RS French[*]

JUSTICE BRAD SELWAY – AN ONGOING DIALOGUE

I have not always felt welcome in South Australia. In 1995, when I was President of the National Native Title Tribunal, I stood at the entrance to a pastoral property not far from Marla Bore and read a sign which said:

> South Australian Civil Servants not welcome. This extends to all other liars, cheats and thieves.

I was conscious also of the South Australian Government's position, communicated to me by the Attorney-General of the day, Trevor Griffin, that because of its colonial history there was no native title in South Australia and therefore nothing for me to do. The one ray of light in this generally unwelcoming environment was Brad Selway, then the Solicitor-General for the State. Although he acted within the instructions laid down by the Cabinet of the day, that there was no native title in South Australia, he was the architect of a proposal for a State-wide settlement of Aboriginal claims. He pursued the concept with vigour. Indeed he was the only Solicitor-General who came out on country. Country at that time included some of the more desolate areas of northern South Australia.

The 1998 amendments to the *Native Title Act 1993* (Cth) introduced a mechanism for the registration of Indigenous Land Use Agreements and provided statutory support to their validity. In 1999 Brad Selway convened a conference of Aboriginal groups, the South Australian State Government, the mining and pastoral industries and other interest groups to devise a framework within which such agreements could be made within South Australia. That initiative set in train a process of negotiations for a State-wide Indigenous Land Use Agreement. A South Australian Indigenous Land Use Agreements-Negotiations Meeting Protocol has been operating since 2001. It has led to the development of templates for indigenous land use agreements in relation to pastoral operations, minerals exploration, petroleum conjunctive agreements, fishing and aquaculture, local government, outback areas and parks.[1]

In 2003, Dr Macintyre and Professor Williams of the University of Adelaide published a book under the title *Peace, Order and Good Government: State*

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[1] The current status of the State-wide negotiating process which Brad Selway initiated is set out in the Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner for 2006 provided under s 209 of the *Native Title Act 1993* (Cth).

Constitutionalism and Parliamentary Reform. The book contains proceedings of a University of Adelaide conference conducted in association with the Australian Association of Constitutional Law. It was concerned with State constitutional and parliamentary reform. It includes a chapter by Brad Selway on ministerial responsibility in which he borrowed a metaphor from Walter Bagehot to describe ministerial responsibility in this country as 'a buckle which joins the Australian system of government'.[2] Selway's chapter, like all his writings, is illuminating and thought provoking. It involves a consideration of the realities of ministerial responsibility and the impracticality of applying old notions of it to contemporary circumstances. He concludes with a sentence which typifies, I think, his passion for the improvement of our constitutional arrangements and the intellect and humour he deployed in the service of that passion:

> The time has come to reconsider our paradigms. If ministerial responsibility is the buckle of Australian government that keeps its trousers up, then there is a buckle which is flawed. We are in danger of being severely embarrassed.[3]

I speak of the writing of my former colleague in the present tense. Mortality circumscribes our dialogue with the past but the dialogue continues, not only through our personal memories of people, but also through engagement with the ideas which they have expressed in the written word. Justice Brad Selway's ideas, recorded in his written words, extend well beyond those set out in the judgments he delivered in his all too short time as a Judge of the Federal Court.

There were three decisions of Justice Selway in which constitutional or quasi constitutional issues were raised. The first, in which the *Constitution* arose only peripherally, was *South Australia v The Honourable Peter Slipper MP*,[4] otherwise known as the Nuclear Waste Dump Case. On 9 May 2003 the Commonwealth Minister for Science announced that a National Repository for the Disposal of Low Level Radioactive Waste would be established 20 kilometres east of Woomera in South Australia. The South Australian Government responded by introducing into State Parliament the Public Parks Bill 2003 under which the proposed waste dump site would be made a public park. Under s 42 of the *Lands Acquisition Act 1989* (Cth) ('LAA') a public park in a State could only be acquired with the prior consent of the State.

On 7 July 2003 the Parliamentary Secretary to the Commonwealth Minister for Finance and Administration, the Hon Peter Slipper MP, signed certificates under

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2 Brad Selway, 'The "Vision Splendid" of Ministerial Responsibility Versus the "Round Eternal" of Government Administration' in Clement Macintyre and John Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (2003), 164.

