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THE CONSTITUTIONAL DECISIONS OF JUSTICE SELWAY:

(I) NUCLEAR WASTE DUMPS AND FIRE BRIGADES; (II) LOW FLYING PLANES AND (III) WHAT IS STATE INSURANCE?*

ABSTRACT

Bradley Selway's contribution to constitutional law as an advocate and writer is well known. This article assesses his contribution to constitutional law in another capacity: as a judge of the Federal Court. It examines his reasons for judgment in three important cases in which his Honour wrote separately. These reasons demonstrate many of the qualities that made him so respected in the field of constitutional law.

INTRODUCTION

Justice Bradley Selway sat on the Federal Court for more than two years. In that time he participated in a series of important constitutional decisions. I intend to discuss three of them today, the most well-known and controversial being the *Nuclear Waste Dump Case* and the *State Insurance Case*.

At this point, Selway J's colleagues, and constitutional law aficionados, may be forgiven for asking, 'Why only three?' After all, the quickest search will reveal that Selway J sat on at least half a dozen cases in which the Federal Court was confronted with substantial constitutional arguments regarding matters ranging from the validity of aspects of electoral arrangements to the validity of forfeiture provisions in fishing legislation. There is, however, method in my approach. In several of these cases, such as *Olbers Co Ltd v Commonwealth*[1] and *Sportodds Systems Pty Ltd v NSW*,[2] the Full Court was unanimous and issued one opinion, and it is impossible for an outsider to determine Selway J's distinctive contribution to it. For that reason, I have concentrated on the three cases where his Honour wrote separately.

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1 (2004) 143 FCR 449.

2 (2003) 133 FCR 63.

I NUCLEAR WASTE DUMP CASE

Justice Selway's first decision that I want to explore in some depth *South Australia v Slipper* (the *Nuclear Waste Dump Case*).[3] For those who do not already know it, the background to the case was as follows.

The Commonwealth had searched for a suitable site for a radioactive waste repository for a number of years. It published draft environmental impact statements in 2002 and 2003, and narrowed the range of proposed locations for the repository to two sites near Woomera in South Australia. In early May 2003, the Commonwealth Minister for the Environment and Heritage gave approval under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) for the establishment, operation and decommissioning of a repository at either of the two sites.

Shortly thereafter, the Commonwealth Minister for Science announced that the national repository for low level radioactive waste would be located near Woomera. The South Australian Premier announced later on the same day that the government of South Australia would do everything it could to oppose the establishment of the repository in that State. One might be forgiven for thinking that this was a response that might aptly be described by the acronym NIMBY, meaning 'Not in my backyard'.

A month passed before these preliminary skirmishes turned into open warfare. In early June 2003, the South Australian Minister for Environment and Conservation made a statement in Parliament indicating that he would introduce a bill to create 'public parks' on the sites identified for the repository. He introduced such a bill the following day. The aim was to torpedo any attempt by the Commonwealth to acquire the sites under the *Lands Acquisition Act 1989* (Cth). Section 42 of the *Lands Acquisition Act* provides, in effect, that there cannot be a compulsory acquisition of interests in land in a public park without the consent of the State or Territory government. There was no doubt that the consent would not be forth-coming.

To understand what happened next it is necessary to explain a little more about the *Lands Acquisition Act*. Section 22 of that Act provides, in essence, that the Minister must declare that the acquisition of land is under consideration; and information must be provided to people who are directly affected. Provisions of the Act then allow for an appeal to the Administrative Appeals Tribunal, which can recommend whether to confirm, revoke or vary the declaration. This is the normal acquisition process. Section 24, however, enables the Minister to make a certificate, if satisfied that there is 'an urgent necessity for the acquisition and it would be contrary to the

3 (2004) 203 ALR 473.

public interest for the acquisition to be delayed by the need for making, and the possible reconsideration and review, of a pre-acquisition declaration'. It also enables the Minister to make a certificate if satisfied that a declaration would result in the disclosure of information prejudicial to the security, defence or international relations of Australia. The effect of such a certificate, if validly made, is that the Minister can then compulsorily acquire the interests in land without having to follow the extended declaration and review process.

Faced with a bald-faced attempt to frustrate the Commonwealth's acquisition, Mr Slipper, the Parliamentary Secretary to the Commonwealth Minister for Finance and Administration, resorted to s 24 of the *Lands Acquisition Act* and issued two certificates.

