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▶▶ [Barrister says Work Choices to survive challenge; Cautions against judicial activism on federal/state balance](#)

Thursday 1st June 2006 12:08 pm EST

The key elements of Work Choices are likely to survive the States'/unions' challenge, though the legislation might have to be "slightly re-cast" after the High Court delivers its judgment, Melbourne barrister Stuart Wood has told a Samuel Griffith Society conference.

Speaking at the [conference](#) in Canberra on Sunday, Wood said that after reviewing the transcript of this month's challenge he believed the "three central aspects" of Work Choices - its foundation in the corporations power, its takeover of the state systems and its emphasis on individual bargaining - would be left standing by the High Court, though not completely unscathed.

"Other parts of the legislation might not survive and indeed these three central parts (like the trade practices legislation post-[Rocla Concrete Pipes](#)) might have to be slightly re-cast."

But, he said, the Work Choices legislation was on "fairly safe constitutional ground".

Wood, who is from Latham Chambers, said that it was possible that because the law was so strongly in the Federal Government's favour, much of the debate in the court was over policy issues.

He said there was a respectable argument that the states' challenges - and particularly that of Victoria - were "grounded more in policy than in law".

He said at times during the Work Choices case, "the debate seemed to be between those who did not like the constitutional law as they found it, and those who did not like where this led them". The concern for the latter group was about federal/state balance, he said.

Referring to some of the debate on the issue in the case, Wood drew attention to comments by Justice Michael Kirby and the Commonwealth's counsel, Solicitor-General David Bennett QC (see from p10 of Wood's [paper](#), and also see the [Related Article](#) and the [transcript](#) - to find the appropriate section, search on "giant step").

Wood said Justice Kirby's approach to legal reasoning was "quite improper", for four reasons:

1. It pretended the *Engineers case* was never decided and that *Rocla Concrete Pipes* and the 35 years of jurisprudence that had built upon it, did not exist.
2. It failed to pay proper respect to the reasoning and received wisdom of earlier High Court judges. He said Justice Kirby couldn't dismiss authorities, by air-brushing them away, because they were written in earlier times. "The current judges are not entitled to arrogate to themselves a blank slate and commence interpreting the Constitution as if they were the first judges to be set the task," he said.
3. Concepts such as constitutional originalism were simply a means to bypass the collective wisdom of previous chief justices and judges. While Wood agreed with Justice Kirby on the protections afforded by a federal system he didn't agree with his "next step" of "using the so-called 'original' (federal) nature of the constitution as a means of avoiding 35 years of jurisprudence".
4. Its strange "implied criticism" of the traditional judicial method of approaching matters case-by-case, as demonstrated in the judge's comments on little steps accumulating into a giant step (in response to Bennett saying "there is no giant step here from the legal point of

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view"). Wood said this appeared to be a "manufactured concern". "What is small, gradual step by step reasoning, in which the law develops case by case, with the Court in each case deciding so much is as necessary to dispose of the case before it, to be replaced with?"

Wood said that in a case like the Work Choices challenge, the court "should try to keep its collective eye on the judicial questions which arise for the decision, and nothing more".

"To try to imagine the battle lines which might next be drawn in some federal/state contest and to attempt to head off those battles even before the lines are drawn or the battles fought, is a task which is more appropriately left to politicians and the political process."

While the use of the corporations power could give Canberra more opportunities to "further degrade" federalism, Wood said he feared undemocratic judicial activism more than democratic centralism.

[The High Court Chooses: Will Work Choices Work?](#), paper delivered by Stuart Wood to Samuel Griffith Society conference, Canberra, May 28, 2006 (the paper might be revised before being published in the conference proceedings).

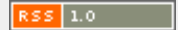
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