THE JUDICIARY IN THE SPOTLIGHT

Legal Studies Teachers' Association Annual Conference

DEPUTY CHIEF MAGISTRATE THEO TSAVDARIDIS[1]

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Introduction

1. The Magna Carta, which means the Great Charter of Freedoms in Medieval Latin, was first signed on 15 June 1215 by an unpopular monarch, King John of England, who wanted to make peace with rebel barons. The problem was that neither King John nor the barons stood by their commitments and it was annulled by the Pope, leading to the First Barons' War. It was reissued with some textual modifications in 1225 — 800 years ago — by King Henry III in exchange for the great council agreeing to a tax to pay for dispatching the army to repel the forces of King Louis VIII of France. Apart from the text, a key difference between the signing in 1215 and 1225 was that King John did so reluctantly whilst King Henry III issued it in his own 'spontaneous and free will' and confirmed them with the Royal seal.

2. This history tells us about the struggle between royal authority and the power of the people — a struggle that explains so much of English and Australian constitutional history. In 2025, we celebrate 800 years since the Magna Carta was reissued by King Henry III and 810 years since it was first issued by King John.

3. A difficulty that faced the barons in the 13th century was the ability to enforce the provisions in the Magna Carta or have a competent body independently adjudicate on any alleged breach of those provisions. Today, that role would fall onto the courts.

4. Courts exist to ensure that the law of the land — the *Constitution* and statutes passed by Parliament — is given effect. People come to the courts with their legal disputes and, as judicial officers, we ensure that every person with an interest is given an opportunity to be heard and the dispute is resolved independently, after hearing all the admissible evidence. This would have been a radical concept back in the 1200s when the King was thought to be incapable of doing any wrong, and the judges of that century were removable at the will of the King.

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5. Today, Australia is blessed to have a robust, independent judiciary which is unafraid to apply and follow the law faithfully and fearlessly wherever it leads us. Judicial officers do not decide cases based on opinion polls. We do not decide cases based on the wealth or skin colour of the parties, or how a party may vote in federal or state elections, and this sometimes means that we reach outcomes that we might have personally preferred went the other way. The judicial officers in this country take our oath very seriously, and we know that our own personal policy preferences have nothing to do with what the law is.

6. Today, I want to highlight two recent major decisions of the High Court of Australia. As you all know, the High Court is the final court for all appeals in the nation — whether the matter originated in a State or a federal court. There are seven talented Justices who selectively hear about 50 cases each year. This smaller workload enables the High Court to devote greater time and resources to answering the most challenging questions of law — these are often questions that have divided lower courts or have significant public interest.

7. I have selected these two decisions because they may have some relevance to parts of the Preliminary and HSC Legal Studies syllabus and to give you an opportunity to consider discussing with your students their significance. In doing so, I want to highlight the role of the courts in applying and interpreting the law.

Yunupingu

8. Last week, the High Court published its decision in *Commonwealth of Australia v Yunupingu*.[2] Mr Yunupingu had made an application to the Federal Court on behalf of the Gumatj Clan or Estate Group of the Yolngu People for compensation under the *Native Title Act 1993* (Cth) for 'past acts' that are 'attributable' to the Commonwealth.

9. Between 1939 and 1969, the Governor-General made ordinances that appropriated minerals and metals to the Commonwealth and granted interests in land to third parties in the Gove Peninsula in the Northern Territory. The Gumatj Clan claim that these actions were invalid because they were inconsistent with the native title rights and interests that were recognised as part of the common law of Australia by the High Court's landmark decision in *Mabo v Queensland (No 2)*.[3]

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2 [2025] HCA 6.
3 (1992) 175 CLR 1.

10. One of the issues was about the power of the Commonwealth Parliament. The Commonwealth Parliament does not have unlimited or plenary power to make laws on anything it wishes. Its legislative power is limited to enumerated subject-matters. Most of those subject-matters are listed in s 51, which includes external affairs, taxation, currency, marriage and immigration. For a Commonwealth law to be valid, it must be capable of being characterised as a law within one of the subject-matters in the *Constitution*.

11. Section 51(xxxi) states that the Commonwealth Parliament shall have the power to make laws with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. The High Court has explained in its past decisions that the effect of s 51(xxxi) is twofold. First, it confers power on the Commonwealth Parliament to acquire property and it conditions the exercise of that power on the State or person being provided with 'just terms'. The second is that it impliedly 'abstracts' the power to compulsorily acquire property from any other legislative power.

12. Section 122 states that the Commonwealth Parliament has the power to make laws 'for the government of any territory' that was accepted or acquired by the Commonwealth. Previous court decisions described s 122 as a 'plenary' power in the sense that, if a sufficient nexus or connection between the law and a territory is shown, the law is within power.

