
Inaugural public Interest Address
“Dark Victory” – the Tampa Victory
by David Marr

Very late in the piece, only a week or so before Dark Victory went to press, Marian Wilkinson and I decided we had to make one last effort to speak to Max Moore-Wilton. Four separate sources had told us that in 1999 he had proposed removing the boat Australia kept moored at remote Ashmore Reef. Its official purpose was to stop trepang being plundered by Indonesian fishermen. But the boat had become the lifeline for asylum seekers arriving at this barren, waterless atoll. Moore-Wilton’s proposal shocked bureaucratic Canberra – and the proposal was killed as too dangerous, too cruel.

Marian and I wrote to Moore-Wilton. I had bumped into him at a wedding and we’d exchanged a few words about the Tampa but he had refused all our requests for interviews. But now, faced with the Ashmore Reef allegations, he rang and confirmed their truth. While we were talking I asked him one of the still-unanswered questions of the Tampa operation – had the order to block the ship come from John Howard? He indicated it had, and that’s what we wrote in Dark Victory.

The other day, to celebrate Howard’s totemic 64th birthday, Moore-Wilton gave an interview to John Lyons of Channel Nine’s Sunday Show which clarified the orders Howard had given the head of his public service sometime on the night of Sunday August 26, 2001.

Moore-Wilton said: “His brief to me was ... that this vessel should not be allowed to land in Australia if we legally can prevent it. That the people on board the Tampa were illegal immigrants who were using duress and force against the ship’s crew to land on Australian territory and that we would do everything possible within the law to frustrate that.”

Let me briefly clear some undergrowth from that statement. Unprecedented efforts to keep these people from landing in Australia had been going on for at least 24 hours before they were rescued by the Tampa. These efforts – some of them shameful - are detailed in Dark Victory. To pretend as the government did then and Moore-Wilton still

does now that the strategy of blocking the Tampa was adopted because of the threats made by the asylum seekers to Cpt Rinnan is a lie.

Nor were these people “illegal” except in the trivial sense that they had no papers. As a party to the Refugee Convention, Australia has undertaken not to penalise asylum seekers arriving without documentation. Nevertheless we do - and have, now, for over a decade both by our policy of mandatory detention and by the vilification of these people – vilification automatically employed by Moore-Wilton describing them as “illegals”.

Nor was it correct of Moore-Wilton to describe the people on the Tampa’s deck that night as immigrants. Most were Afghans heading for Australia at a time when nearly every Afghan asylum seeker reaching these shores could establish genuine claims to refugee protection. Canberra knew that night that it was shutting Australia’s ports to refugees. That’s what it was all about.

When the Taliban fell, most of the Afghans rescued by the Tampa lost their claim to refugee protection. But not all of them. Some were recognised as true refugees by both the UNHCR and Australia. About 25 of these are still behind the wire on Nauru with Australia scouring the world – unsuccessfully – to find a country willing to take them off our hands. The other day, Ruddock finally admitted these people would have to come, at last, to Australia – the country they were heading for that night on the deck of the Tampa. The Pacific Solution has collapsed.

That’s just the undergrowth. What’s crucial in Moore-Wilton’s snappy and deceptive answer to John Lyons – and crucial to all that happened from the blocking of the Tampa onwards – was to assert the legality of this operation. Listen to Moore-Wilton words again: “His brief to me was ... that this vessel should not be allowed to land in Australia if we *legally* can prevent it. That the people on board the Tampa were *illegal* immigrants who were using duress and force against the ship’s crew to land on Australian territory and that we would do everything possible *within the law* to frustrate that.”

Before going any further I think it’s useful to make a few declarations. Marian Wilkinson and I don’t believe in open borders. Those who pose as refugees in order to circumvent immigration controls imperil the whole refugee system. Refugee claims have to be carefully scrutinised and those with no right to protection deported. Effective policing of people smugglers is also essential for the survival of the Refugee Convention.

Smuggling rings must be challenged and broken. But it is our not-very-radical view that the policing of our borders and the administration of the refugee system should – like all functions of the Commonwealth - be carried out according to law.

Right from the start, the Tampa operation wasn't. On the night Moore-Wilton got his brief from the Prime Minister, Capt Arne Rinnan was threatened with the people smuggling provisions of the Migration Act if he did not turn the Tampa around. The Tampa's log records the threat succinctly: 'prosecution and fines up to A\$110,000 and jail.'

