Chapter Three

When does Precedent become a Nonsense?

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I begin by thanking the Society for having invited me here to speak today. It is a great pleasure to be here, and to speak to such a distinguished group.

Let me proceed by turning away from specifics to have you consider a quite abstract, theoretical issue. Assume for the moment that you were designing a legal system from scratch. All sorts of issues would arise. Do you want an adversarial court system (where each side presents its own case and the judge is merely a referee or umpire), or an inquisitorial one (where the judge actively attempts to pursue the truth and has the greater powers fitting for this expanded role)? Do you want to give a comparatively big role or a comparatively smaller (even non-existent) role to juries? Do you think it best to gear your procedures—all the many rules that set out how lawsuits are to be initiated, how relevant information is to be "discovered" from the opposing side, how disputes about these information-gathering and issue-refining interlocutory steps are to be handled, and more—towards a system that will eventually (2, 3 or even 5 years down the track) allow all the disputed issues to be tested at once so as to give both sides their single day in court as it were, or instead towards a system that settles issues piecemeal and one-by-one over time? And what about the judges? Do you want them chosen from the general ranks of lawyers, or do you want to establish a separate training and career stream for them right from university onwards?

If you opted for the former alternative in each instance then you should be glad to be living in a common law legal system rather than in one of the civil law systems as found in France or Germany, say.

Here's another difference between the common law world (one that includes not just Australia, but the UK, the US, Canada, New Zealand, India, Ireland, Malaysia, chunks of Africa, and most of the formerly pink bits on the map of the world) and the civil law world. It has to do with what might be thought of as the gravitational force or weight of previously decided cases. Or put in terms of those people who apply and interpret the legal rules, namely the judges, it has to do with their freedom of action. Do you want past cases—precedents—to constrain our judges always, sometimes or never? The common law world, as a generalization, opts to make past decisions—precedents—more influential, more constraining, and of greater gravitational force (arguably much, much more so) than does the civil law world.

Of course there are also rules related to court hierarchy, to lower courts being compelled to follow the reasoning and decisions of higher courts. But for the rest of this paper, let us put aside any difficulties related to upholding that sort of hierarchy by assuming that we are always talking about a jurisdiction's highest court. So any constraints or gravitational force (for the simplifying purposes of this paper) will be those that operate at the same level—the highest level—of the court structure.

With that caveat out of the way, the question becomes this: do you want your highest court's top judges, when deciding difficult cases today, to be constrained by (or to feel the gravitational force of, or the influence of) past decisions of that same highest court always, sometimes or never?

Those inclined to opt for the "always" answer are explicitly or implicitly putting much stock in the importance of certainty. Where judges are compelled to follow the reasoning used in a five-year-old or twenty-year-old or even eighty-year-old case—or series of such cases—then outcomes will generally be more predictable than when such precedents are not regarded as constraining.

Of course, no one thinks of certainty of outcome as a good-in-itself. Its value is tied to the satisfaction of people's expectations, and the concomitant Benthamite importance placed on facilitating their fulfilment.[1] On this way of thinking, greater certainty of outcome leads to more satisfied expectations, and so to greater ease in planning and shaping one's life, and so on.

Those who would have answered "never", by contrast, are making flexibility (at the point of application of the rules) the more important value or virtue. On this view, the emphasis is put on changing social

circumstances and technology, and the need for a responsive, flexible approach at the point of application of the rules.

In highly simplified terms, then, there is a spectrum ranging from total certainty at one end to total flexibility at the other, with various shades of grey in between. In practice, of course, all real life legal systems will strike a compromise somewhere between the two poles of "total certainty" and "total flexibility".[2] They will answer "sometimes" to the question of whether the top court's judges ought to be constrained by that court's past decisions—though common law systems lean this way, comparatively speaking, more than others.[3]

That sketches out the basic framework in which we can consider the question posed in the title to this paper. Or rather, it almost does. Two further matters are worth mentioning. Both relate to rules and the nature of rules, because it will be rules that the point-of-application judges will be interpreting. Now in today's legal world the vast preponderance of the relevant rules that affect us come from statutes. They are rules that have been laid down by the elected Parliament after three readings and the Royal Assent. Statutory rules intrude into almost all areas of life. But even so, there are also rules that come from past cases, that have evolved (case by case) over time from the sequential decisions of unelected judges. We can see these latter sort of rules most obviously in tort law, and in the glosses put by judges on all those statutes.