South Australia and a person who claimed to have native title interests in the same land, Mr McKenzie, then commenced proceedings challenging the issue of the certificates. They raised several arguments, including one based on non-compliance with provisions of the *Native Title Act 1993* (Cth). Three arguments deserve special mention because they concerned the *Constitution* or became significant on appeal. The first was that the Parliamentary Secretary's issue of the certificate was unconstitutional, because 'just terms' under s 51(xxxi) of the *Constitution* required that a person be given a fair hearing before the acquisition of property. The second was that the certificates had been issued for an improper purpose. The third was that the Parliamentary Secretary had not afforded natural justice before issuing them.

Displaying his customary succinctness and rigour, Selway J dismissed the challenge. He rejected in short order the argument that the Constitution's requirement of 'just terms' required a hearing before property could be acquired. His Honour also rejected the argument that the Parliamentary Secretary had acted for an improper purpose, observing that the *Lands Acquisition Act* said nothing about 'prospective public parks' and there was no implication about them. He also explained that the argument of South Australia and Mr McKenzie about the construction of s 24 would seem to preclude the relevant Minister from taking into account any 'extraneous' circumstances which would defeat the acquisition, or render it pointless. As Selway J explained:

> Assume, for example, that the interest being acquired was a mineral which was in the process of being mined by the current owner. On the argument put by the state and Mr McKenzie the power under s 24 … to effect the acquisition before the extraneous circumstance (namely the mining operation) rendered the acquisition pointless or impossible (or even less appropriate) would not fall within the legislative purpose. The relevant urgency would be to prevent the mining activity; it would not be the delay caused by the pre-acquisition procedures. The delay caused by compliance with the pre-acquisition procedures would merely provide the 'temporal context' in which such destruction can occur. Yet both the state and Mr McKenzie accepted in argument that such a case would justify the exercise of the power under s 24

> of the [*Lands Acquisition Act*]. They were undoubtedly right to do so. There is simply no logical reason why the [*Lands Acquisition Act*] would be read in such a way as to limit the power of the Minister to act in such a case. But having made that concession…there is no obvious basis upon which this case can be distinguished.[4]

Finally, Selway J rejected the argument that the power to issue a certificate under s 24 had to be exercised in accordance with the requirements of natural justice. He found that natural justice was excluded by 'plain words of necessary intendment'.[5] His reasoning seems to have been as follows: decisions to acquire land for public purposes frequently involved broad policy issues that might not be amenable to the processes of a fair hearing; it was not disputed that the pre-acquisition procedures complied with any requirements for a fair hearing, and it was clear that those procedures were comprehensive; s 24 of the *Lands Acquisition Act* was an exception to that exclusive procedure; and most importantly, the terms of s 24 confirmed that natural justice was not intended to apply. In this regard, the minister could issue a certificate if satisfied either that there was an urgent necessity for the acquisition such that it was contrary to the public interest for it to be delayed by the need to comply with the making, and possible review and reconsideration, of a pre-acquisition declaration, or that compliance with the code would result in the disclosure of information prejudicial to the security, defence or international relations of Australia. In Selway J's view, the only fair reading of the statutory scheme was that Parliament had evinced an intention to exclude the fair hearing rule in relation to the grant of a certificate.

Unfortunately for the Parliamentary Secretary and the Commonwealth, the matter did not end there. South Australia and Mr McKenzie appealed to the Full Federal Court, which upheld the appeal on the basis of improper purpose and a breach of natural justice.[6] Justice Branson wrote an opinion upholding the appeal on the ground of improper purpose, and joined Finn J's opinion upholding the appeal on the ground of a breach of natural justice. Justice Finklestein agreed with both.

The basis for Branson J's finding of an improper purpose emerges from two passages. The first is this:

> In my view, the proposition that Parliament is to be understood as intending that the Minister could be satisfied that there is an 'urgent necessity for the acquisition' where the only ground of urgency is a desire in the Minister to avoid the application of a restriction placed on the Minister's power acquisition by the Parliament is a startling one. Similarly, in my view, the proposition that Parliament is to be understood as intending that the Minister

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4 Ibid 492 [64].
5 Ibid 482 [23].
6 The decision is reported as *South Australia v Slipper* (2004) 136 FCR 259.

