SEPTEMBER 11 AND ITS AFTERMATH: CHALLENGES FOR LAWYERS AND THE RULE OF LAW

ADDRESS TO MADDOCK LONIE & CHISHOLM 15 APRIL 2002 BY CHRIS MAXWELL QC – PRESIDENT, LIBERTY VICTORIA

Thank you very much for your invitation to speak to you today. This is the first time, in my 18 months as President of Liberty Victoria, that I have been invited to address a law firm. I was also here several weeks ago, addressing a meeting of the Amnesty International Legal Group on the subject of the proposed anti-terror laws.

Clearly this firm has a strong sense of the importance of engaging with the significant issues which confront lawyers and the rule of law today. As I will say a little later, I hope today will be the beginning of a partnership between your firm and Liberty Victoria into the future.

September 11

On 11 September 2001, two important events occurred at opposite ends of the world. The better known of the two was the cataclysmic terror attack on the United States, in New York and Washington.

The other event occurred a few hours earlier, in Melbourne. On the afternoon of September 11, Justice North of the Federal Court handed down his decision in the matter of *Victorian Council for Civil Liberties v. Minister for Immigration and Multicultural Affairs*[1]. In his judgment, Justice North declared that the Federal Government had broken the law in detaining 433 asylum-seekers on the vessel *MV Tampa* in Australian territorial waters, and preventing them from setting foot on Australian soil.

Specifically, his Honour held that –

(a) the Federal Court had jurisdiction to make an order for release in the nature of a writ of *habeas corpus;*

(b) Liberty Victoria, though a stranger, had standing to seek that relief;

(c) the Government's acts had resulted in a total restraint on the freedom of the *Tampa* asylum-seekers;

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1 (2001) 110 FCR 452.

(d) Liberty Victoria was entitled to a remedy requiring the release of the asylum-seekers. The Federal Government should release them and bring to the Australian mainland;

(e) the *Migration Act*, which contains comprehensive provisions concerning the removal of aliens, was intended to regulate the whole area of removal of aliens, and left no room for the exercise of any prerogative power on the subject. In particular, ss.198 and 199 of that Act constitute a comprehensive code for the removal from Australia of unlawful non-citizens.

In some ways the most important point about the judgment was that, the morning after he had delivered it, Justice North turned up for work! He had not been sacked, he had not been threatened, he had not been assassinated. Elsewhere in the world he might not have been so lucky.

More vividly than ever before, this case brought home to me the vital importance of a fearlessly independent judiciary, and how fortunate we are to have it.

The circumstances could hardly have been less propitious. The Government's stand, in preventing the arrival of the *Tampa* asylum-seekers, was receiving overwhelming support from the public. The asylum-seekers, consequently, were as despised and powerless a group of people as could have been imagined. And the Federal Government had made sure that the asylum-seekers could have no communication with the outside world, let alone with the public interest lawyers who had been trying repeatedly to get instructions from them. On the second day of the hearing, Liberty's solicitors (Holding Redlich) made a written request to the Australian Government Solicitor for access to the asylum-seekers so that proper instructions could be obtained. The request was flatly refused.

But at 5:30 pm on Friday, 31 August 2001, the door of the Federal Court was open to these people. Thanks to the energy and inventiveness of John Manetta, a barrister and now a member of the Liberty Victoria Committee, and of the tireless lawyers at the Public Interest Law Clearing House (PILCH), the possibility of an action for *habeas corpus* had been identified the previous day[2]. Julian Burnside QC was retained, papers were drawn and, at 1:30 pm on the Friday, Burnside telephoned me to ask whether Liberty Victoria would be prepared to act as the applicant and, if so, would I be able to assist him in presenting the arguments.

Amnesty International had been asked but, because of its somewhat cumbersome international structure, had not yet made a decision. Being a small organisation, we were able to make a decision quickly. Recognising that there was a costs risk (of which more

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[2] Independently I received a message on my mobile phone from another Liberty Committee member, Remy Van Der Weil, asking: "What about *habeas corpus for the Tampa?*"

later), we nevertheless agreed readily. (Decision-making in the age of mobile phones and email is a great deal faster than it would once have been!).