3 Ibid 173.

4 [2003] FCA 1414.

the LAA to the effect that there was an urgent need for the acquisition of the relevant land. The urgency was related to the pending enactment of the South Australian statute which would enliven s 42 of the LAA. Certificates of urgency having been issued, the Parliamentary Secretary signed declarations of acquisition under the LAA without undertaking procedures that would have been applicable in the absence of the certificates. The State instituted proceedings under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth) to challenge the certificates and the acquisitions. Selway J dismissed the applications at first instance. His decision was reversed on grounds of statutory construction informing the availability of the administrative law grounds upon which the certificate and declarations were challenged.[5]

In answer to the State's argument that the proposed acquisition would be for an illegal purpose as contrary to the *Nuclear Waste Storage Facility (Prohibition) Act 2000* (SA), he said no issue of high constitutional principle was involved:

> It may be accepted that the Commonwealth and its officers are bound by State laws of general application (see *A v Hayden* (1984) 156 CLR 532), although there are very significant exceptions. One is where there is an inconsistent law of the Commonwealth for the purposes of s 109 of the *Constitution*. Another involves the implication derived from the federal structure of the *Constitution* which was considered and explained in *Re Residential Tenancies Tribunal of New South Wales; ex parte Defence Housing Authority* (1997) 190 CLR 410. Another involves the rule of statutory interpretation that criminal statutes are normally not understood as applying to government: see *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 270. But none of these exceptions can have any application in a case where the relevant statutes which prohibit relevant conduct do not purport to apply. That is this case. The relevant statutes do not apply generally to possession of land – they certainly do not apply to the acquisition of land. The acquisition is not unlawful.[6]

The argument was also put that it was inconsistent with the statutory purpose in s 42 of the LAA for the Commonwealth to exercise its powers under s 24 of that Act for the purpose of defeating an attempt by the State to establish a public park. While he was prepared to accept that there might be an implication that it would be improper to effect an acquisition before legislation was enacted by the Commonwealth Parliament which would prevent it there was 'no reason to make any such implication in relation to legislation introduced into a State Parliament'. His Honour said:

> The only relevant constitutional implication in that context would be an implication in relation to federalism. On the fact of it, such an implication is

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5 *State of South Australia v Honourable Peter Slipper MP* (2004) 136 FCR 259.

6 Ibid at [36].

> denied by the terms of s 109 of the *Constitution* which expressly provides for what happens in the case of inconsistency between Commonwealth and State laws.[7]

There is not a great deal to say about the short quasi constitutional points which were dealt with properly and succinctly in that case and which did not figure in the Full Court judgment. However they raise, at least by association, our apparently inexorable progress towards the constitutional oxymoron of '*unitary federalism*'. That is the federalism you have when you don't have States. Questions arise out of contemporary political debate about whether the Commonwealth could lawfully acquire, for the purposes of export overseas, uranium ores in the ground anywhere in Australia and issue licences to mining companies to mine them and to others to enrich them for that purpose. There is a question whether it could acquire land for the purpose of constructing nuclear reactors thereon or to be used for the purpose of a repository for radioactive waste. These are just a subset of larger issues about the Commonwealth's power, in a global economy, to take control of national resources and infrastructure including roads, railways and ports.

In *Civil Aviation Authority v Boatman,*[8] the '*Low-Flying Planes Case*', we enter the twilight world between judicial and administrative functions. Here a constitutional issue fell for decision. The question was whether s 30DE of the *Civil Aviation Act 1988* (Cth) confers upon the Federal Court an administrative function not conferred in aid of the exercise of any judicial power and therefore outside the scope of the judicial power. The impugned provision empowers the Civil Aviation Safety Authority to apply to the Federal Court for an order that the holder of a civil aviation authorisation, which it had suspended, be prohibited from doing anything covered by the authorisation and which, without the authorisation, would be unlawful. The section provides that if the Federal Court is satisfied that there are reasonable grounds to believe that the holder of the authorisation has engaged in, is engaging in or is likely to engage in conduct that constitutes, contributes to, or results in a serious and imminent risk to air safety the Court must make such an order. The majority of the Full Court (Sundberg and Stone JJ) held that the provision involved the exercise of judicial power in respect of a matter and was therefore valid. Justice Selway came to the contrary view holding that the power conferred on the Court by s 30DE was not judicial power.

