ATTORNEY-GENERAL
THE HON ROBERT McCLELLAND MP

2009 Constitutional Law Conference

New South Wales Parliament House, Sydney

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CHECK AGAINST DELIVERY

[Acknowledgements]

- **First, may I acknowledge the traditional owners of the land we meet on – and pay my respects to their elders, both past and present.**

[Other Acknowledgements]

- **Associate Professor Andrew Lynch, Director, Gilbert and Tobin Centre of Public Law, University of New South Wales**
- **Sir Gerard and Lady Brennan**
- **Sir Anthony and Lady Mason**
- **The Honourable Ian Callinan and Mrs Callinan**
- **Justice Michelle Gordon, Federal Court of Australia**

- **Justice John Heydon, High Court of Australia and Mrs Heydon**
- **Distinguished guests**
- **Ladies and gentlemen**

[Introduction]

1. As many of you will know, the Australian Government, through a committee of eminent Australians, is currently consulting the people of Australia on the recognition and protection of human rights. With limited exceptions, our Constitution does not recognise individual rights, freedoms or guarantees. In *Kruger v Commonwealth* (1997)[1] Dawson J said: "Those who framed the Australian Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of Parliament. Thus, the Constitution deals, almost without exception, with the structure and relationship of government rather than with individual rights."

2. Nevertheless, in dealing with the structure and relationship of government, the Constitution

[1] 190 CLR 1 at 61.

does protect some fundamental individual rights. These rights are said to arise from "silent constitutional principles"[2] that are part of our public heritage. That constitutional heritage includes the English constitutional instruments - Magna Carta and the Bill of Rights 1688.[3]

3. Tonight I would like to reflect on how the first of those English constitutional instruments has had a profound impact on the development of fundamental rights - namely, the right to due process and the rights of citizens not to be arbitrarily deprived of their property. In doing so, I will endeavour to avoid what one writer has described as the unsatisfactory compound of "a mixture of legal dogma and legal history."[4]

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2 See Murphy J in *Victoria v Australian Building Construction Employees' Union and Builders Labourers' Federation* (1982) 152 CLR 25 at 108.

3 Ibid.

4 Mummery, D., "Due Process & Inquisitions" (1981) 97 Law Quarterly Review 287 at 303.

[Magna Carta]

4. Magna Carta is generally regarded as the origin of that principle which underpins the Westminster system: the rule of law. Its significance to Australia is recognized by the fact that a copy of the Charter is displayed in our Federal Parliament. As an aside, according to modern values, it could be argued that the Charter is voidable because on 15 June 1215 it was obtained under clear duress from King John. But Magna Carta was subsequently confirmed by seven Kings and its principles have been repeated from generation to generation.

5. There can be no doubt that the barons, clergy and foot soldiers who so pressured King John intended the document to be of great significance and intergenerational in its impact. Chapter 1 sets out that King John granted to all free men "all the underwritten

liberties, to be had and held by them and theirs, of us and our heirs for ever." In Chapter 61 the King also committed that he shall "procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and if any such things has been procured, let it be void and null."[5] Not a bad job of entrenching I must say.

6. The Charterers have had significant success. Their intentions have been fulfilled, at least in respect to those matters I have mentioned - due process of law and resistance to arbitrary deprivation of property.[6]

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5 See Guthrie, W.D., 'Magna Carta' (1929) 15 American Bar Association Journal 39.

6 I would not wish to overstate my claim of the significance of the impact of the Magna Carta and note that its name has been taken in vain by all kinds of eccentrics. See, for instance, *Re Attorney-General (Cth); Ex parte Skyring* (1996) 135 ALR 29. In debate for another time, it has been suggested that the Magna Carta has also informed the development of the law in respect to the right to trial by jury for Commonwealth indictable offences, ensuring the right of appeal or review and, possibly, the separation of church and state.

[Due process of law]

7. Unquestionably the most significant clause of Magna Carta is contained in Chapter 39 which has been interpreted as saying: "No freeman shall be taken or imprisoned or disseised, or outlawed, or exiled, or in any wise destroyed, nor shall we go upon him, nor send upon him, but by the lawful judgement of his peers or by the law of the land."

