The Reality and Indispensability of Legislative Intentions

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Abstract

Some members of the High Court have recently challenged the longstanding, fundamental principle that the primary object of statutory interpretation is to ascertain the legislature's intention. They have described legislative intention as a 'fiction' that is, in reality, merely a by-product of the judicial interpretation of statutes. We acknowledge that there are good reasons for scepticism about some accounts of legislative intention, and for concern about the use of legislative history to reveal the subjective intentions of individual legislators. Nevertheless, we contend that radical scepticism about legislative intention is fundamentally misconceived, because it is inconsistent with the constitutional allocation of lawmaking authority to legislatures, reflected in orthodox principles of statutory interpretation, and with intelligible application of those principles in practice. We show how legislatures are complex purposive institutions, which form and act on intentions that arise from but are not reducible to the intentions of individual legislators. We also provide an account of a legislature's 'objective' intentions, which are and should be the object of interpretation, and demonstrate that no other account either makes sense or provides a plausible rationale for its being the focus of statutory interpretation.

I Tradition and Scepticism

For at least six centuries, common law courts have maintained that the primary object of statutory interpretation 'is to determine what intention is conveyed either expressly or by implication by the language used', or in other words, 'to give effect to the intention of the [lawmaker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed'.[1] This has often been described as 'the only rule', 'the paramount rule', 'the cardinal rule' or 'the fundamental rule of interpretation, to which all others are

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This article develops arguments that we have explored elsewhere, especially in Jeffrey Goldsworthy, *Parliamentary Sovereignty, Contemporary Debates* (Cambridge University Press, 2010) ch 9 and Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012), reviewed in Jeffrey Goldsworthy, 'Legislative Intention Vindicated?' (2013) 33 *Oxford Journal of Legal Studies* 821. We thank Sir Anthony Mason, Jim Evans, and participants in the 'Judges and the Academy' seminar held in Melbourne on 26 July 2013, especially Justices Pamela Tate and Chris Maxwell, for valuable comments on earlier drafts; the usual disclaimer applies.

1 Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (W Maxwell & Son, 1883) 1; *Attorney-General v Carlton Bank* [1899] 2 QB 158, 164 (Lord Russell).

subordinate'.[2] In the leading case of *Cooper Brookes*, Mason and Wilson JJ said: '[t]he fundamental object of statutory construction in every case is to ascertain the legislative intention … The rules [of interpretation] … are no more than rules of common sense, designed to achieve this object'.[3] Likewise, Gleeson CJ has said that 'the object of a court is to ascertain and give effect to, the will of Parliament'.[4] It follows that '[j]udicial exposition of the meaning of a statutory text is legitimate so long as it is an exercise … in discovering the will of Parliament: it is illegitimate when it is an exercise in imposing the will of the judge'.[5]

The proposition that the will or intention of Parliament is the object of interpretation has been affirmed in leading cases and textbooks on statutory interpretation in England, Australia, Canada and the United States for ages (literally).[6] It can be found as far back as the 15th century: Chrimes reports that it 'was certainly established by the second half of the fifteenth century', and by Henry VII's reign was 'sufficiently established to be clearly stated several times from the bench'.[7] The many early authorities that consistently attest to the crucial role of legislative intention in statutory interpretation include *A Discourse Upon the Exposicion and Understandinge of Statutes* (pre-1567); Plowden; Selden; Coke's *Institutes* (1630s); Bacon's *New Abridgement of the Law* (1736); Blackstone's *Commentaries* (1765); and Dwarris's *General Treatise on Statutes* (1848).[8] In the 20th century, some American 'legal realists' and other academic writers expressed scepticism about the reality of legislative intentions. But the vast

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2 Respectively, *Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 ER 1034, 1057 (Tindall CJ); *Attorney-General (Canada) v Hallet & Carey Ltd* [1952] AC 427 (Lord Diplock); *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161 (Higgins J).

3 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ).

4 *Wilson v Anderson* (2002) 213 CLR 401, 418.

5 Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 27.