What, if any, legal advice was obtained before those threats were made is a mystery. Senior officers of the Attorney-General's department only learnt about the threat later - and with dismay. The Norwegians regarded it at first as an empty threat, empty because they assumed Canberra had made a mistake, a mistake that would be corrected as soon as they had time to obtain competent legal advice. But a few days deeper into the crisis – as the Tampa was about to cross the line into Australian territorial waters – Canberra again threatened to fine and imprison Rinnan.

Rinnan was not a people smuggler. The possibility of ever committing him for trial on such a charge was impossibly remote. The facts simply didn't fit such a charge and his best defence would be the government's own claim that he was doing what he was doing under duress. Canberra's threats to Rinnan under the Migration Act were empty, bullying and unfounded in law.

On the same night, there was a collision of views in Canberra over a very old principle of the sea: that the master of a ship is best placed to decide in an emergency the right course of action for his ship, his cargo, his passengers and his crew. While Rinnan was fielding threats from both the asylum seekers and Canberra, he asked an officer of AMSA – the Australian Maritime Safety Authority – whether it was best to take his ship to Indonesia or to Christmas Island. The officer replied: 'That's a question, sir, that I'd say is up to the captain.'

Later, the CEO of the rescue authority, Clive Davidson told the Senate Inquiry into a Certain Maritime Incident: 'Custom and practice is that the master would assess the situation.' Speaking at a maritime law conference after these events were well over, Mark Zanker, an assistant secretary in the International Division of the Attorney General's department confirmed both Rinnan's authority to decide the issue and the good sense of the decision he reached. Zanker said: 'It is difficult to see

that the master had any choice but to change course as he did towards Christmas Island.’

But the view of the Prime Minister, the Foreign Minister and the Department of Prime Minister and Cabinet was that Canberra – or failing Canberra, Oslo – had a right to order Rinnan where to take his ship. This came to a head in the frantic twelve hours before the Tampa entered Australian territorial waters with both Downer and Howard on the phone begging their counterparts in Norway to order the ship to sail.

This is what we wrote: “A blustering, emotional Downer demanded that the Norwegian minister order the *Tampa* to stay away. Thorbjørn Jagland pointed out, once again, that he had no authority to do so. Once more the Australian minister swept the point aside...As far as Jagland was concerned it didn’t matter on what grounds the Australian government disputed Rinnan’s decision. ‘I had to stick to the principle that the captain had the right to make the judgement.’ Downer now told Jagland that if the *Tampa* entered Australian territorial waters, it would be boarded by military force. Jagland said: ‘I could only reiterate what I said all the time, that this was against international law but that we couldn’t do anything about this. We are a tiny nation far away. We couldn’t intervene in it but I can only maintain the principles.’

In an aside here: as a result of the Tampa crisis, the Maritime Safety Committee of the International Maritime Authority (the IMO) has recommended one of the Safety of Life at Sea rules be strengthened to re-emphasise the independent authority of the ship’s master. This is a deliberate slap in the face for Australia. If adopted by the IMO, the new rule will state explicitly that the master shall not be prevented from making decisions which he believes are necessary for safety of life at sea by ‘the owner, charterer, or the company ... or any other person’ – which construction would encompass John Howard, Alexander Downer and Max Moore-Wilton.

But this is not a simple story. At the heart of the Tampa crisis is an issue international law cannot solve – yet even here, the government set out to misrepresent the situation to its own advantage. On the second day of the crisis, with the Tampa hove to in the Indian Ocean, Howard emerged from Cabinet to tell the press there were only two states responsible for landing the rescued asylum seekers on its decks. Howard said: “It is our view that as a matter of international law this matter is something that must be resolved between the government of Indonesia and the government of Norway.”

That was wrong and known to be wrong by anyone with any knowledge of this famous black hole in international law. For over 25 years since the fall of Saigon, attempts have been made to draft binding international rules assigning responsibility for the disembarkation of refugees rescued at sea. Ships masters have an obligation to rescue – but there is no clear obligation on any country to take the survivors off the hands of the shipping companies. All that international law has established is that there are three candidates: (1) the flag state of the ship – that would be Norway. (2) the state of the next port of call, that might be Indonesia or Singapore. (3) Or the coastal state – Australia.

Leaving Australia off that list of possibilities was one of John Howard's most remarkable misstatements of law in the Tampa crisis – and as far as I have been able to determine, no considered legal advice was given to the Prime Minister or Cabinet before he made that statement to the press. It was more or less plucked out of the air.

So twenty four hours into the crisis, the Australian government had shut the ports to refugees contrary to the Refugee Convention, made a legally baseless threat to Rinnan, attacked his prerogative as ship's master and misrepresented to the public Australia's obligations under international law. And that was only a start.