> could be satisfied that a provision enacted by the Parliament would have an operation according to its terms is a startling one.[7]

The second passage is this:

> I do not believe that s 24(1) can be understood to reflect a legislative intent that the power thereby given to the Minister may be exercised for the purpose of preventing s 42 from applying to the acquisition in question. In my view, by acknowledging that he acted under s 24(1) of the *Lands Acquisition Act* to prevent s 42 from operating in accordance with its terms, the first respondent has conceded that he acted to frustrate the will of Parliament as reflected in s 42. The power of acquisition granted by the *Lands Acquisition Act* is part of a statutory scheme that includes s 42. It is not open to the respondents to suggest, as they sought to do, that although as a matter of statutory interpretation s 42 would have an operation in respect of a public park brought into existence to frustrate the Commonwealth's powers of compulsory acquisition, Parliament did not really intend the section to have that operation.[8]

Her Honour derived 'some guidance' for this conclusion from the decision of the House of Lords in *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* (the *Fire Brigades Case*).[9] The circumstances of that case can be described briefly. In 1964, the British government introduced a scheme to compensate victims of crime. It did so through the royal prerogative, and payments were made ex gratia, with annual amounts being appropriated by Parliament. In 1988, however, legislation was passed to introduce a new statutory scheme with compensation awarded on a case by case basis and based upon common law principles applicable in tort cases. Under the legislation, the Secretary of State was authorised to specify when the scheme was to come into effect. In 1993, the Secretary indicated that the statutory scheme would not be brought into effect; instead, a non-statutory scheme would be introduced under the prerogative. This new scheme was based on fixed amounts for certain classes of injury. The Fire Brigades Union challenged the Secretary's decisions not to bring the statutory scheme into effect and to introduce a new, non-statutory scheme.

All members of the House of Lords rejected the argument that the Secretary was under a legally enforceable duty to bring the statutory scheme into force. All members of the House of Lords also held that the Secretary was under a good faith duty to consider whether to bring the scheme into effect. However, a majority of the House of Lords, comprising Lord Browne-Wilkinson, Lord Lloyd and Lord Nicholls, found that the introduction of the non-statutory scheme was inconsistent with that duty; it amounted to avowing that the statutory scheme would never be introduced. Lords Keith and Mustill, in dissent, said that this was not so.

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7 (2004) 136 FCR 259, 273-4 [58].
8 (2004) 136 FCR 259, 275 [65].
9 [1995] 2 AC 513.

The reasons of the House of Lords have always struck me as peculiar. Their Lordships regarded it as almost self-evident that the Secretary was under a good faith duty to consider whether to bring the scheme into effect. It followed from this that the Secretary could not renounce this duty, and could not act inconsistently with it, for this would amount to frustrating the will of Parliament. However, such a duty has some very odd characteristics – so odd, indeed, one could use the term 'sui generis' to describe it. Except in the circumstances of that case, it is difficult to see how it could be legally enforced: if the Secretary of State had refused to bring the scheme into effect and had publicly stated that, having considered the issue, he could not envisage any circumstances in which it would be appropriate to do so, what remedy could have been granted?[10] Furthermore, for the new, non-statutory scheme to have had any effect, Parliament would have had to appropriate money for it, a point made by Lord Mustill in his dissent.[11] Given this fact, it was somewhat artificial, if not bizarre, to conclude that the Secretary of State could frustrate the will of Parliament merely by introducing a new, non-statutory scheme which his successors could legally abolish at the stroke of a pen. It would have made more sense to recognise that statute left it to the Secretary to determine 'if and when' the statutory scheme would take effect and that therefore his actions were not unlawful.[12]

Regardless of the correctness of the *Fire Brigades Case*, however, I do not see how it supports Branson J's conclusion that the power in s 24 could not be used to prevent interests in land from becoming public parks. Her Honour's reasoning seems to be no more than this: the *Fire Brigades Case* demonstrates that actions which frustrate the will of Parliament are improper; s 42 of the *Lands Acquisition Act* says that interests in public parks cannot be compulsorily acquired without the consent of a State and Territory government; therefore, using s 24 to prevent s 42 from applying in a particular case would frustrate the will of Parliament and is improper. However, whether a purpose is improper depends on construing the statutory provisions and ultimately answering what was Parliament's intention in conferring the relevant power. The *Fire Brigades Case* does not help to answer this question, since all that it establishes (even if one were to accept its correctness) is that actions that are inconsistent with the will of Parliament are unlawful.