Justice North sat until 9:30 pm on the Friday evening, from 11:00 am until about 10:00 pm on the Saturday, and until about 10:00 pm on the Sunday. At that point – thanks to the insistence of the Judge and the patience of the District Registrar – a mediated settlement of the interlocutory application was arrived at. The asylum-seekers were transferred from the quite unsuitable conditions on the *Tampa* to the naval vessel *Manoora*, and thence sailed to New Guinea and Nauru – on the Government's undertaking that, if the application succeeded, they would be returned.

The Court then proceeded immediately to hear the applications for final relief. The Court sat through the following Monday, Tuesday and Wednesday, and delivered judgment six days later.

Delay in the Courts is a matter of legitimate public concern. But the converse should also be true. Judicial expedition and diligence of this exceptional degree should be a matter of public acclamation. Sadly, this amongst other aspects of the *Tampa* case went unremarked because it was overtaken, almost immediately, by the tragic events in America.

The appeal to the Full Court

Justice North's decision was handed down on Tuesday, 11 September at 2:15 pm. At 10:15 on the Thursday morning (13 September), a Full Court of the Federal Court convened to hear the Government's appeal. The Chief Justice, Justice Black, presided, with Justice Beaumont and Justice French. Argument took a day, and on Monday, 17 September at 4:15 pm, the Chief Justice announced the decision.

By majority (Beaumont and French JJ), the Court upheld the Government's appeal and set aside the orders for the release of the asylum-seekers and their delivery to the Australian mainland. The judgments repay reading in full.[3]

Needless to say, Liberty Victoria has a strong preference for the dissenting judgment of the Chief Justice. Leaving aside the question whether the treatment of the *Tampa* asylum-seekers could properly be characterised as "detention" for the purposes of *habeas corpus*, the critical issue was whether – assuming it <u>was</u> detention – there was legal authority for it.

Was there power?

As already noted, Justice North had concluded that if there were power to prevent the *Tampa* from landing, it had to be found within the four corners of the *Migration Act*. His

[3] See (2001) 110 FCR 491.

Honour held, in accordance with established principle, that the passing of that Act had ousted any Crown prerogative which might previously have existed with respect to the same subject-matter.

The Chief Justice identified the applicable principle in the following terms:

> *"It is uncontentious that the relationship between a statute and the prerogative is that where a statute, expressly or by necessary implication, purports to regulate wholly the area of a particular prerogative power or right, the exercise of the power or right is governed by the provisions of the statute, which are to prevail in that respect: Attorney-General v. De Keyser's Royal Hotel Limited* [1920] AC 508. *The principle is one of parliamentary sovereignty.*
>
> *The question is, what is the test to determine whether a prerogative power has been displaced by a statute? The accepted test is whether the legislation has the same area of operation as the prerogative."*[4]

The Government's argument was that it had acted in exercise of a prerogative power, embraced by the executive power of the Commonwealth under s.61 of the Constitution. In a lengthy analysis, the Chief Justice considered whether this prerogative - to refuse an alien admission to the realm - still existed. His Honour noted that –

- in an 1890 article in the Law Quarterly Review, WF Craies (author of the well-known work Statutory Interpretation) argued that the prerogative to exclude aliens in times of peace –

  "if not absolutely gone, was deemed too weak and rusty for independent exercise."[5]

- in 1938, Professor Holdsworth in his History of English Law noted that the last occasion on which a prerogative power to expel or exclude non-citizens had been exercised was in 1771, when the Crown directed that Jews "unable to pay the usual freight" should, unless they had a passport from an ambassador, be excluded from British territory.

In the event, the Chief Justice found it unnecessary to express a concluded view about whether this "rusty" prerogative still existed, being satisfied that –

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4 110 FCR at 501.

5 (1890) 6 Law Quarterly Review 27 at 37.