Naturally, as the crisis developed over the next few weeks – first the Tampa and then the military blockade of the Indian Ocean – the government went to considerable lengths to stay within the law where it could. But where its new – and instantly popular - policy of shutting the ports to refugee boats conflicted with law and conventions, Canberra was willing to go on breaking and misrepresenting them to suit its purposes.

What is profoundly worrying about that – and was the principal reason for my part in writing *Dark Victory* – is Canberra somehow managed to maintain an aura of lawfulness over the whole operation and even today the public remains unconcerned by strategies which call into question Canberra's commitment to the rule of law.

The biggest legal obstacle to the Howard government's new strategy of shutting the ports to refugee boats – including the Tampa - was the absence of any law authorising such a blockade. The Migration Act was a carefully constructed machine designed to Hoover asylum seekers up as soon as they approached Australian waters for fear they might otherwise slip ashore and disappear into the hinterland. This absolute obligation to

bring asylum seekers ashore for processing applied to immigration officials, police, the coastguard, the navy – and in certain circumstances the army.

So what did Canberra do once Rinnan ignored all threats and brought the Tampa to within a couple of kilometres of Christmas Island? First, all such Australian officials were kept away from the ship – and the SAS was distanced from the Migration Act by making by the device of ensuring they did not board the Tampa from “a Commonwealth vessel” which is defined in law as a vessel flying the Australian ensign. The rubber duckies that took the SAS troops out to the ship, flew no flags.

Then – the day the SAS boarded the Tampa – the government tried and failed to pass the Border Protection Bill. This has to be a contender for the worst piece of legislation ever presented to the national parliament. I think it’s hard to dispute that the tone and the provisions of this little bill – drafted in the prime minister’s office at his direction – raises serious questions about John Howard’s dedication to the rule of law.

It would give the Prime Minister power to direct the seizure of ‘any vessel’ and use force if necessary to take the ship and everyone on board ‘outside the territorial sea of Australia’. No matter what happened during such operations —deaths, disasters and injuries—no civil or criminal proceedings could be taken against the Commonwealth or the officers carrying out these operations. No one – neither ship owner nor asylum seeker - could go to the courts ‘to prevent a ship, or any persons on board a ship, being removed to a place outside the territorial sea of Australia’. The bill was retrospective to 9 that morning and would operate ‘in spite of any other law’.

As you know, Labor rejected that bill that night. So what was Canberra then to? First the government used the Defence Signals Directorate facilities at Geraldton to eavesdrop on all lawyers’ communications with the ship – and reports based on these intercepts circulated in the bureaucracy before and during the hearing before Justice North.

The Scandinavians knew this and used it as a channel of communication with the government

The government faced another difficulty with its plan to force the Tampa back out to sea. The powerful HMAS Arunta was on its way to Christmas Island but we understand – Marian and I – that the navy somehow made it

clear it should not be asked to force the Tampa back into international waters – because the navy wouldn't do it.

Precisely why we don't know, but we learnt of this in the context of assertions by military sources that the navy was not willing to break the law. And while the navy doesn't come out of these weeks with an entirely clean slate, the military at nearly every stage of this story showed a greater commitment to lawfulness than the civilian bureaucracy.

Meanwhile, pro bono lawyers in Melbourne were mounting a habeus corpus action to bring the asylum seekers ashore. It was a dirty fight. Here are just a few of the highlights -

- * Their conversations with the ship were also being monitored and reported on to Canberra bureaucrats.

- * The Solicitor-General David Bennett presented the pro bono lawyers with an affidavit sworn by Admiral Ritchie that put the cost of the military operation at Christmas Island at about \$3 million a day. Those figures were shamelessly inflated as Navy documents we obtained for the book admitted. But Bennett threatened the lawyers' clients – and that was essentially themselves – with catastrophic financial repercussions if they did not agree to the transfer of the asylum seekers from the Tampa to the Manoora.

- * Howard's lies on that point....

- * Bill Farmers' lies...

As you know, Tony North ordered the asylum seekers ashore. There was an immediate appeal, a single day's hearing and a weekend's furious drafting of judgements that led to North's decision being overturned by a majority of two to one a couple of days after the destruction of the World Trade Centre.

Justice Bob French found – with the support of Bryan Beaumont – that there is embedded in the Constitution a power to decide who comes into this country so fundamental that its independent exercise would survive even if the Migration Act was held to “cover the field”. French said the power could be used because the Migration Act did not, in explicit terms, prohibit its continued exercise. So the Federal Court decided Canberra could act directly contrary to the terms and the policy of its own Migration Act.

