Australian society for the better and facilitated the enforcement of people's rights. Those black letter laws provided us graduates with an exciting environment in which to practice our shiny new profession! We were indeed the beneficiaries of the legislative legacy of the Whitlam Government!

### **Magna Carta**

- 19 Today's graduates are also graduating in a memorable year for a reason which finds its source in even more ancient times than 1975. You are

graduating in the year of the 800th anniversary of the signing of the Magna Carta – the Great Charter – at Runnymede in Great Britain in June 1215.

- 20 As lawyers you will work in an environment which owes much to the legacy, if not the letter, of Magna Carta. An environment in which the black letter laws you will seek to apply are part of a legal matrix which can trace many of its fundamental principles to that document.
- 21 Magna Carta has been mistakenly described as “a reaction against the tyrannies and excesses of King John”.<sup>1</sup> For those of you who do not remember, King John is often portrayed as the venal brother of the saintly King Richard the Lionheart. In fiction at least, if not in fact, Robin Hood of Sherwood Forest was King John’s *bête noire*.
- 22 The real story of how Magna Carta came to be signed is too long to recount today. However, it did involve a revolt against King John by his barons not least because the monarch was “a capricious and inconstant ruler”, extracted enormous “taxes” from his subjects to finance his unsuccessful military expeditions and, in due course, faced with revolt by his barons embarked on a mission to subjugate them.<sup>2</sup> Continuing conflict with the barons was only averted by the compromise agreed in Magna Carta. Significantly for the purpose of today’s proceedings, at a time when the absolute legal authority of the King was accepted,<sup>3</sup> chapter 29 of Magna Carta stated:

“No free man shall be taken or imprisoned or exiled or in any way destroyed nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”

- 23 Thus Magna Carta manifestly asserted “the superior authority of the ordinary law and of regular over arbitrary justice”.<sup>4</sup> In effect, “King John promised that

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<sup>1</sup> Lord Irvine of Lairg, “*The Spirit of Magna Carta Continues to Resonate in Modern Law*”, (2003) 119 LQR 227 (at 229)

<sup>2</sup> Lord Irvine of Lairg (at 229 – 230).

<sup>3</sup> The Honourable Murray Gleeson AC, Chief Justice of Australia, “*Legality – Spirit and Principle – the Second Magna Carta Lecture*”, New South Wales Parliament House, Sydney, 20 November 2003.

<sup>4</sup> Lord Irvine of Lairg (at 231).

he would stop throwing people into dungeons whenever he wished”, a proposition said to “lie behind what is now known as due process of law”.<sup>5</sup>

- 24 It is hardly surprising, then, that Magna Carta has been described as “the first great act of a united nation”.<sup>6</sup> In the future “government not only had to be just, but also had to consider the good of the community”.<sup>7</sup> Magna Carta’s significance was brought home to the 13<sup>th</sup> century English populace by it being read in public by sheriffs, foresters and other bailiffs. By 1300, copies were being displayed in cathedrals and other public places across the land.<sup>8</sup>
- 25 In contemporary terms the “primary importance of Magna Carta” has been said to be that it is a “beacon of the rule of law ... [and that] it proclaimed the fundamental nature of individual liberties.”<sup>9</sup>
- 26 In August 1952 Australia bought a 1297 copy of Magna Carta. It was the first copy of Magna Carta ever to be sent out of England permanently. The then Prime Minister Robert Menzies described it as a “remarkable and historic document: the first charter of which we have record of what we now call civil rights or civil liberties”. His remarks were echoed by the Leader of the Federal Opposition, Dr H V Evatt, who described the copy as a “priceless possession [which] stood for the rule of liberty and was implicit in the constitutions of Australia, the British Commonwealth countries and the United States.”<sup>10</sup>
- 27 Just last year, Justice Antonin Scalia of the United States Supreme Court described Magna Carta as “being with us every day”.<sup>11</sup>

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<sup>5</sup> Jill Lepore, “*The Rule of History – Magna Carta, The Bill of Rights and the Hold of Time*”, *New Yorker*, April 20, 2015.