So one further matter worth mentioning is the issue of the relative clarity and certainty of statutory rules versus judge-made or common law rules. Some writers have been tempted to think that the judge-made variety will always be inherently amorphous, fuzzy and lacking in determinacy. I think that sort of line is over-stated. The best legal philosopher of last century, the Oxford don H L A Hart, responded to that sort of nihilistic claim by noting that there is no doubt that the common law can produce "a body of rules … as determinate as any statutory rule".[4]

Of course, one must recognize that the indeterminacies involved when rules are inferred from precedents will be more complex, and the uncertainties more often encountered than with statutes, as a generalisation. But that is just to say that when rules have to be inferred from the ratio of past decisions, it will generally (though not always) be the case that such rules have less specificity, and less constraining effect over future circumstances, than do rules laid down in statute form by a legislature—*not* that such judge-made rules can never really amount to rules, or never provide determinacy (which is the sort of nihilistic line that tempts some writers).

The second further matter that needs stating is that *all rules*—be they statutory or judge-made or constitutional in origin—will have an "open texture"[5] or "penumbra of uncertainty".[6] No rule, however fanatically detailed (and one might think here of a tax code), can unambiguously and uncontentiously apply to every single future set of circumstances. All rules will have a "core of settled meaning"[7]—where the answer dictated by the application of the rules to the facts is clear to most people, such as when I drive into the back of your car while it is stopped at a red light—and an attendant penumbra of doubt. It is just that some rules have a very large core of settled meaning and a very small amount of doubt (again, think of tax codes, or laws related to corporate securities), while a few others have a tiny core of settled meaning and great amounts of uncertainty as to the outcomes they command (think of the "award custody based on the best interests of the child" rule in family law, or any enumerated rights in a Bill of Rights).[8] Indeed, on rare occasions it is the case that legislatures will intentionally pass rules with next to no constraining content—no core of settled meaning—as a means of abdicating decision-making powers and handing them off to the unelected judges.

For our purposes in this paper, though, this second matter worth mentioning boils down to this. Despite the claims made by some writers, rules are *not* empty, wholly amorphous things that leave the point-of-application judges always free to do as they please or think best. "[T]he life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules [whatever their source] which … do *not* require from them a fresh judgment from case to case".[9]

On the other hand, no rule (whatever its source, and no matter how fanatically detailed) will always be constraining, always point to only one reasonable choice, always eradicate reasonable disagreement. That is simply the nature of language, and the fact that humans bring to the table differing moral sentiments. Sometimes, though by no means always or even often, judges simply will have discretion, whether it be in interpreting a statutory or constitutional provision, or in determining the applicability of a case law rule.

As that same legal philosopher H L A Hart put it:

> "The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental [for example] constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success".[10]

I think now, with that framework and those two supplementary refinements in place, we can turn to the issue of when precedent becomes a nonsense.

Stare decisis ("to adhere to decided cases") is the policy or doctrine of standing by precedent and not disturbing settled points of law. This respect for precedent, as noted above, is stronger in common law systems, though in no system today does it amount to total inflexibility, with no scope at all or ever for judges in the present to second guess what they decided in the past.

And notice this. The whole point of such a doctrine or policy is to constrain judges *when they would otherwise decide a case differently*. A doctrine or rule that said, "Follow past cases only when you think they have been rightly decided (given the other sources of law in play)", is empty.[11] It amounts to nothing more than saying, "Decide this case on grounds *other than* how similar cases have been decided in the past, though if your conclusion and the conclusion from past cases happen to align or agree, then feel free to mention those past cases (for window dressing purposes)".