13. The issue is whether s 51(xxxi) abstracts from, or carves out of, s 122 the power to make any law with respect to an acquisition of property. If it did, then s 51(xxxi) would condition that law on the requirement to pay 'just' compensation. If it did not, then the Commonwealth would be free, in the exercise of the power in s 122, to acquire property in a territory without paying 'just' compensation.

14. The High Court held that s 51(xxxi) did abstract from s 122 the power to make any law with respect to acquiring property. First, the Court reached that decision by looking to the text of the *Constitution* as a whole. It held that there is a general principle of constitutional interpretation that, to make the condition of 'just terms' effective, s 51(xxxi) must be construed as the sole source of power to make any law for the acquisition of property.

15. Secondly, the Court rejected the submission made by the Commonwealth Government that laws made under s 122 are territorially confined and that there is no equivalent constraint on the legislative power of State Parliaments. The Court noted that the Commonwealth Parliament has the power to make laws of nationwide application but also the potential to make laws of

national significance even if their application is territorially confined. It explained that, when the Commonwealth is accepting or acquiring the territory, the government of the territory moves to a national plane. It is therefore unprincipled to equate the s 122 'territories' power of the Commonwealth with the powers of the States.

16. Lastly, the Court looked to precedent. It noted that, in a 2009 decision in *ICM Agriculture Pty Ltd v Commonwealth*,[4] the Court had held that the power of the Commonwealth to make grants with terms and conditions in s 96 was affected by s 51(xxxi). The Court explained that s 51(xxxi) excluded from the Commonwealth Parliament the power to impose a term or condition that would directly or indirectly require a State to acquire property otherwise than on just terms. The Court in *ICM Agriculture* had rejected the view that, because s 96 is found in Chapter IV of the *Constitution* and s 51(xxxi) is found in Chapter I, s 51(xxxi) had no work to do outside its own Chapter. Based on this precedent, it could not accept any argument that, just because s 122 is found in Chapter VI, it is immune from abstraction.

17. I invite you all to focus on the High Court's reasoning carefully. The first basis was the text and the need for the *Constitution* to be read as a whole, and making every provision effective. The second basis was on constitutional principle and the structure that it created for the division of powers between the Commonwealth and the States. The third basis was on precedent that had already rejected the argument that the Chapter in which the power is found is determinative of whether s 51(xxxi) abstracts the power to acquire property.

18. There has been some reporting in the media that *Yunupingu* could lead to significant financial implications for the Commonwealth Government. But these potential consequences did not sway the Justices of the High Court or affect their decision in any way. Those Justices followed the *Constitution* wherever it took them. This is what happens, quietly, day in and day out in the High Court and the courts in Australia.

***NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[5]**

19. *NZYQ* is another important decision of the High Court in 2023 that attracted significant media attention. One of the issues was whether the statutory framework for immigration detention was unconstitutional. *NZYQ* was a stateless Rohingya Muslim who had his bridging visa cancelled following a criminal conviction. After he was released from criminal custody, he was

4 (2009) 240 CLR 140.
5 [2023] HCA 37.

taken into immigration detention. Section 198 of the *Migration Act 1958* (Cth) imposed a duty on the Minister and his Department to remove NZYQ from Australia as soon as reasonably practicable but required that he be kept in immigration detention until removed from Australia, deported or granted a visa.

20. Despite attempts by the Minister's Department, it was considered that there was no real prospect of removal of NZYQ from Australia becoming practicable in the reasonably foreseeable future. NZYQ sought a writ of habeas corpus requiring release from detention. The writ of habeas corpus is one of the most celebrated writs in common law. It is available to secure the liberty of a subject by affording an effective means of immediate release from unlawful or unjustifiable detention. If there is a detention for which there is no legal justification, a court will order the detained person to be released.

21. An implacable obstacle for NZYQ's application was a previous 2004 decision of the High Court in *Al-Kateb v Godwin*.[6] *Al-Kateb* held that the relevant provisions of the *Migration Act 1958* (Cth) did not contravene Chapter III of the *Constitution*, entitled "The Judicature", which establishes the federal judiciary, including the High Court of Australia, and outlines its powers and functions including the ability to interpret the *Constitution*. NZYQ challenged the correctness of *Al-Kateb* and submitted that it should be reopened and overruled.

22. In an unanimous decision, the seven Justices of the High Court granted leave to reopen and formally overruled *Al-Kateb*. After concluding that NZYQ's decision was unlawful, the Court issued a writ of habeas corpus requiring the Minister and the departmental officers to release him forthwith.