> *"the Parliament intended that in the field of exclusion, entry and expulsion of aliens the Act should operate to the exclusion of any executive power derived otherwise than from powers conferred by the Parliament. This conclusion is all the more readily drawn having regard to what I have concluded about the nature and the uncertainty of the prerogative or executive power asserted on behalf of the Commonwealth."*[6]

By contrast, French J (with whom Beaumont J agreed) concluded that –

> *"The Migration Act, by its creation of facultative provisions, which may yield a like result to the exercise of executive power, in this particular application of it cannot be taken as intending to deprive the executive of the power necessary to do what it has done in this case. The Migration Act confers power. It does not in the specific area evidence an intention to take it away."*[7]

Was there detention?

Though it was, in the end, an academic question, it was the dissenting view of the Chief Justice that asylum-seekers had been detained on the *Tampa*. He concurred with the view of Justice North, who had found that there was, in reality, a total restraint on their freedom. The Government had taken –

> *"complete control over the bodies and destinies of the [asylum-seekers]."*[8]

Justice French, on the other hand, held that there was no restraint on the liberty of the asylum-seekers which could be attributed to the Commonwealth. In his Honour's view:

> *"the actions of the Commonwealth were properly incidental to preventing the asylum-seekers from landing in Australian territory where they had no right to go. The inability to go elsewhere derived from circumstances which did not come from any action on the part of the Commonwealth. The presence of SAS troops on board the MV Tampa did not itself or in combination with other factors constitute a detention."*[9]

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6 110 FCR at 508 para 64.
7 110 FCR at 545 para 202.
8 110 FCR at 473 para 81.
9 110 FCR at 548 para 213.

The question of costs

It was a matter of public knowledge that all the lawyers working for Liberty Victoria, and for Eric Vadarlis, the other applicant, were doing so pro bono. When judgment was handed down at first instance, in favour of Liberty Victoria and Mr Vadarlis, Julian Burnside announced that Liberty would seek no costs against the Government.

When the Full Court's decision was handed down, reversing the decision, we were optimistic – naively as it turned out – that the favour would be returned. The judgment of Justice French concluded with this statement:

> *"The counsel and solicitors acting in interests of the [asylum-seekers] in this case have evidently done so pro bono. They have acted according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the executive accountable for the lawfulness of its actions. In so doing, even if ultimately unsuccessful in the litigation they have served the rule of law and so the whole community."*[10]

A few days earlier, the Council of the Law Institute had passed a resolution commending the applicants' lawyers, for acting pro bono –

> *"and in the face of some public hostility. Ultimately the law, and lawyers, gain the respect of the public because of actions such as yours."*

But our illusions were soon shattered. As we left Court we were informed by the Solicitor-General that the Commonwealth would want its costs of the hearing at first instance and of the appeal.

The Court directed that written submissions be filed on the question of costs. This occurred by early October. Then we waited...

Whether pro bono?

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[10] 110 FCR at 548-9 para 216.

The delay gave us an opportunity to reflect on the sheer hypocrisy of the position taken by the Commonwealth Attorney-General – for it was his decision that the costs application be pursued.

Only months earlier, the Attorney had been publicly extolling the virtues of pro bono work, as a means of expanding access to justice. He referred to the 1.7 million hours of pro bono work done by lawyers every year, describing it as –

> *"a significant contribution to the public good of time, effort and expertise that has gone largely unrecognised."*

He called on lawyers everywhere to maximise their pro bono commitment.

(As a former Commissioner of the Legal Aid Commission, I strongly disagree with this approach. There is, of course, an important place for pro bono work. But it is, by definition, ad hoc. It is not, and can never be, a substitute for a properly-funded legal aid system, in which requests for assistance are judged according to uniform means and merits guidelines.)

The victory at first instance had completely vindicated the decision of Liberty Victoria, and Mr Vadarlis, to bring the proceedings in the first place. We had won on almost every point. The efforts of the lawyers had, as Justice French said, been in accordance with the highest ideals of the law, enabling powerless individuals, entitled to the protection of Australian law, to assert that entitlement.