8. Over time, the phrase "the law of the land" evolved to become "due process of law". The earliest formal use of that term was in a statute of the year 1354 - 28 Edward III - which provided that no person should be condemned without being first brought to answer by due process of the law, or, in Norman French, "due proces de lei".[7]

9. There has been extensive writing and, indeed, controversy, about the evolution of this crucial

[7] Guthrie, Op cit, p. 40.

term.[8] But I think it is fair to say that the evolution of the phrase is significant because it became more than merely descriptive of "the law of the land". Instead, due process became a fundamental concept and principle which has both informed the development of the law and tempered its application.

10. Magna Carta is recognized as the source of the expression "due process of law" contained in the Fifth Amendment to the Constitution of the United States, ratified 1791, and the 14th Amendment, ratified 1868.[9]

11. In the Australian context, in *R v Mackellar; Ex parte Ratu*, Murphy J specifically credited Magna Carta as a foundation of natural justice and due process, saying: "The doctrine of natural justice is not a modern development; it is traditional in most English speaking

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8 For a useful discussion of that evolution see judgment of Priestly JA in *Adler v District Court of New South Wales* (1990) 19 NSWLR 317 at 347.

9 *Constitution of the United States of America: Analysis and Interpretation*, Senate Document 92-82, p. 1137, referred to by Murphy J in *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461.

countries. It is an aspect of due process, traceable in English law at least back to Magna Carta."[10]

12. In *Ebner v Official Trustee in Bankruptcy* (2000)[11] Gleeson CJ, McHugh, Gummow and Hayne JJ said: "Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal. Perhaps the deepest historical roots of this principle can be traced to Magna Carta."

13. There remains debate as to whether there is an implied constitutional right to a fair trial in Australia, at least at a federal level.[12] But it is nonetheless arguable that a fundamental principle of due process is integral to Australia's constitutional heritage and the development of Australian jurisprudence.

14. It might be seen at a deep level in the High Court's decision that Chapter III of the

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10 *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461, per Murphy J at 483.
11 205 CLR 337 at 343.
12 See Keyzer, P., *Constitutional Law*, 2nd ed., 2005, LexisNexis Australia, Sydney, p. 276-277.

Constitution, and the separation of judicial power, presents a barrier to any 'bill of attainder' or 'bill of pains and penalties' – even at State level.[13] It might be seen in concerns about legislation permitting the Parliament to direct the detention of a person, for the purpose of punishment, when their guilt or innocence has not been determined by a court.[14] And it might be seen in the determination to uphold the discretion of courts to stay proceedings where an unfair trial would otherwise result.[15]

15. Interestingly, the principles of Magna Carta are echoed beyond the criminal jurisdiction. In *Groves v the Commonwealth* (1981)[16] the High Court determined that a member of Australia's armed services could not be prevented from pursuing an action for negligence against the Commonwealth in circumstances where he was

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13 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
14 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.
15 *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Dietrich v The Queen* (1992) 177 CLR 292.
16 150 CLR 113

not involved in armed conflict. This was - the Court said - because "[h]e may not have the benefit of [Chapter] 29 of Magna Carta, justice to him *can* be denied by the courts; unlike the rest of the community, he is excluded from what Sir Edward Coke described as the right of every subject, that he may 'for injury done to him … by any other subject … take his remedy by the course of the law and have justice and right for the injury done to him…'".[17]

[Deprivation of property]

16. Australian courts have also recognised the historical foundations of Australian constitutional bulwarks against the arbitrary deprivation of property.