23. To understand the decision in *NZYQ*, one must look to another decision of the High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[7] In *Lim*, the Court held, aside from exceptional cases, that 'the involuntary detention of a citizen in custody by the State is penal or punitive in character'. The *Constitution*'s first three Chapters are structured such that Chapter I goes to legislative power, Chapter II goes to executive power and Chapter III goes to judicial power. *Lim* recognised that, under our system of government, involuntary detention 'only exists as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'. *Lim* recognised that the difference between a non-alien and an alien (or unlawful non-citizen) lies in the vulnerability of the alien to exclusion or

6 (2004) 219 CLR 562.
7 (1992) 176 CLR 1.

deportation. Accordingly, it recognised the laws would be valid to detain an alien if the detention is 'limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.'

24. In *Al-Kateb*, the High Court applied *Lim* and, by majority, held that the *Migration Act 1958* (Cth) has valid application to detain an unlawful non-citizen in respect of whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. *Al-Kateb* has been the subject of immense criticism, including from Justices of the Court after it was decided.[8] At the same time, the principle in *Lim* had been repeatedly acknowledged and frequently applied.

25. In *NZYQ*, the High Court held that *Al-Kateb* had come 'increasingly to appear as an outlier in the stream of authority which has flowed from *Lim*' and that it had been '"weakened" by later decisions'. In considering whether *Al-Kateb* is reconcilable with *Lim*, six Justices found that the *Lim* principle would be devoid of substance if it was 'enough to justify detention … designed to achieve an identified legislative objective that there is no real prospect of achieving in the reasonably foreseeable future.'

26. On the evidence before the Court, there was no real prospect that NZYQ could be removed from Australia in the reasonably foreseeable future. Thus, in the reasonably foreseeable future, NZYQ would be detained indefinitely. The very justification of detaining him — to facilitate and enable NZYQ to be removed or deported — cannot be achieved. At that moment, there is no non-punitive justification for the continuing detention of NZYQ.

27. The media reporting after *NZYQ* was fierce and strong. Some commentators and politicians blamed the High Court for siding with dangerous criminals. Those who make such inflammatory statements should seriously reconsider them. Baseless attacks on the High Court harm our public understanding of its decisions and risk bringing the judiciary into disrepute. The Court was faithfully applying a long line of authority that came before and after *Lim* that had held that, absent exceptional circumstances, punishing individuals by detaining them is a judicial function. These ideas did not come out of thin air: they are rooted firmly in the text and structure of the *Constitution*, particularly its vesting of federal executive power in Chapter III to the courts. This is an important safeguard of individual liberty.

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8 *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1 at 23-32 [54]-[77].

Conclusion

28. I hope that these brief insights into *Yunupingu* and *NZYQ* have shone some light on the work of the judiciary in constitutional law, native title and human rights. When a person comes before the High Court (and, yes, the Local Court too), they are entitled to an impartial judiciary which will deliver justice according to law. Most of my work as a Deputy Chief Magistrate of the Local Court of NSW involves criminal matters. Every accused is entitled to the presumption of innocence unless and until proven guilty. They are entitled to be given the opportunity to test the prosecution's evidence, and to put their own case to an impartial judicial officer. They are entitled to be treated fairly and with respect. I cannot guarantee any person more than that, but I promise them nothing less.

29. It bears repeating some words that I said last year in a separate speech:

> When students come and visit the Local Court on school excursions or as part of work experience or internships, they can sometimes observe a short criminal hearing. Students have said to me that, after seeing the evidence, they had a hunch or suspicion that an accused committed an offence. But they were surprised, and perhaps even disappointed, when the Magistrate acquitted the accused. The answer is simple: a court finds an accused guilty if and only if the prosecution has proven beyond reasonable doubt — which is a very high standard — all the elements of the offence and negatived any defences in respect of which an accused has discharged the evidential burden. I have no hesitation ruling against the prosecution, and acquitting an accused, if the prosecution has not met this legal burden. Equally, I have no hesitation finding an accused guilty if the evidence, viewed as a whole, proves beyond reasonable doubt all the elements and negatives any defences.

30. Some of these core principles of a fair trial made their way into the Magna Carta 800 years ago. And after many years of learning, the courts have refined them to ensure that every person is entitled to equal justice under the law.

31. On behalf of the Chief Magistrate, Judge Michael Allen, and myself, I thank you for all that you do in educating and inspiring the minds of the students of New South Wales, some of whom will go on to become lawyers, others leaders in business, and others Magistrates, Judges or Members of Parliament. I am cognisant of the enormous effort that goes into preparing lesson plans and curriculum materials; delivering instructional content; assessing student progress and understanding; providing feedback and support to help students improve their knowledge of the legal system, address misconceptions and develop study skills; and preparing students for assessments and the HSC. This is where respect for the law begins and community confidence in the justice system is forged.