More bluntly put, *stare decisis* is about imposing a constraint, the substance or outcome of which today's decision-maker thinks is wrong. (Again, it would be no constraint if past cases pointed to an outcome believed right or correct on independent grounds, or on first principles, or in the absence of any concern for precedent).

As I tried to make clear at the start, therefore, *stare decisis* emphasises certainty over flexibility and even over perceived right outcomes (in the absence of those precedents). It is grounded on the view or theory that securing expectations and certainty of outcome should trump (at least sometimes) other legal principles pointing to a different outcome.

And surely it will be uncontentious for me to say that following such a doctrine is at least sometimes a good thing. Indeed, I am one who places more emphasis on upholding certainty than most—or at least than most legal academics—and so would depart from the doctrine's strictures more grudgingly than most.

But therein lies the rub. Therein lies a main gravamen or grievance at the heart of the High Court's s. 51 (xx) corporations power jurisprudence. The fact is that different judges take different views of how much respect to pay past precedents. As far as the High Court's corporations power jurisprudence is concerned, not all these views have been equally well placed. There has been an asymmetry at work. When precedent-respecting judges (who also happened to be inclined to adopt relatively narrower interpretations or Commonwealth-unfriendly interpretations) found themselves outvoted in subsequent cases, and outvoted fairly consistently as it turned out, they regarded themselves as bound by those previous decisions. Their self-disciplined adherence to *stare decisis* contributed to a kind of ratchet-up effect. A Gibbs and a Wilson, and maybe too a Dawson[12] and to a lesser extent a Stephen, or possibly even a Brennan, felt locked into what had gone before—namely, a creepingly expansionist development of s. 51 doctrine.[13]

On the other hand, a number of judges—a Murphy, a Mason, a Deane and a Gaudron, say—those inclined to adopt relatively liberal or Commonwealth-friendly interpretations of the Commonwealth's s. 51 (xx) powers, were not as attached to *stare decisis*. They felt freer to ignore its constraints. So although these judges were occasionally outvoted, they usually adhered to their minority views in subsequent cases, holding out in some instances until they could form part of a newly-constituted and more expansionist majority. This ratchet-up effect began with Isaacs J in the 1920 *Engineers Case*[14] and has more or less characterized the High Court ever since.

So let me call this Nonsense Number One. It is the asymmetry problem. Where some judges are more precedent-respecting than others, there comes a point at which those who feel themselves to be more constrained by past decisions than their judicial colleagues start to look like chumps (to the outside observer). Movement is all one way. The interpretively-conservative, precedent-respecting judge can only ever hold the existing line. His or her judicial philosophy does not allow for the recapturing of lost territory. Once lost, it is lost forever. The upholding of past decisions, even of what are seen to be wrongly decided precedents, counts for too much for these judges.

Now of course an asymmetry problem only arises here or anywhere if the judges who more greatly defer to precedent happen also to share some substantive position—one in favour of a federalist, pro-States interpretation of the Australian Constitution, say, or one that sees no right to an abortion lurking in the penumbras and emanations of the US Constitution, perhaps. If the various substantive judicial views were independent of, or randomly distributed amongst, the approach-to-precedent judicial views, all this might well balance out or come out in the wash or amount to nothing.

The problem arises—the nonsense shows itself—when the distribution of the two sorts of views is not random, not mutually independent. And that, unfortunately, can plausibly be claimed to be what has happened with division of powers federalism cases in Australia. As a generalisation, the precedent-respecting judges have tended also to be the States-rights or pro-federalism judges. When that happens, such judges find themselves on the losing end of a ratchet-up effect. And at that point, one might well say that the normal respect shown by these judges for precedent has become a nonsense.

Staying with Australian High Court federalism or division of powers jurisprudence, I think one might lay claim to a second sort of nonsense as regards precedent. I call this the *Uncommon Law* effect. I call it that because the best way to illustrate this second nonsensical aspect of a strict respect for precedent is by turning to a work of fiction.

