

In *New South Wales v Commonwealth (WorkChoices Case)* (2006) 231 ALR 1, the key issue was whether s 51(xx) of the Constitution (the “corporations power”) could be used to refashion the legislative regime that had previously relied on s 51(xxxv) (conciliation and arbitration in relation to interstate industrial disputes). The joint majority judgment of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ referred to the Convention Debates at Melbourne in 1898 as supporting an inference that s 51(xxxv) was intended as “[68] an authority for legislative experimentation”, but *not* supporting any inference that s 51(xxxv) was intended to be “the sole method open to the Parliament of the Commonwealth for legislating for industrial regulation”. As to the intended scope of s 51(xx), however, these judges declined to draw any inference from the Convention Debates at all.

***New South Wales v Commonwealth (WorkChoices Case)***  
(2006) 231 ALR 1

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ:** [40] No doubt the reference made by Mr Barton to the Commonwealth being given power “as far as it can legislate upon the general subject” of corporations can be taken as suggesting some breadth to the power. But to fasten upon this one comment, made in debate, as fixing “the framers’ intention” would be to place altogether too much weight upon it. Rather, the absence of any extended debate about this power does no more than show that, like so many of the legislative powers ultimately granted to the federal Parliament in s 51, the power with respect to corporations was not politically controversial at the time the Constitution was framed. But it also follows that it is impossible to distil any conclusion about what the framers intended should be the meaning or the ambit of operation of s 51(xx) from what was said in debate about the power, or from the drafting history of the provision.

To pursue the identification of what is said to be the framers’ intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes that it is both possible and useful to attempt to work out a single collective view about what now is a disputed question of power, but then was not present to the minds of those who contributed to the debates. And even if a statement about the framers’ intention can find some roots in what was said in the course of the Convention Debates, care must be taken lest, like the reserved powers doctrine, the assertion assumes the answer to the very question being investigated: is the law in issue within federal legislative power? For the answer to that question is not to be found in attempting to attribute some collective subjective intention to all or any of those who participated in the Convention Debates. And when it is said that a particular construction of the constitutional text does, or does not, accord with the framers’ intention, the statement compares competing constructions of the Constitution, both of which must be based in its text, interpreted in accordance with accepted principles.

In the case of s 51(xx) the statements made in the course of the Convention Debates were so few and equivocal as to provide no foundation for a conclusion about what those who spoke in debate thought would be the scope or meaning of s 51(xx). Moreover, in the case of s 51(xx), assertions about the framers’ intention often leave out of account two subsequent developments of fundamental importance which cannot be assumed to have been foreseen by the framers. First, corporations law was still developing in the last decade of the nineteenth century. There can be no clearer demonstration of that than the decision in *Salomon’s Case* [*Salomon v Salomon* [1897] AC 2]. Only with that decision, in November 1896, did the courts fully grasp the implications of corporate personality. And its consequences for the rights of creditors and others were still being debated, and dealt with, well into the twentieth century. Secondly, the place of corporations in the economic life of Australia today is radically different from the place they occupied when the framers were considering what legislative powers should be given to the federal Parliament.

The Explanatory Memorandum for the Amending Act asserted that “[f]orty-nine per cent of small businesses employing staff are currently incorporated”. There is no material before the Court in these matters which would show what would have been the equivalent proportion of incorporated [41] small business employers in the 1890s. There is, however, every reason to think that it would have been very much smaller. For as Kahn-Freund pointed out, in 1944, it was the decision in *Salomon’s Case* that encouraged the sole trader (or small group of traders) to conduct business as a limited company even

where the venture was not especially risky or where no outside capital was required. Relatively recently, legislation doing away with the doctrine of ultra vires in relation to companies, permitting registration of single member companies, and doing away with certain capital requirements, may be seen as the continuation of development of the corporation as a vehicle for the sole trader's pursuit of commercial gain with minimum exposure to risk of personal liability. That development did not begin until *Salomon's Case* was decided.

None of these events could be foreseen by the framers. It is not possible to attribute to them some intention about how this legislative power operates in respect of these or other subsequent legal, economic, and social developments, without making some assumption to the effect that the framers intended that the legislative power granted to the federal Parliament should be limited, not only to facts and circumstances of the kind that existed at federation, but also to whatever kinds of legislative solution had then been devised to address the problems then revealed. But the plaintiffs, correctly, made no such explicit contention.

Rather, the plaintiffs confined their contentions about the framers' intention to the drawing of a conclusion from what was said in the Convention Debates, in *Huddart Parker*, and in early texts, that s 51(xx) was not intended by the framers to have the reach that would be necessary to support the Amending Act. Those sources do not support the conclusion asserted by the plaintiffs.

By contrast, for Callinan J (who dissented), the fact that the Convention Debates gave "[249] only the most cursory of attention" to the corporations power was itself a clear indication that the power was *not* perceived as far-reaching.

**Callinan J: [249]** It is inconceivable that the founders visualized a power as broad as the one now asserted. Throughout the Debates, the principal preoccupation of the delegates was with the adjustment of powers between the new polity and the States, as they would become. I do not doubt that if the corporations power were intended to abrogate so much industrial power as would otherwise be within State power, as the majority hold, the possibility and desirability of that abrogation would have been of intense concern to the founders.

Accordingly, he reaffirmed his support for "originalism":

**Callinan J: [223]** The Constitution should be construed in the light of its history. It should be construed purposively. The founders' intentions and understandings, to the extent that they can be seen to be generally consensual, are relevant. The evidence to be found in the Debates is valuable. The referenda, the results of them, and what was said by informed, legally qualified and knowledgeable legislators in relation to the Bills for them, are relevant in the way, and for the purposes that I have stated. The Constitution should not be construed to enable the Court to supplant the people's voice under s 128 of it. The Constitution should not in general be read as if it were intended to confer powers in duplicate. "Originalism" so-called, is no less a proper interpretative tool than any other, and will often be an appropriate one. It is useful here.

In a footnote he quoted the rhetorical question posed by Justice Antonin Scalia at the 17th Boston-Melbourne-Oxford Conversation on Culture and Society (Melbourne, 22 October 2005): "Would anyone vote for a constitution which said 'Those general norms set forth in this document ... do not refer to the people's current understanding of what is embraced by those terms, but rather shall bear the meaning assigned, from time to time, by unelected and life tenured committees of lawyers'?"