Although Brad was in the minority, the concerns raised by his dissent must be taken seriously. If the Court is not empowered, as he contended, to make orders incidental to administrative investigative functions under the *Civil Aviation Act 1988* (Cth), it may be that a variety of other orders of a similar character which the Court is empowered by other statutes to make, would come into question.[9] Further there are

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7 Ibid at [59].

8 (2004) 138 FCR 384.

9 See, eg, the discussion of the power of the Court to issue summonses for examination

some classes of court orders mandated by statute which seem to leave the Court very little room for the exercise of the judicial function.

An example of a statutory provision which raises a question somewhat similar to that in the *Low-Flying Planes Case* is s 1323 of the *Corporations Act 2001* (Cth). Under that provision the Court can make certain classes of asset freezing orders and appoint receivers to the assets of corporations or individuals pending the outcome of investigations by the Australian Securities and Investments Commission of the affairs of companies and their officers. Some might take the view, although it does not seem to have been suggested, that the powers conferred by that provision have an administrative character which is not directed to the resolution of a particular controversy or dispute.

Under recent amendments to the *Native Title Act 1993* (Cth), introduced by the *Native Title Amendment Act 2007* (Cth), the Court is required to dismiss certain applications for native title determinations where they have been lodged in response to future act notices and when the question whether the future act can be done has been resolved in some way. The obligation to dismiss becomes an obligation not to dismiss where there are 'compelling reasons' not to do so. There is also a new provision for dismissal of claims by the Court where the Registrar of Native Title, an administrative official associated with the National Native Title Tribunal, refuses their registration under the Act on merit grounds.[10]

Sometimes the so-called 'Chameleon' metaphor can be called into service. A function which is administrative when carried out by an administrative body acquires a judicial colour when carried out by a court. A recent example arose in *Pasini v United Mexican States*.[11] Section 19 of the *Extradition Act 1988* (Cth) authorises a magistrate to conduct proceedings to determine whether a person is eligible for surrender in relation to extradition offences. It is well established that the function is administrative not judicial and that the magistrate does it, in effect, as *persona designata* and not as a court. The Federal Court is given the power under s 21 of the *Extradition Act 1988* (Cth) to undertake a review of the magistrate's decision. The High Court referred to the line of authorities establishing 'that there are some powers which appropriately may be treated as administrative when conferred on an administrative body and as judicial when conferred on a federal court or court exercising federal jurisdiction'.[12] The Court also made the point in that case that under s 21 of the Act the function conferred on the Federal Court differs from that of a magistrate under s 19 because the Federal Court is required to determine whether the magistrate's decision was right or wrong and, if wrong, what

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under the *Corporations Act 2001* (Cth) discussed in *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 and the cases there referred to.

10 *Native Title Act 1993* (Cth) ss 94C, 190D.

11 (2002) 209 CLR 247.

12 Ibid at [12].

decision should have been made by the magistrate. It thereby determines the rights and liabilities of the parties to the review proceedings and thus exercises judicial power.[13]

A constitutional decision which went directly on appeal from Justice Selway's judgment to the High Court was *Victorian WorkCover Authority v Andrews*.[14] Optus Administration Pty Ltd held workers' compensation insurance under the *Accident Compensation (Workcover Insurance) Act 1993* (Vic). In 2004 the Commonwealth Minister made a declaration that Optus was eligible to be granted a licence under the *Safety Rehabilitation and Compensation Act 1988* (Cth). This had the result that Optus was no longer subject to the requirement imposed by Victorian law to insure with Victorian Workcover. Victorian Workcover commenced action in the Federal Court of Australia seeking declaratory relief that provisions of the Commonwealth Act upon which Optus relied were invalid. This was on the basis that the Federal law lay outside the legislative power of the Commonwealth to make laws with respect to insurance by reason of the exclusionary words 'other than State insurance' in s 51(xiv) of the *Constitution*. Justice Selway dismissed the application at first instance. His judgment discloses an historically based approach to the interpretation of the *Constitution* by way of reference to the convention debates and to analogous powers relevant to State banking. That approach was informed by his deep knowledge of colonial and constitutional history.