<sup>6</sup> Lord Irvine of Lairg (at 232).

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.* (at 232 – 233).

<sup>9</sup> *Ibid.* (at 234).

<sup>10</sup> *The West Australian*, 20 August 1952, page 1.

<sup>11</sup> Jill Lepore, (New Yorker).

- 28 Representations of Magna Carta also pervade American, and by necessary extension global, popular culture. In 1997 there was a simple song about it on “The Simpsons”.<sup>12</sup> I’ll spare you a rendition.
- 29 In 2013 rapper Jay-Z released an album, “Magna Carta Holy Grail”. Songs on the album in fact “told listeners nothing about Magna Carta”, however it is said that “the album was inspired by the ‘ideals of Magna Carta, and Jay-Z’s personal conviction’ that these remain relevant today”.<sup>13</sup>

### **The principle of legality**

- 30 Leaving pop culture aside, probably the most enduring legacy of Magna Carta, and that which endures for all our benefit today, lies in the fact that by asserting the superior authority of regular over arbitrary justice, it entrenched the principle of legality in the common law world. This means that “[a]ll public power must be based on law [and that] [g]overnments and citizens are subject to the law”.<sup>14</sup>
- 31 Chief Justice Gleeson described the principle of legality as “govern[ing] the relations between Parliament, the executive and the courts ...not merely [as] a common sense guide to what a Parliament in a liberal democracy is likely to have intended”, but as “a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted [and] ... an aspect of the rule of law”.<sup>15</sup>
- 32 That working hypothesis to which the Chief Justice referred feeds a principle of statutory interpretation no doubt well known to today’s graduates. It is that “a statutory intention to abrogate or restrict a fundamental freedom or principle

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<sup>12</sup> Magna Carta at 800, by Tiffany Middleton, American Bar Association, <http://www.nche.net/pages/history-matters/january-2015---middleton> (accessed 28 April 2015).

<sup>13</sup> *Ibid.*

<sup>14</sup> Gleeson CJ, *Legality – Spirit and Principle*.

<sup>15</sup> *Electrolux Home Products Pty Ltd v Australian Workers’ Union* [2004] HCA 40; (2004) 221 CLR 309 (at [21]).

or to depart from the general system of law must be expressed with irresistible clearness”.<sup>16</sup>

33 The significance of this aspect of the principle of legality is “that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words ... because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.”<sup>17</sup> As you would understand, the principle “operates ... as a powerful instrument for securing human rights”.<sup>18</sup>

34 In this, and in many other ways time does not permit me to address, Magna Carta promoted the principle of the rule of law, serving as “a reminder that internal peace and stable government required, at the very minimum, a balance between the governors and the governed, and a measure of restraint in the use by government of its coercive power ... requirements ... most effectively met by a system of government under the law”.<sup>19</sup>

35 That is what underpins this year’s celebration of the 800<sup>th</sup> anniversary of the execution of Magna Carta. I hope graduating in this memorable year will assist in entrenching your memories of today’s occasion. I hope, too, that it will serve as a reminder to you graduates in whatever area you pursue your legal training, even if it is not directly in a legal sphere, that you are working in a society shaped by the principle of legality.

36 For the wider audience too, I trust that this brief excursion into somewhat ancient legal history can be seen for its contemporary relevance. The legacy of Magna Carta should ensure that Australian society remains governed by the rule of law.

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<sup>16</sup> *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277 (at 304)

<sup>17</sup> *Reg v Home Secretary; Ex parte Simms* [2000] 2 AC 115 (at 131) per Lord Hoffmann.

<sup>18</sup> Gleeson CJ, *Legality – Spirit and Principle*.

<sup>19</sup> Geoffrey De Q. Walker, *The Rule of Law*, Melbourne University Press, 1988 (at 97).