A P Herbert's *Uncommon Law*[15] is a brilliantly sustained parody of the common law. Its 66 so-called "misleading cases", which over time first appeared in *Punch*, appear technically correct in both the language and reasoning typically used in common law judgments. Each step in the fictional judge's train of thought follows plausibly from what went before. Some steps are wholly uncontentious and mirror orthodoxy, some choose between alternatives that are all within the realm of reasonable possibilities, none is obviously identifiable as beyond the Pale. And yet from sound, unexceptional starting points the conclusions reached are ridiculous; they are laughable—which is, of course, Herbert's intention. He is trying to make the reader laugh by shepherding him along a path that ends in absurdity, but whose twists and turns all appear well-chosen, or at least not strikingly wayward.

Each time the conclusion reached looks laughably far-fetched, or at minimum implausible, when viewed from the initial vantage of the rules (statutory or case law ones) used to determine the outcome. The self-evident problem with each case—the point which enables Herbert to demonstrate the absurdity of the result—is that the enactors of those rules (or the earlier judges creating them in a previous case) would never have envisaged that they would be used or interpreted in this way.

It is precisely that sort of claim—one that makes following precedent today take on a nonsensical aspect—that I think can be made in relation to the Australian Constitution and how it has been interpreted by the High Court in federalism cases since at least 1920. None of the Constitution's framers would ever have imagined, back in the 1890s or in 1901, that a century or so later the Australian States would be as emasculated as they are today: that they would be so dependent upon the Commonwealth for their governmental finances; and that their policy-making capacities would be so contingent upon political decisions taken by the federal government.

More specifically, none of the framers would have anticipated that the "corporations" power (s. 51 (xx)) would be held to allow the Commonwealth to take over the field of industrial relations; that the "external affairs" power (s. 51 (xxix)) would be deemed to enable the Commonwealth to enact far-reaching environmental, human rights and industrial relations laws; or that the States could be cajoled into abjuring income tax powers, not least because four federal statutes—passed at the same time (during the Second World War) and consecutively numbered—were assessed or judged individually (and, of course, held to be valid) and not as part of a package. And this is merely to highlight some of the better known ways in which the competencies of the Commonwealth have waxed, while those of the States have waned.

Nothing in the language of the Australian Constitution, or its structure, or the process that was used to adopt it, or the basis upon which its approval by the voters was promoted, or the likely original understandings of most of those voters, or anything else at the time would have suggested that the States would become the enfeebled, emasculated creatures they have become. Put slightly differently, no one, or almost no one,[16] would have guessed or predicted that virtually all of the *important* division of powers cases would go the Commonwealth's way.[17] Or at least, there would have been no grounds at the time for thinking that Australia's political centre would do so much better at the hands of the judiciary than would be the case in Canada, Germany or even the United States.

So my second nonsense claim amounts to this. Australia's High Court, in deciding distribution of powers federalism cases over the last century, culminating in the recent *Work Choices Case*,[18] has created an end product that looks not unlike one of Herbert's misleading cases, although of course the High Court's intentions have been something other than simply the reader's amusement.[19]

Like the mock hypotheticals of A P Herbert's *Uncommon Law*, a number of discrete steps have been taken in interpreting s. 51, each of which seemed at the time to be itself certainly plausible, usually reasonable, sometimes perhaps inevitable, and never beyond the Pale, yet which cumulatively created an effect that today

is at least remarkable, if not troubling or even possibly absurd (according to taste). And that cumulative effect has left us today in the position where following these division of powers precedents can seem to be a nonsense, our Nonsense Number Two.

That makes two sorts of nonsense claims I am linking to our High Court's federalism jurisprudence—one I have called the asymmetry problem and one the *Uncommon Law* problem, reminiscent of A P Herbert's mock hypotheticals.