This was a hugely important win for the government – not legally so much as politically. The decision of the full Federal Court greatly bolstered the government’s claim to be merely following the law. The one contest of lawfulness actually fought out in a court was won by the government. As far as the public was concerned, Canberra was proceeding with the blessing of the courts.

But the full Federal Court decision was not legally so important because, according to sources who spoke to Marian and me, had the court upheld Tony North’s decision and ordered the asylum seekers ashore, it was the government’s intention to reverse the decision by legislation. By this time, Howard knew Labor had almost destroyed itself by rejecting the Border Protection Bill. To survive, Labor had to support everything Howard now did to pursue his campaign against the boat people. As one Labor adviser said to me, Howard could now do what he liked and fix any legal problems retrospectively.

Labor did support the legislation put through parliament immediately after the court’s decision. This was the Border Protection (Validation and Enforcement Powers) Act operated to block any appeal from the full court to the High Court. Even this was an extraordinary contravention of our understanding of the rule of law: to abort litigation while it is still on foot by passing retrospective legislation.

I blame the press a lot for not telling Australians what was going on here but this was a point where the lawyers had to speak up. ...

Where were the lawyers? They have always been better – though hardly vocal enough - on that other day to day contravention of lawfulness in this country: the prolonged imprisonment of men, women and children for administrative purposes. Not for weeks but years and years – indeed, indefinitely. And not just here but on Manus and Nauru.

As it happens, the constitutions of both PNG and Nauru give asylum seekers greater protection against unlawful imprisonment on those islands than they enjoy in Australia. But in designing and executing the Pacific Solution Canberra was undeterred by constitutional guarantees of liberty and due process.

The Constitution of Nauru guarantees ‘no person shall be deprived of his personal liberty except as authorised by law’ and guaranteed all prisoners on the island the right to a lawyer of their own choice. But the asylum

seekers had committed no offence in Nauru or for that matter in PNG where there are similar Constitutional sanctions against imprisonment without trial.

Records produced to the Senate's CMI inquiry show that hundreds of asylum seekers were already sitting in the Topside camp on Nauru while Canberra bureaucrats tried to find some legal basis for them being held there. Canberra's clever solution was to claim none of them were detainees at all. They were visitors on special visas which were issued on condition that each person remained within the confines of a camp.

That disgraceful claim is still being made by the government. Here is Ruddock three weeks ago correcting Nick McKenzie of the ABC's World Today who had referred to refugees being in detention on Nauru.

PHILIP RUDDOCK: On Nauru they are certainly detained in the sense that they're on the island of Nauru, but it is not a detention situation in the same way that it would be if they were in Australia.

NICK MCKENZIE: I was aware that they were actually enclosed in a detention camp?

PHILIP RUDDOCK: There is accommodation to which they are, to which they are actually allocated.

The detention of the asylum seekers on these islands was put beyond practical challenge by persuading both PNG and Nauru to prevent Australian lawyers coming to the islands. And the Nauru supreme court – a Melbourne solicitor – was suddenly unable to hear cases initiated in Melbourne. Ruddock claims these decisions were and are absolutely nothing to do with Australia – but if you reflect for a moment you will realise that the Pacific Solution would have failed at the start if the asylum seekers – denied access to Australia's courts – could access the courts of PNG or Nauru. Australia had placed them, as a matter of policy, beyond the reach of any court.

This was the message of law, lawfulness and good government Australia was sending into the region....

But Operation Relex and the Pacific Solution worked. It cost about \$500 million; lives were lost – some would argue, hundreds of lives; but there are no more boats and Australians are very happy with that outcome. All the reflection and soul searching we've been through since the Tampa has

not really touched the great mass of opinion in this country. Support for closing Australia to boat people and sending them off to the Pacific is almost as strong now as it was in the last months of 2001.

I believe this is largely because Australians have a naïve belief that what was done by Canberra in those months was done to people “out there” to people we were not allowing “in here”. But the geography of this assumption is all wrong. It doesn’t take into account the damage done to Australian institutions and principles to achieve this result – in particular to the bedrock principle that governments must act lawfully.

Max Moore-Wilton reckons he was told to keep everything within the law. But on my reckoning, between the appearance of the Tampa in late August and John Howard’s election victory in early November, the government misused the law, misrepresented the law, ignored the law, broke the law, retrospectively reversed the law and placed some of the most needy and vulnerable people on earth beyond the reach of any law.

I don’t know how Australia recovers from that.