In any event, Branson J's reasons assume that if an Act has provided for a certain consequence, the powers under the Act should be construed so as not to interfere with the attainment of that consequence. This assumption, at least in an unqualified form, strikes me as unsound. It would mean that the Commissioner of Taxation could not use his general powers (assuming that those powers would otherwise

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10 See [1995] 2 AC 513, 566 (Lord Mustill), 576-7 (Lord Nicholls).

11 [1995] 2 AC 513, 567 (Lord Mustill).

12 Lord Lloyd of Berwick, who was in the majority, pointed out that the statute book was littered with provisions that had never been brought into force, and gave the *Easter Act 1928* (UK) as an example: [1995] 2 AC 513, 571. It is hard to imagine anyone giving good faith consideration to the commencement of that Act.

extend that far) to discourage people from engaging in lawful tax avoidance (not evasion) schemes. Yet why should that be the case? I use this example not to show that general powers cannot be confined by reference to what an Act has provided, but to show that there is nothing ineluctable about the assumption made by Branson J. Everything depends on the circumstances and the terms of the statutory scheme.

That brings me to the central issue on which Selway J differed from Branson J: whether s 42 implicitly confined the power in s 24. While no one disagrees that the power to acquire land cannot be used if a public park is already in existence and a State or Territory government does not consent to the acquisition, I suggest that the conclusion that the exercise of s 24 to prevent land from being turned into a public park from applying is improper does not follow. It has long been understood that the consequences are relevant to the interpretation of statutes. As Cardozo J once said: 'Consequences cannot alter statutes, but may help to fix their meaning.'[13]

The consequences of adopting Branson J's view are just as startling, if not more so, than the alternative that she rejected. It would seem to entail that any compulsory acquisition under the Act could be prevented merely by a State or Territory's decision to declare the land, even an unattractive and inaccessible tract of scrubby desert, a public park. Confronted with such a decision – no more than a blatant attempt to undermine the exercise of the powers under the *Lands Acquisition Act* – the Minister would simply have to shrug his or her shoulders and hope that the State and Territory decision was never implemented; in the meantime, nothing could be done. Years of preparation and consultation might have been in vain. It is, with respect, hardly self-evident that the statutory scheme should be read as compelling such a result.

This takes me to the issue of procedural fairness. Finn J, unlike Selway J, held that procedural fairness applied to the power to issue a certificate under s 24 and that it had not been afforded. He claimed that the Australian Law Reform Commission (ALRC) report on which the *Lands Acquisition Act* had been based, and the Act itself, showed that the purpose of the legislation was to implement a general rule that decisions leading up to compulsory acquisition would be subject to merits review, with limited exceptions. However, in his view, it was one thing to say that s 24 excluded expansive merits review; it was another to say it excluded the rules of procedural fairness, given that in many instances adequate procedural fairness falling short of the merits review system could be afforded to a landowner without causing a delay that would be contrary to the public interest. Thus, the power in s 24 was not of its nature inconsistent with procedural fairness.[14]

In addition, Finn J claimed that the ALRC report and the Minister's second reading speech both recognised the profound impact an acquisition could have on the owner

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13 *In re Rouss* (1917) 116 NE 782, 785.

14 (2004) 136 FCR 259, 283-4 [109]-[110].

of the land, and that there was a recognised need to balance private and societal interests. In this context, his Honour indicated that the legislature would be expected to have spoken with 'unmistakable clarity' if it had intended to deny procedural fairness to a landowner. He said that it had not done so.[15]

The content of procedural fairness was one that Finn J accepted depended on the circumstances; in some cases, the requirements might be negligible. Had passage of South Australia's bill been imminent, for example, the Minister could have proceeded to issue the certificate and acquire the land without affording a hearing.[16] However, in his Honour's view, on the facts there was no such urgency which justified the complete lack of a hearing, even a truncated one.[17]

I confess that it is startling to me to regard s 24 as a power conditioned upon affording a fair hearing. The requirement that the Minister be satisfied that there is an 'urgent necessity' for the acquisition, and that the delay caused by the Act's pre-acquisition procedures would be contrary to the public interest, firmly points to the absence of any such requirement. So does the 'national security' basis for issuing the certificate. However, the Full Federal Court has now held otherwise.