The case before him proceeded on the basis, which he accepted, that the proviso in s 51(xiv) of the *Constitution*, excluding State insurance from the ambit of the Commonwealth legislative power, should be treated in the same way as the proviso in s 51(xiii) relating to State banking. He considered evidence from the historical record and the convention debates about the meaning of State Banking. He inferred that, as in the case of banking, the purpose of the proviso in relation to State insurance was to enable each State to determine for itself whether and on what terms it wished to establish its own insurance business provided that business was only to be conducted within the State. Applying *Bourke v State Bank of New South Wales*[15] he concluded that the proviso in relation to State insurance imposes a general restriction upon Commonwealth legislative power. An appeal to the Full Court of the Federal Court was instituted by the Attorney-General for Victoria. That appeal was then removed into the High Court under s 40 of the *Judiciary Act 1903* (Cth), and on 21 March 2007 the High Court dismissed the appeal.[16]

Beyond the narrow focus of particular judgments we get a much larger view of the depth and range of Brad Selway's constitutional thought in his extra-curial writings. I attach a list, which is probably not exhaustive, of his journal articles published

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13 Ibid at [18].
14 (2005) FCA 94.
15 (1990) 170 CLR 276.
16 *Attorney General (Vic) v Andrews* (2007) 233 ALR 389.

between 1992 and 2005. One, to which I would like to refer, was published in the *Public Law Review* in 2003 under the title 'Methodologies of Constitutional Interpretation in the High Court of Australia'.[17] In that paper Brad Selway essays a comprehensive discussion of the methodology of interpretation which goes well beyond the merely descriptive to his own creative contribution. On the question of fundamental assumptions about the *Constitution* which underpin approaches to its interpretation he says:

> For my part I think it sufficient that the *Constitution* establishes the High Court itself and the other institutions of Australian government. That is a political fact accepted by the court, the other arms of government and the people. It necessarily follows that the Australian legal system must proceed on the assumption that the *Constitution* is binding. It is binding in law because in fact it is treated as binding. Such is the nature of a fundamental assumption.[18]

The second fundamental assumption which he identifies and questions is that which treats our *Constitution* as a statute. The identification of the task of constitutional interpretation as one of statutory interpretation of a particular kind is not sufficient of itself to establish the relevant methodology of interpretation. It has become clear that there is no consensus about that assumption. He identifies 'textualism' as the prevailing broad church within which all Justices of the High Court worship. It is a church which encompasses a variety of approaches. Their taxonomy is difficult. He refers to Sir Anthony Mason's suggested categories of originalism, intentionalism, literalism, progressivism and the evolutionary approach. He offers an interesting critique of the contemporary meaning approach of Kirby J and rather frighteningly points out:

> If the Constitution is to be interpreted in accordance with contemporary standards there is no obvious reason why courts comprised of judges are the appropriate persons to perform that function.[19]

He puts it another way when he says:

> [T]he fact that the Commonwealth *Constitution* is plainly predicated upon the High Court having jurisdiction to hold legislation invalid for breach of the *Constitution,* necessarily implies that constitutional provisions have a meaning capable and appropriate for judicial interpretation. This in turn implies that the meaning is, at least in part, unchanging.[20]

Brad Selway's approach to constitutional interpretation, rightly in my opinion, rejects the notion of a 'theory of everything' to guide the judge to meaning.

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17 (2003) 14 *Public Law Review* 234.
18 Ibid 236.
19 Ibid 242.
20 Ibid.

Whenever I hear of theories of everything, I am reminded of the cosmologist John Barrow who once said:

> There is more to everything than meets the eye.[21]

Brad Selway writes with approval of what he calls the 'flexible five' of the High Court. At the time of his writing they comprised Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ. Of them he says:

> The primacy of the constitutional text has been asserted and maintained. The approach is fundamentally conservative and legalistic, based upon precedent and logical analysis. But the approach is not rigid or 'tied to the past'. Where it is clear that the *Constitution* needs to develop then this has been achieved.[22]

The *Public Law Review* essay rewards reading and re-reading for those who want both a comprehensive overview and some exposure to new thoughts on constitutional interpretation. It was not, of course, the entire compass of his writings. He wrote widely on State constitutional law, on federalism, on the impact of a Republican constitution and on co-operative arrangements between the Commonwealth and the States. He was much concerned about the workings of government in a practical way as well as with questions of higher constitutional theory.