The inevitable effect of the Commonwealth's pursuit of an order for costs will be to discourage pro bono litigation. It is false to distinguish between the lawyers (who, of course, are not at personal risk for costs in the usual case) and their clients. If the justification for pro bono work is that it allows a just claim to be asserted where it would not otherwise be, then an application for costs will produce exactly the opposite effect. It will discourage those with good claims, but limited resources, from pursuing them, even where lawyers are prepared to act for nothing.

Costs in public interest litigation

Finally, on the Friday before Christmas, the Full Court handed down its decision. Once again, the Court was split 2-1. But this time, we had the numbers!

In a joint judgment, Chief Justice Black and Justice French decided that there should be no order as to costs ie. each party should bear its own costs. This judgment, too, repays close attention for its discussion of the principles applicable to the exercise of the costs discretion, both in general and in cases which may be characterised as "public interest litigation".

Importantly, the Court emphasised that there is no special rule governing the award of costs in public interest litigation. Their Honours said:

> *"That a proceeding was brought otherwise than for the personal or financial gain of the applicant, and in that sense in the public interest, does not detract from the general proposition that ordinarily costs follow the event and that the primary factor in deciding on the award of costs is the outcome of the litigation."*[11]

Noting that the Commonwealth's success on the appeal weighed in favour of an order for costs in accordance with "the usual rule", their Honours identified the following particular features which, they said, "together point powerfully in the other direction":

> *"•* *The proceedings raised novel and important questions of law concerning the alleged deprivation of the liberty of the individual, the executive power of the Commonwealth, the operation of the Migration Act 1958 (Cth) and Australia's obligations under international law.*
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> • *There was divided judicial opinion on these important issues, illustrating their difficulty.*
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> • *The Commonwealth Parliament has subsequently passed laws purporting to exclude the rights of VCCL and Vadarlis or any other person to pursue the matter further, albeit special leave to appeal in the High Court was refused on other grounds going to utility and jurisdiction.*
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> • *The Commonwealth Parliament has also legislated to establish, as a proposition of statute law, in accordance with the view of the majority in the Full Court, that the Migration Act does not prevent the exercise of the executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders.*
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> • *There was no financial gain to either VCCL or Vadarlis in bringing their claims.*

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[11] Para 18.

- *The legal representation for VCCL and Vadarlis was provided free of charge. The quality of the representation (on all sides) ensured that the proceedings, and the important questions to which they gave rise, were pursued and resolved with expedition and efficiency."*

Their Honours concluded with this summary:

> *"This is a most unusual case. It involved matters of high public importance and raised questions concerning the liberty of individuals who were unable to take action on their own behalf to determine their rights. There was substantial public and, indeed, international controversy about the Commonwealth's actions. The proceedings provided a forum in which the legal authority of the Commonwealth to act as it did with respect to the rescued people was, and was seen to be, fully considered by the Court and ultimately, albeit by majority, found to exist."*[12]

Why not the High Court?

On the morning of 19 September 2001, the "brains trust" of Liberty Victoria met in my chambers to consider the reasons of the members of the Full Federal Court. On the basis of those judgments, we formed the view that there was a proper basis in law for an application to the High Court for special leave to appeal.

Later that day, however, we announced that there would be no appeal. The Commonwealth had introduced a Bill, which the Labor opposition had given a commitment to support, which would retrospectively make lawful any action taken by or on behalf of the Commonwealth in relation to the *Tampa* or any person on board the vessel.

The decision was made with great reluctance. As we said in our press release –

> *"In short, the Federal Government – aided by the Labor opposition – is about to do what no other litigant in the same position could do – wave the legislative magic wand and validate conduct which, in the view of two judges of the Federal Court, was unlawful.*
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> *While Liberty Victoria of course respects the sovereignty of Parliament, it is most regrettable that the exceptional*

[12] Paras 28 and 29.