I suspect, however, that the discovery of a fair hearing requirement in s 24 will prove to be a Pyrrhic victory. While it may have prevented the minister from issuing the certificate in the *Nuclear Waste Dump Case*, the section may not do so in other cases. All the minister has to do is to wait until the last practicable moment to issue the certificate and there will be no opportunity for a hearing. The requirement to ensure a fair hearing for affected landowners (on which Finn J placed so much emphasis) can therefore be circumvented, at least if the minister obtains decent legal advice.

II CIVIL AVIATION SAFETY AUTHORITY V BOATMAN

The case of *Civil Aviation Safety Authority v Boatman*[18] is one of the rare cases where I think that Selway J erred.

The legislative background turns on three provisions in the *Civil Aviation Act 1988* (Cth).

Section 30DB provides that a holder of a 'civil aviation authorisation' – essentially a licence to fly – must not engage in conduct that constitutes, contributes to or results in a serious and imminent risk to air safety.

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15 Ibid 284 [111].
16 Ibid 285 [117].
17 Ibid [118].
18 (2004) 138 FCR 384.

Section 30DB provides that if the Civil Aviation Safety Authority (CASA) believes that the holder of an authorisation has engaged in, is engaging in or is likely to engage in such conduct, it may suspend the authorisation by giving written notice to the holder. However, the suspension ends on the fifth business day after the day on which the holder of the authorisation was notified of the suspension, unless CASA applies to the Federal Court in accordance with s 30DE.

Section 30DE then provides, in essence, that if the Federal Court is satisfied that there are reasonable grounds to believe that the holder has engaged in, or is likely to engage in, conduct that would constitute or contribute to or result in a serious and imminent risk to air safety, it must make an order prohibiting the holder from doing anything authorised by the authorisation. The order remains in force for a period (not more than 40 days) that the Court considers reasonable to allow CASA to complete an investigation into the circumstances that gave rise to the decision to suspend the authorisation.

CASA suspended the authorisation of Boatman and another respondent, and then applied to the Federal Court for an order under s 30DE. The question of the validity of s 30DE was reserved for the Full Federal Court.

The majority of the Court, comprising Sundberg and Stone JJ, rejected the respondents' claim that s 30DE had invalidly conferred non-judicial power. Justice Sundberg said that the task imposed on the Court by the provision involved the application of a standard to facts found, resulting in the final determination of a dispute between the parties. This, he held, was an exercise of judicial power.[19]

In the course of reaching this conclusion, Sundberg J rejected the respondents' attempt to draw an analogy between the nature of the power conferred on the Court and search warrants, which were administrative in character. Search warrants, he explained, were only awarded on an ex parte basis and they did not determine the rights of the parties; that was why they were not regarded as being part of judicial power. By contrast, the Court's power under s 30DE was exercised after hearing both sides of the dispute, and the power did determine the rights of the parties.[20]

Justice Stone took a similar approach. Her Honour held that, under s 30DE, the Court was obliged to make a final determination of the authorisation holder's rights and privileges, and was to do so on the basis of suitable standards. This was enough to stamp the power as judicial power.[21] In her view, the respondents' analogy

19 Ibid 396 [25].
20 Ibid 395-96 [22]-[24].
21 Ibid 405 [58].

between the nature of the power conferred on the Court and search warrants was unhelpful.[22] As her Honour explained:

> Whether a particular power is judicial or non-judicial must be decided by application of established principles or criteria. Analogy may assist in identifying the principles or criteria but it can never substitute for them. I accept that there is no single definition or rule that can be applied to determine the issue however … if a power has accepted hallmarks of judicial power it is highly likely to be judicial.[23]

Her Honour also distinguished the case of *Yanner v Minister for Aboriginal and Torres Strait Islander Affairs*,[24] which held that the power conferred on the Federal Court to remove a statutory disqualification on a member of the Aboriginal and Torres Strait Island Commission (ATSIC) was inherently non-judicial.[25]