All that space and time allow me now[20] are two final indulgences. Firstly, I will give a quick recap of the outcome in the *Work Choices Case*, to show how far down Herbert's path we have come. Then, secondly, I will leave the realm of diagnosis and speculate on a few potential cures—or paths that at least offer some faint hope of ameliorating matters.

So recall that in the *Work Choices Case* the High Court, by a majority of five to two, upheld the entirety of the *Workplace Relations Amendment (Work Choices) Act* 2005,[21] largely on the basis of s. 51 (xx). As importantly, the majority reached this broad understanding of what s. 51 (xx) authorizes by rejecting various arguments that would have restricted its ambit. Hence, the argument that the explicit laying down of a more limited industrial disputes power in s. 51 (xxxv) served to restrict the ambit or reach that could be attributed to s. 51 (xx) was rejected, principally on the basis that this would entail, as it did, a return to the reserved powers doctrine.

Likewise, the proposition that a narrower construction of s. 51 (xx) should be adopted to avoid altering the federal balance was rejected, this time on the basis that arguments from the "federal balance" are contrary to the established principle that federal heads of power are to be interpreted as widely as the language used allows, without any thought being given to the impact of the conclusion on the powers left to the States.

Appeals to the Convention Debates, and the original intentions of the framers, and to s. 51 (xx)'s drafting history, as evidence of a more limited reach for the power, were also rejected. And the fact that three referendum attempts by Commonwealth governments to broaden the scope of the corporations power had been defeated—that the 1910, 1912 and 1926 proposals to amend s. 51 (xx) and s. 51 (xxxv) to confer a general industrial relations power on the Commonwealth were put to referenda but each one failed to pass—was not seen as relevant, but was baldly dismissed on the basis that the "failure of successive referendums to alter s. 51 (xx) and s. 51 (xxxv) provides no assistance in the resolution of the present matters".[22]

Thus, each argument that would have restricted the ambit or scope of s. 51 (xx) was rejected by the majority. Yet nothing in the majority's Commonwealth-friendly interpretation or approach ran obviously contrary to precedent. (Indeed, if anything, the dissenting judgments of Justices Kirby and Callinan are more inconsistent with previous authority.)[23] The outer reaches of s. 51 (xx) having never before been specified, the majority in the *Work Choices Case* could be seen as simply having adopted one of various plausible alternative readings or interpretations open to it.

That is the *Uncommon Law*-like point we have now reached. To me, it is not unfair to characterize where we are now as a nonsense.

Yet that is diagnosis, not cure. True, it raises interesting theoretical issues, such as which of the orthodox views surrounding division of powers questions are today most plausibly rejected—perhaps, say, the orthodox view that no powers are reserved to the States by implication? Yet rather than consider those sorts of issues, I finish this paper by turning to the practical issue of whether anything at all can be done.

A s. 128 referendum is almost certainly out—only the Commonwealth, not the States, can trigger one. This will not happen, whichever party is in government. So that leaves the judges themselves. They are the ones who have interpreted the Australian Constitution heavily in favour of the Commonwealth; they have gotten us to where we are today by means of a step-by-step series of cases. Anyone seriously interested in rebalancing our federalist arrangements is forced into relying on the judges, for want of other alternatives.

Here are three suggestions:

(1) Overrule *Engineers*': The time has come to argue that the reasoning in the *Engineers' Case* was faulty. However nuanced the case itself might or might not have been,[24] it now appears to be a roadblock to rebalancing federalism in Australia. So it is now, I think, time to argue that the *Engineers' Case* went too far in propounding that each federal legislative head of power should be read not only literally, but in isolation from the other heads of power, and without any regard to the history and federal structure underlying the distribution of powers between the Commonwealth and the States. True, counsel have been leery of taking this line of argument—they shied away from it in the *Work Choices Case* and in the equally important, equally Commonwealth-friendly *Tasmanian Dam Case*.[25] But given where we are now, there is no longer any tactical advantage in conceding that *Engineers'* was correctly decided. The States should instruct counsel to argue

explicitly for it to be overruled.