> *power to legislate retrospectively should be used in a case such as this, where the Commonwealth's conduct involves –*
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> *(a) (unlawful) detention;*
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> *(b) a breach of Australia's international obligations under the Refugee Convention;*
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> *(c) the deliberate contriving of a situation where the asylum seekers would be denied the ordinary protections of Australian law and refused access to the procedures which Parliament has established;*
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> *(d) the denial of any access to, or communication with, the asylum seekers (including the outright refusal of a request by Liberty's solicitors for access to the asylum seekers in order to seek instructions); and*
>
> *(e) the use of military personnel to enforce administrative detention."*

Mr Vadarlis, on the other hand, did make an application for special leave. He failed, principally on the ground that by then the asylum-seekers were in Nauru and the world had moved on.

The link with terror

Between 11 and 19 September, the Federal Government sought to engender hostility towards the asylum-seekers by linking the issues in the *Tampa* litigation with the tragic events in the United States. Both in and out of Court, the Government hinted that there might have been terrorists on board the vessel from which the *Tampa* asylum-seekers were rescued.

There was no basis for these insinuations. The only conclusion to be drawn is that the Government was deliberately inciting hatred for political purposes. As with the pernicious fairytale about the children overboard, the imputations against the *Tampa* asylum-seekers have never been withdrawn.

The anti-terror laws

In October, the Government announced that new laws would be introduced into Parliament outlawing terrorism. It was not until March this year that we finally saw the details of these appalling proposals.

The proposed anti-terror laws are founded on a fallacy, a verbal trick. The Government asserts that "terrorism" is some new species of human malefaction, having its own legal and moral qualities. Thus Attorney-General Williams speaks of the need for:

> *"measures to enhance our ability to meet the challenge of the new terrorist environment*".

In fact, "terrorism" is only another name for serious criminal activity. All that distinguishes a "terrorist" act from any other criminal act as its scale and its political motivation.

There is no need for a new offence of terrorism. Our criminal law already provides heavy penalties for the crimes in question – murder and conspiracy to murder in particular. Nor can there be any justification for creating absolute liability offences carrying maximum sentences of 25 years.

The response to a terrorist act – or, in Australia's case, to the entirely theoretical possibility that someone may be planning one – must be to bring to bear the full armoury of police and ASIO powers as they presently exist. And to resist calls for new laws unless and until a compelling case is made that existing powers are inadequate.

Liberty Victoria has made two submissions to the Senate Committee which is enquiring into the Bills. Have a look at our website (www.libertyvictoria.org.au) and make a submission of your own.

Lawyers and Liberty

One of the slogans of Liberty Victoria is:

> *"The voice of Liberty must be heard".*

Never has it been more important than now for our democracy to be served by vigorous, independent non-government organisations, which can challenge the prevailing orthodoxy or political consensus and which can stand up for those minority groups or interests which our majoritarian system neglects.

The issues with which Liberty Victoria is called on to deal are, to a significant extent, legal issues, or issues which require some understanding of legal principle and process. As the *Tampa* case and the debate on the anti-terror laws demonstrate, the work of

Liberty Victoria provides a unique opportunity for lawyers to put their skills to work in the public interest, in the fields of public policy to which our roles as client advisers and advocates rarely take us.

I want to invite your firm, and those who work here, to enter into partnership with Liberty Victoria. This can happen in any one of the following ways:

- the firm simply makes a donation to Liberty Victoria, to confirm what has been made evident by your inviting me here today - that the firm believes what Liberty is doing is important;

- individual lawyers can become members of Liberty Victoria, and can choose whatever level of active involvement suits their commitments;

- best of all, your firm can respond positively to the invitation I will soon be making to a number of law firms in Melbourne, to make a commitment to provide recurrent funding to Liberty Victoria over three years, to fund a full-time research and education position.

When I took office in October 2000, there was no regular administrative support at all. Now we have two highly-qualified research officers, working a total of 13 hours per week. My aim is to have the office staffed full-time by the end of this year, so that our capacity to identify and respond to public policy issues is maximised.

Thank you for inviting me today.