Justice Selway dissented. He found the analogy with search warrants compelling. In particular, his Honour was influenced by the fact that the function of making an order under s 30DE was not incidental to a judicial function; it was incidental to an administrative function of investigating breaches of s 30DB. The presence of some features more analogous to judicial power, such as the fact that the Court would hear both sides, did not prove decisive for Selway J.[26]

In a collection such as this, which is dedicated to the contribution of Bradley Selway to constitutional law, I naturally hesitate to suggest that his Honour had it wrong. Yet, in my view, his Honour did. The nature of judicial power is one of the hardest aspects of constitutional law; no one disputes this. If there is one hallmark of judicial power, however, it is that it involves a court settling a controversy about rights and liabilities. That, as Sundberg and Stone JJ decided in this case, ought to have been enough to uphold the law. It was mistaken for Selway J to hold that s 30DE was inherently non-judicial because it was incidental to an executive function and because it was similar in some respects to search warrants; for in other respects, the function of the Court under s 30DE was much closer to the traditional judicial function, as his Honour admitted. Furthermore, if the Federal Court can validly be granted the function of reviewing a magistrate's extradition decision, even where its declaration is simply a step towards an exercise of an administrative power by the Attorney-General,[27] it is difficult to see why the fact that s 30DE was incidental to an executive function should place it beyond the pale. The ultimate process, in each case, is not judicial.

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22 Ibid 404 [57].

23 Ibid.

24 (2001) 108 FCR 543.

25 As explained by Stone J in *Civil Aviation Safety Authority v Boatman* (2004) 108 FCR 384, 403 [51], 404-5 [58].

26 Ibid 411-13 [80]-[81].

27 *Pasini v United Mexican States* (2002) 209 CLR 246.

There is another way of making this point, and that is by reference to the 'chameleon doctrine'. The High Court has recognised that there is a class of functions that have a 'double aspect', or that take their character as judicial or administrative depending on the body upon which they are conferred. Disciplinary proceedings are a classic example.[28] Despite finding that making an order under s 30DE was exercising a disciplinary function, Selway J held that it could not be exercised by a court because the ultimate process was not judicial. However, once his Honour found that the proceedings were disciplinary, and that legislation involved the application of facts against identifiable criteria in the legislation, that should have ended the inquiry.

In my view, Selway J's error demonstrates the need for caution in reasoning by analogy in this area.[29] The historical considerations that have led to labelling some functions, such as extradition, as inherently non-judicial may not always be easy to reconcile with principles about the nature of judicial power, and the reliance on the examples may lead to incoherence in an already difficult field.

III THE STATE INSURANCE CASE

I turn now to the third constitutional decision of Selway J: *Victorian Workcover Authority v Minister for Employment and Workplace Relations* (the *State Insurance Case)*.[30] This decision was the first case to deal fairly and squarely with s 51(xiv) of the *Constitution*, which provides the Commonwealth Parliament with the power to make laws with respect to 'insurance, other than State insurance'.

The background to the decision must commence with the operation of the *Safety Rehabilitation and Compensation Act 1988* (Cth) (the SRC Act). The SRC Act enables the Minister to declare that a company, including one that competes with a Commonwealth authority or competes with a company that was previously a Commonwealth authority, is an 'eligible company'. Once the Minister has made such a declaration, the Safety, Rehabilitation and Compensation Commission is then given the power, subject to its being satisfied of certain criteria, to grant the eligible company a licence. The effect of granting a licence is that, by force of the

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28 *Visnic v Australian Securities and Investments Commission* (2007) 234 ALR 413; *Albarran v The Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 234 ALR 618. In each case, the High Court indicated that the disciplinary powers were not inherently judicial. Significantly, however, in *Albarran* (2007) 234 ALR 618, Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ approved a passage of the Full Federal Court stating that the exercise of the power in question could have been performed by a court or an administrative tribunal, at 625 [29].

29 See (2004) 138 FCR 384, 409-10 [75-76] for Selway J's approach.

30 *Victorian WorkCover Authority v Andrews* [2005] FCA 94 (Unreported, Federal Court of Australia, Selway J, 17 February 2005).

SRC Act, the licensee becomes immune from State or territory laws 'relating to workers compensation'.