I was the subject of his trenchant critique in respect of my judgment in the Full court in the *Tampa Case*;[23] a judgment which I must say won me a lot of new academic friends. I was asked by a leading English public law academic in London in March 2006: 'Were you in that extraordinary judgment?' When I answered in the affirmative he said, 'Well I am not going to congratulate you for it', which I suppose is as close to condemnation as English academic politeness allows. I should have had a sense of Brad Selway's views on the topic when I saw the title of his paper on the case published in the *Federal Law Review* in 2003. It was called 'All at Sea — Constitutional Assumptions and "The Executive Power of the Commonwealth" '.[24] I won't defend myself against what he says I said. But his thoughts about s 61 of the *Constitution* are, I think, a very important contribution, informed by a deep understanding of constitutional history, to a debate that has barely begun. It is a debate which, I think, leaves many important questions yet to be answered.

Justice Brad Selway has left behind him a rich legacy of ideas, principally through his academic writings which I suspect will constitute a wider and greater

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21 JD Barrow, *Theories of Everything* (1991) 20.
22 Ibid 250.
23 *Ruddock v Vadarlis* (2001) 110 FCR 491.
24 (2003) 31 *Federal Law Review* 495.

contribution than the limited number of judgments he had the opportunity to deliver in the area of constitutional law. May our engagement with his writings and our dialogue with him continue for a long time.

BIBLIOGRAPHY OF JOURNAL ARTICLES BY BRADLEY SELWAY

'Of kings and officers: the judicial development of public law' (2005) 2 *Federal Law Review* 187

'The Australian "single law area" ' (2003) 1 *Monash University Law Review* 30

'All at sea: constitutional assumptions and "the executive of power of the Commonwealth"' (2003) 3 *Federal Law Review* 495

'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 4 *Public Law Review* 234

'The constitutional role of the Queen of Australia' (2003) 3 *Common Law World Review* 248

'Mabo: where have we been and where have we yet to travel?' (2002) *Australian Mining and Petroleum Law Association Yearbook* 95

'Commentary on James Thomson's federal implications of an Australian republic' (2002) 4 *University of Notre Dame Australia Law Review* 155

'The different role of an Australian Attorney-General' (2002) 4 *Public Law Review* 263

'Principle, public policy and unfairness: exclusion of evidence on discretionary grounds' (2002) 1 *Adelaide Law Review* 1

'The use of history and other facts in the reasoning of the High Court of Australia' (2001) 20 *University of Tasmania Law Review* 129

'The principle behind common law judicial review of administrative action: the search continues' (2002) 2 *Federal Law Review* 217

'The source and nature of the liability in tort of Australian governments' (2002) 1 *Tort Law Review* 14

'Anthony John Brownlee and section 80' (2002) 1 *Public Law Review* 7

'Hughes case and the referral of powers' (2001) 4 *Public Law Review* 288

'The Federation: what makes it work and what should we be thinking about for the future' (2001) 4 *Australian Journal of Public Administration* 116

'Horizontal and vertical assumptions within the Commonwealth Constitution' (2001) 2 *Public Law Review* 113

'The Constitution of the UK: a long distance perspective' (2001) 1 *Common Law World Review* 3

'The role of policy in the development of native title' (2000) 3 *Federal Law Review* 403

'Management structures for government lawyers' (2000) 2 *Australian Journal of Public Administration* 105

'Commentary: the question of independence. Sunrise or sunset? Administrative law in the new millennium.' 2000 *National Administrative Law Forum*, Chris Finn (ed), (2000) AIAL 87

'Duties for lawyers acting for government' (1999) 2 *Public Law Review* 114

'Judicial review: a process in search of a principle' (1998) 19 *AIAL Forum* 18

'The nature of the Commonwealth: a comment' (1998) 1 *Adelaide Law Review* 95

'The rule of law, invalidity and the executive' (1998) 3 *Public Law Review* 196

Commentary (1998) 1 *Australian Bar Review* 42

'The rise and rise of the reasonable proportionality test in public law' (1996) 4 *Public Law Review* 212

'Proceedings involving the State Crown in "State" jurisdiction' (1992) 6 *Law Society Bulletin* 27

'The Constitution of South Australia' (1992)1 *Public Law Review* 39

In addition, Brad Selway published a book entitled *The Constitution of South Australia* (Federation Press, 1997)