6 Maxwell, above n 1, 1; *Halsbury's Laws of England* (LexisNexis Butterworths, 4th ed) vol 44 [522]; Francis A R Bennion, *Statutory Interpretation* (Butterworths, 2nd ed, 1992) 345–7; P St J Langan, *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 12th ed, 1969) 28; Henry Campbell Black, *Handbook on the Construction and Interpretation of the Laws* (West Pub Co, 1896) 35ff; Earl T Crawford, *The Construction of Statutes* (Thomas Law Book Co, 1940) 244–5; Norman J Singer, *Sutherland Statutory Construction* (West Publishing, 5th ed, 1992) vol 2A, 22–3; Elmer Driedger, *Construction of Statutes* (Butterworths, 1983) 105–6; Pierre-André Cote, *The Interpretation of Legislation in Canada* (Carswell, 1991) 4–5.

7 S B Chrimes, *English Constitutional Ideas in the Fifteenth Century* (American Scholar Editions, 1965) 294. See also Philip Hamburger, *Law and Judicial Duty* (Harvard University Press, 2008) 52–8.

8 Most of these authorities are cited in Raoul Berger's excellent collection of early English sources, '"Original Intention" in Historical Perspective' (1986) 54 *George Washington Law Review* 296, 299–308; see also Raoul Berger, 'The Founders Views — According to Jefferson Powell' (1989) 67 *Texas Law Review* 1033, 1059–65. To Berger's copious references can be added Plowden's summary of various cases involving statutory interpretation, as 'hav[ing] always been founded upon the intent of the Legislature': *Stradling v Morgan* (1560) 1 Plowd 199, 205; and Sir Edward Coke's statement that 'every statute ought to be expounded according to the intent of them that made it': 4 Co Inst 330. Coke's conception of interpretation is discussed in R A MacKay, 'Coke — Parliamentary Sovereignty or the Supremacy of the Law?'(1924) 22 *Michigan Law Review* 215, 236–7. See also Sir Fortunatus Dwarris and W H Amyot, *A General Treatise on Statutes: Their Rules of Construction, and the Proper Boundaries of Legislation and of Judicial Interpretation* (William Benning & Co, 2nd ed, 1848) 551–2, 556–60.

majority of judges and textbook writers throughout the common law world (and the civil law world) have consistently maintained that legislative intentions are essential to the interpretive enterprise.[9]

In the High Court of Australia, this fundamental principle now appears to be in question. In several recent cases, High Court judges have described legislative intention as a 'fiction' or 'metaphor'.[10] In *Momcilovic* the word 'intention' is frequently put in scare quotes, implying that it is very dubious indeed.[11] In *Lacey*, six High Court Justices said:

> Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.[12]

This suggests that legislative intention is not something that exists before judicial interpretation, but instead, is a product or construct of interpretation; or in other words, that it is not the object that the process of statutory interpretation aims to discover, but rather is whatever that process produces.[13] In *Momcilovic*, Hayne J referred to legislative intention as a 'metaphor' which (seemingly to his regret) 'now seems ineradicable', and observed that what matters is not 'the intention (expressed or unexpressed) of those who propounded or drafted the Act', but 'the reach and operation of the law … as … ascertained by the conventional processes of statutory interpretation'.[14] '[T]he objective intention of the legislation [is] revealed by its proper construction'.[15] He put the point bluntly: '"Intention" is a *conclusion* reached about the proper construction of the law in question *and nothing more*.'[16]

This new sceptical view in the High Court is not without appeal: as we will see, there are good reasons for scepticism about some accounts of legislative

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9 Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) ch 1, 1.

10 *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 87 ALJR 131, 138 [25]; *Zheng v Cai* (2009) 239 CLR 436, 455–6 [28]; *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [44] ('*Lacey*'); *Momcilovic v The Queen* (2011) 245 CLR 1, 44–5 [38] (French CJ) ('*Momcilovic*'). Surprisingly, Dawson J seems to have got this ball rolling, in *Mills v Meeking* (1990) 169 CLR 214, 234, in a passage quoted with approval in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339 (Gaudron J); 345–6 (McHugh J). McHugh and Kirby JJ regularly denied the reality of legislative intention: *R v Hughes* (2000) 202 CLR 535, 563 [60] (Kirby J); *Emanuele v Australian Securities Commission* (1997) 188 CLR 114, 146 (Kirby J); *Northern Territory v GPAO* (1999) 196 CLR 553, 644 [236] (Kirby J); *Byrnes v The Queen* (1999) 199 CLR 1, 34 [80]; *Pfeiffer v Stevens* (2001) 209 CLR 57, 82 [92].