Optus and a group of Toll companies had employees in Victoria. They therefore had to comply with provisions of the *Accident Compensation Act 1985* (Vic) and the *Accident Compensation (WorkCover Insurance) Act 1993* (Vic) (the WorkCover Act). Optus took out compulsory Victorian WorkCover insurance pursuant to these Acts, and the Toll companies self-insured in accordance with them. Both Optus and the Toll companies applied to the Minister for declarations that they were eligible companies under the SRC Act. The Minister made the declarations, and Optus was granted a licence by the Safety, Rehabilitation and Compensation Commission. Victorian WorkCover commenced proceedings challenging the making of the declarations on the ground that the Minister had failed to afford it procedural fairness. It also challenged the SRC Act's provisions on the ground that they were beyond Commonwealth legislative power. The Attorney-General for Victoria intervened to support the constitutional challenge.

Justice Selway rejected the argument that the Minister should have given Victorian WorkCover a fair hearing before making the declaration because its interests would be affected and it had a legitimate expectation. In his Honour's opinion, Victorian WorkCover had no legitimate expectation that it would not be prejudicially affected by the decision, for there was nothing in the statutory scheme or the Minister's decision-making process to give rise to such an expectation.[31]

His Honour's treatment of the constitutional argument was more detailed, as befitting the importance and novelty of the question. He noted that the parties had agreed that s 51(xiv) of the *Constitution* should be treated in the same way as the power in s 51(xiii). The latter provides the Commonwealth Parliament with the power to make laws with respect to 'banking, other than State banking'.

His Honour explored the history of the 'State banking' proviso, discussing the Convention Debates and the status of postal office banks, government savings banks and trading banks in the colonies.[32] He concluded that the term referred to the business or activity conducted by a State as banker.[33] He also concluded that the reason for inserting the 'State insurance' proviso in s 51(xiv) of the *Constitution* would seem to have been the same as for 'State banking'. As he put it:

> The purpose of the proviso in relation to 'State insurance' was so that each Australian State could determine for itself whether and on what terms it wished to establish its own insurance businesses (as New Zealand had done), providing that the business was only conducted within the State. Presumably

31 Ibid [30]-[31].
32 Ibid [42]-[50].
33 Ibid [41]-[42].

> it was also to accommodate New Zealand if that colony decided to join the federation.[34]

His Honour then sought to apply the principles outlined by the High Court in *Bourke v State Bank of NSW*,[35] which concerned the 'State banking' proviso. In that case, the Court had rejected an interpretation of the proviso as conferring an exclusive State power, and expressed the view that the issue was one of characterisation. This was what the High Court said:

> The only satisfactory solution … is to accept that there is no exclusive State power to make laws with respect to State banking. But the words of s 51(xiii) still require that, when the Commonwealth enacts a law which can be characterized as a law with respect to banking, that law does not touch or concern State banking, except to the extent that any interference with State banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking … Put another way, the connexion with State banking must be so 'insubstantial, tenuous or distant' that the law cannot be regarded as one with respect to State banking. Of course, these are the tests used in the familiar process of characterisation. But they are employed in the context of an embracing Commonwealth power expressed as one to make laws with respect to banking other than State banking. They are not employed in the context of an exclusive State legislative power with respect to State banking.[36]

Justice Selway saw the dispute between Victorian WorkCover and the Minister as turning on different interpretations of this passage from *Bourke*. The Minister, his Honour noted, had argued that a law giving an employer the ability to join a Commonwealth insurance system did not touch and concern State insurance; it did not directly interfere with the relationship of customer and insurer, but simply gave persons a choice whether or not to be insured. On the other hand, Victorian WorkCover and the State had argued that such a law did touch and concern State insurance.[37]

Justice Selway accurately characterised the effect of Victorian WorkCover and the State's arguments in this way: any Commonwealth law which directly affects the relationship between a State insurer and someone indemnified by that insurer is invalid. He pointed out that on this view, a Commonwealth Act establishing a Commonwealth insurer and authorising it to offer insurance to defence personnel, public servants and Commonwealth pensioners, including those in Victoria, would be invalid.[38] He did not interpret the passage in *Bourke* that I have quoted as

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34 Ibid [52].
35 (1990) 170 CLR 276.
36 Ibid, 288-9.
37 [2005] FCA 94, [63]-[68].
38 Ibid [67].