(2) Appoint more High Court Justices from smaller States: In 2005, five of the seven High Court Justices came from the Sydney Bar. One of the other two was from the Melbourne Bar. To Canadian or American eyes this is nothing less than incredible. Nothing remotely similar could happen, or has happened, in either of those federalist jurisdictions. Yet in Australia, the two largest States (and perhaps one in particular) dominate when it comes to the appointment of High Court Justices. In fact, the two smallest of Australia's six States, South Australia and Tasmania, have never—not once in over a century—had a single High Court Justice appointed from their State. More to the point, though, it has often been judges appointed from the other smaller states—Queensland and Western Australia—who have been the more balanced in their judgments and more solicitous of the point of view of the States, although as one might expect, the picture is by no means uniform.

Given where we are today in division of powers federalism jurisprudence, this is a change worth considering. Appoint regularly two or even three of the High Court's Justices from outside New South Wales and Victoria—at this stage there is nothing to lose. And a campaign to have High Court Justices chosen from a broader geographical pool might, on other grounds, attract the support of some non-federalist centralists.

(3) Defend originalism as the best interpretive approach to the Constitution: In my opinion, and despite the disparaging views of some current High Court Justices to the contrary, originalism is the most attractive interpretive framework for interpreting Constitutions, as opposed to statutes.[26] Without entering into the philosophical arguments,[27] I think any other interpretive approach ends up collapsing into a sort of "Constitutions are just about expressing our most important values as a community" outlook: one that has the effect of giving us an unshackled judiciary, uniquely free to amend or alter or change it in ways they—those judges, and no one else—happen to think advances society, or keeps pace with the international community, or whatever be your favourite metaphor (i.e., any metaphor that obscures the fact that people disagree about what advances society, and that a handful of judges do not have a pipeline to God on these matters).

The present emphasis on a sort of literalism in these cases does nothing to prevent this collapse and the end result of a relatively unshackled judiciary—one that clearly favours a very strong, powerful Commonwealth. Stronger advocacy of some sort of originalism as the best interpretive approach to the Constitution, coupled with the explicit aim of appointing High Court Justices who are committed originalists, may help. Certainly this interpretive approach, when sincerely held, appears capable of pushing a judge to uphold federalist outcomes, even when he personally agrees with the thrust and goals of the Commonwealth legislation being challenged (as seems likely in the case of Justice Callinan in the *Work Choices Case*).

That more or less exhausts any positive suggestions I have. Even cumulatively they can seem rather lame, I concede. The fact is, though, that the odds are stacked against our federalist arrangements being rebalanced. And this is no less true, even when the accumulated body of precedents that have interpreted our division of powers federalism arrangements has become a nonsense.

Endnotes:

1. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (eds. Burns and Hart), Athlone Press, 1970 (first published in 1780). Bentham thought that the more people's pre-existing expectations were satisfied, the more likely this was to translate into an increase in overall utility or social welfare.

2. The well-known Oxford legal philosopher H L A Hart put it thus in his masterpiece *The Concept of Law* (Oxford University Press, 1961), p. 127:

   > "In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case".

3. Indeed, up to 1966 in the United Kingdom, the House of Lords' position was that these top judges

would not overrule past decisions, though there was still some wiggle-room via distinguishing past cases on narrow grounds.

4. *The Concept of Law*, *op. cit.*, p. 132.

5. *Ibid*., p. 130.

6. *Ibid*., p. 131.

7. *Ibid*., p. 140.

8. No one goes to court and says, for example, that he is against "the right to free speech". Such Bill of Rights entitlements bear on matters such as where to draw the line when it comes to campaign finance regulations, or hate speech provisions or defamation regimes. The rule, "everyone has the right to free speech", leaves all these areas virtually wide open. Different lines can be drawn in the name of the rule, as is clear from even a cursory glance at the different answers given in the free speech jurisprudence of, say, Canada, the US, New Zealand and the UK.