17. In the *Communist Party Dissolution Case* (1951)[18] the High Court said that, as at the date of the Constitution, "the King had no power by

[17] Ibid., per Stephen, Mason, Aickin and Wilson JJ at 126.
[18] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

the exercise of his prerogative to dissolve bodies corporate or unincorporate or forfeit their assets to the Crown or to deprive his subjects of their contractual or proprietary rights. Such action on his part would have been contrary to Magna Carta and the subsequent acts re-affirming Magna Carta referred to in Halsbury's Laws of England, 2nd ed., vol. 6, p. 450."[19]

18. That is not to say, as was made clear in the *Communist Party Dissolution Case*, that a person or entity could be not deprived of their property by a valid law of the Commonwealth Parliament. However, as was explained in *Clunies-Ross v Commonwealth* (1984)[20]: "an executive power of acquisition of land for a public purpose is different in nature to a legislative power of a national Parliament to make laws with respect to the acquisition of

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19 Ibid., per Williams J at 230-231.
20 155 CLR 193 at 201.

land for a purpose in respect of which the Parliament has power to make laws: see Magna Carta, c. 29 (25 Edw. 1 c. 29).”

19. The exercise of legislative power under section 51(xxxi) of the Constitution is of course conditional on just terms compensation. That precondition, I would argue, stems from the victory that the barons, clergy and people of England had over their Monarch on 15 June 1215.[21]

[International law]

20. The issue of proprietary rights of the individual is interesting because it is in that area that a possible merging of the principles of Magna Carta and the primary international human rights instrument, the Universal Declaration of Human Rights, can be detected. For example,

[21] Or, more accurately, perhaps against King John's immediate successor, Henry III. Under his reign, the chapter protecting freeman from being “taken or imprisoned, or disseised, or outlawed, or exiled, or in any wise destroyed” was amended to insert, after “disseised”, the words “of his free tenement or of his liberties or free customs”; Guthrie, Op cit, p. 40.

in *Newcrest Mining* (1997)[22] Kirby J referred to Article 17.2 of the Universal Declaration, which provides that "[n]o one shall be arbitrarily deprived of his property". His Honour described the roots of Article 17 in the following terms: "Whilst this article contains propositions which are unremarkable to those familiar with the Australian legal system, the prohibition on the arbitrary deprivation of property expresses an essential idea which is both basic and virtually uniform in civilised legal systems. Historically, its roots may be traced as far back as the Magna Carta 1215, Art 52 of which provided: 'to any man whom we have deprived or dispossessed of lands, castles, liberties or rights, without the lawful judgement of his equals, we will at once restore these'".[23]

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22 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

23 Ibid., per Kirby J at 658-659.

21. His Honour adopted similar reasoning in *Malika Holdings Pty Ltd v Stretton* (2001)[24] where he said that "the Universal Declaration of Human Rights, Art 17, like the Magna Carta (1215), cl 52, treats as 'fundamental' the rule against arbitrary deprivation of property."

22. Some may say we are seeing a merging of ancient rights and ancient constitutional principles with developments in international law.

23. It is not my intention to enter that debate, save in so far as I will invite you to consider the words of Brennan J in *Mabo v Queensland [No. 2]*, where he said: "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law

[24] 204 CLR 290 at 328.

declares the existence of universal and fundamental rights."[25]

24. I appreciate that there is a difference of opinion as to the extent to which fundamental international human rights principles have influenced and continue to influence the development of the common law. I would suggest, however, that this will inevitably be the subject of ongoing academic and adversarial debate. In particular, our friends across the Tasman are also engaged in the debate. For instance, Cooke P (as he then was) of the New Zealand Court of Appeal has said that it is "the duty of the judiciary to interpret and apply national constitutions, ordinary legislation and the common law in the light of the universality of human rights."[26]

[Conclusion]

[25] (1992) 175 CLR 1 at 42.
[26] Quoting the Balliol Statement of 1992; *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266.

25. Given this controversy, and in closing, I will leave you with a question, to which there will no doubt be a range of responses around the room. The question is - should the Parliament, by legislative action or the Executive by administrative action or practice, do anything to guide or influence that evolution of this important debate? An interesting challenge for Brennan J's son, Father Frank Brennan, who is presently chairing the Government's National Human Rights Consultation. I look forward to hearing what you, and all Australians, have to say on this issue.

ENDS (approx 1,970 words)