compelling such a surprising result. He encapsulated his view of the proviso, and explained why the SRC Act was valid, in these terms:

> [T]he Commonwealth cannot legislate so as to affect directly the internal organisation of a State insurer. Nor can it legislate so as to affect directly the terms and conditions on which a State insurer offers insurance. Nor can it legislate so as to prevent directly persons entering into insurance arrangements with a State insurer, at least as long as the relevant 'State insurance' does not extend beyond the limits of the relevant State. However, where the law is a general law that incidentally affects a State insurer (e.g. it affects the market place in which the State insurer operates) then the law does not fall within the proviso. It is clear from the mischief to which the proviso is directed, that what was envisaged was the continuing capacity of the State insurance business to operate in a commercial marketplace … There is no basis for treating the words 'State insurance' as extending to State laws requiring persons to insure with a State insurer or to State laws conferring an economic monopoly on a State insurer. In my view such State laws are not themselves 'State insurance'.[39]

His Honour expressed the view that a Commonwealth law was not a law touching or concerning State insurance merely because it removed restrictions on those within the insurance market place when those restrictions have been imposed by State law. On this basis, the SRC Act was valid.[40]

The case was then argued before the High Court, with most of the States intervening to argue for the reversal of Selway J's decision, and the Minister and the Attorney-General for the Commonwealth contending that it was correct. I am glad to report that a majority of the Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; Kirby and Callinan JJ dissenting) upheld the decision.[41]

In an echo of Selway J's analysis, Gleeson CJ held that the expression 'State insurance' in s 51(xiv) of the *Constitution* meant a State-owned or controlled business of insurance, not the insurance market within a State or a State's regulatory scheme concerning insurance.[42] He pointed out that the provisions of the SRC Act did not regulate transactions entered into by Victorian WorkCover, and they did not prohibit the conduct of State insurance or substantially affect Victoria's capacity to conduct state insurance.[43] For this reason, they did not invade the area of protection given by s 51(xiv) to the States. Gleeson CJ, like Selway J, did not accept that the 'State insurance' proviso in s 51(xiv) protected a State insurance

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39 Ibid [70].
40 Ibid [72].
41 *Attorney-General (Vic) v Andrews* (2007) 233 ALR 389.
42 Ibid 392-3 [6] and [9].
43 Ibid 395 [17].

monopoly. To do so, he indicated, would leave no room for the Commonwealth legislative power over State insurance to operate.[44]

Gummow, Hayne, Heydon and Crennan JJ, in a joint judgment, upheld the decision for different reasons. In their view, the provisions of the SRC Act could not be characterised as laws with respect to insurance, let alone State insurance, so s 51(xiv) did not apply. As they explained:

> [T]he licensing provisions leave Optus at liberty to decide whether to take out insurance, and, if so, on what terms, or to remain a 'self-insurer'. They do not touch and concern insurance in any more than an incidental fashion. Still less do the licensing provisions touch and concern 'State insurance' as must be made good if the appeal is to succeed. [45]

Their Honours regarded it as unnecessary to consider whether Selway J was correct to hold that a law requiring people to insure with a designated State insurer would not amount to 'State insurance' in s 51(xiv).[46]

The dissenting judges, Kirby and Callinan JJ, disagreed with the views of Selway J and Gleeson CJ on whether the 'State insurance' proviso protected State insurance monopolies.[47] Given the difference of opinion, it remains to be seen how the High Court would resolve this question should it arise.

CONCLUSION

Those of us who knew Bradley Selway recognised what a talent he was. His contribution as Solicitor-General of South Australia was large; in a host of cases, he proved himself an extremely able advocate who combined a no-nonsense approach to the law with courtesy towards the court and fellow counsel. His time as a Federal Court justice was far too brief. Nonetheless, his few constitutional decisions show many of the qualities he displayed as an advocate: a sound grasp of history, evident chiefly in the *State Insurance Case*; an ability to cut to the heart of the argument; and an ability to express himself succinctly and persuasively. As one who had the pleasure of appearing before Selway J on several occasions, I can say that he will be missed.

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44 Ibid 393 [10].
45 Ibid 407 [83].
46 Ibid [84].
47 Ibid 425 [155]-[159] (Kirby J), 430 [174] (Callinan J).