9. *The Concept of Law*, *op. cit.*, p. 132 (italics in the original).

10. *Ibid*., p. 149 (italics in the original).

11. See Bruce Harris, *Final Appellate Courts Overruling Their Own 'Wrong' Precedents: The Ongoing Search for Principle*, (2002) 118 *Law Quarterly Review* 408, where he seems to miss this point, as made clear by Jack Hodder's blunt response in *Departure from 'Wrong' Precedents by Final Appellate Courts: Disagreeing with Professor Harris*, [2003] *New Zealand Law Review* 161.

12. Though see Dawson J in *Re Dingjan* (1995) 183 CLR 323.

13. This paragraph and a dozen or so others scattered throughout the remainder of this paper are reworked versions of similar comments made in a paper I am writing with a colleague, Nicholas Aroney, entitled *An Uncommon Court: How the High Court of Australia has undermined Australian Federalism*. I thank Dr Aroney for allowing me to incorporate bits of our joint paper into this one.

14. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

15. First published by Methuen, 1935. This edition 1979.

16. It is quite possible that Isaac Isaacs foresaw the potential for interpreting the Constitution in a pro-federal manner, provided the High Court's interpretive approach could be separated from the framers' original intentions and understandings.

17. This is not to deny that some well-known federalism cases went against the Commonwealth, such as the *Communist Party Case*, the *Bank Nationalisation Case*, the *State Banking Case* and the *Incorporation Case*, nor that s. 51 was in part a ground for these decisions. The point is that the general trend has undeniably been in the Commonwealth's favour.

18. *New South Wales and Ors v. The Commonwealth* (2006) 231 ALR 1 (hereinafter "*Work Choices*").

19. Here is a sampling of Herbert's *Uncommon Law* cases. In *Dahlia Ltd v. Yvonne* (pp. 314-319), a decision of the House of Lords is argued to be in the nature of an Act of God, something no reasonable man could assess or predict in advance. In *Fardell v. Potts* (pp. 1-6), the notion of a reasonable man is held not to encompass or subsume that of a reasonable woman. In *Rex v. Puddle* (pp. 159-163), a Collector of Taxes is held to be a blackmailer. In *H M Customs and Excise v. Bathbourne Literary Society* (pp. 408-413), a lecturer who makes people laugh, and so is entertaining as well as informative, is held (against

expectations) not to be subject to a heavy tax and not to be doing something illegal. In *Haddock v. Mogul Hotels, Ltd* (pp. 269-274), it is held that every waiter must know by heart the whole text of the Licensing Acts before being permitted, lawfully, to remove a patron's alcoholic beverage after closing time. In *Haddock v. Thwale* (pp. 124-129), motor cars are held to be subject to the same treatment, at law, as wild beasts (and in this case ordered to be put down). And so on, and so on.

20. For a much more detailed defence of the claim, with extensive reference to, the cases, see my and Nicholas Aroney's paper cited above, *loc. cit.*.

21. This Act introduced a number of very significant amendments to the earlier 1996 Act. The key goal of the *Work Choices Act* was the replacement of State industrial relations laws (and bits of the old Commonwealth system) with a near-comprehensive national system designed to encourage direct negotiations of workplace agreements, without the intervention of trade unions or other third parties.

22. *Work Choices*, paragraph [135]. See too paragraphs [125]—[134].

23. And Kirby J's attempts to distinguish the external affairs power from the corporations power seem particularly weak.

24. See George Winterton's *The High Court and Federalism: A Centenary Evaluation* (pp. 197-220), in P Cane (ed.), *Centenary Essays for the High Court of Australia* (Lexis Nexis, 2004) for an argument that it was more nuanced.

25. *Commonwealth v. Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam Case*).

26. See my *Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of 'Original Intent'*, (2000) 6 *Legal Theory* 109-126, and my *Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century*, (2006) 17 *King's College Law Journal*, 1-26.

27. See *ibid*..