11 *Momcilovic* (2011) 245 CLR 1, 74–5 [11]–[12] (French CJ); 85 [146(v)], 92 [170], 116 [261], 120 [270] (Gummow J); 133 [315], 134 [319], 135 [322] (Hayne J).

12 *Lacey* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted).

13 In *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 87 ALJR 131, French CJ and Hayne J said that 'the identification of statutory purpose and legislative intention is the product of those processes [of statutory construction], not the discovery of some subjective purpose or intention': at 138 [25]. But this is ambiguous because, as we show in pts III and VII below, these are not the only alternatives.

14 *Momcilovic* (2011) 245 CLR 1, 136 [327], 133 [315], see also 134–5 [321].

15 Ibid 136 [327].

16 Ibid 141 [341] (emphasis added).

intention, and for concern about the use of legislative history to reveal the subjective intentions of individual legislators. Nevertheless, we respectfully contend that radical scepticism about legislative intention is fundamentally misconceived. It is inconsistent with constitutional principle, and threatens to render interpretive practice unintelligible. In what follows, we defend a theory of legislative intention that addresses the legitimate concerns of the sceptics, while avoiding the calamitous consequences of radical scepticism. If the judges who have expressed doubts about legislative intention never intended to embrace radical scepticism, our theory should prove acceptable to them.

II Why Theories of Legislative Intention Matter

The most basic principles of statutory interpretation are constitutional principles. As French CJ said, they 'help to define the boundaries between the judicial and legislative functions'.[17] Gleeson CJ explained that:

> [o]bserving those principles goes to the essence of the role of courts in a liberal democracy, and of the relationship between courts and citizens, whose elected representatives are the authors of the legislation that courts are duty bound to understand and apply.[18]

The practice of statutory interpretation has traditionally been regarded as an attempt to identify and give effect to the lawmaking choices that Parliament has made, in exercising its constitutional authority (within jurisdiction) to change the law as, when, and how it sees fit. The constitutional grant of legislative authority entails that the object of statutory interpretation is the intention of the enacting Parliament, and that the point of particular principles of interpretation (maxims, presumptions and so on) is to infer this intention from both textual and contextual evidence. The new sceptical view in the High Court inverts this traditional understanding, instead taking judges to construct legislative intentions rather than to discover them. This new view overturns the assumption that legislative intentions exist before judges interpret statutes, are the objects of their endeavours, and provide an independent, objective benchmark of the accuracy of their conclusions. If the sceptics are right to say that legislative intention is merely whatever results from applying the principles of statutory interpretation, the judges could not misunderstand or be mistaken about legislative intentions. They could misapply the principles, but there would be nothing outside the principles to misunderstand or mistake. Nor could the principles themselves be faulted for failing to help judges accurately to reveal and clarify legislative intentions. There would be nothing to reveal or clarify, only something (and it is not clear what) to be constructed.

We do not argue that the traditional principles of statutory interpretation require substantial revision. On the contrary, we aim to vindicate the role played by those principles in revealing and clarifying legislative intentions, although we acknowledge that some of them may have other functions.[19] Nor do we argue that

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17 Ibid 46 [42] (French CJ).

18 Gleeson, above n 5, 27; see also *Singh v Commonwealth* (2004) 222 CLR 322, 336 [19].

19 See pt V below.

legislative intentions should be ascertained by some novel process apart from the traditional principles. Our thesis is that legislative intentions are best ascertained by applying the traditional principles, which form an intelligible and coherent set precisely because their primary rationale is to infer what the legislature actually intended.

It might be objected that our disagreement with the new sceptical view on the High Court is therefore purely theoretical, with no practical consequences. This is because both sides advocate continued application of orthodox interpretive principles; arguably, the only difference is that the sceptics regard 'intention' as just a label for whatever emerges from that process, while we regard the process as aiming to ascertain an independently existing intention. If we all argue for application of the same interpretive principles, why would it matter whether legislative intentions truly exist?

We think it matters a great deal, for several related reasons. First, an attempt to apply the orthodox principles without believing in an independently existing intention is likely to become an artificial, pointless and debilitating exercise, like perpetuating religious rituals after abandoning belief in God. If there is no such intention to serve as the lodestar guiding application of the principles, interpretation is likely to become a kind of game played to reach desired results. If the fundamental principle of statutory interpretation is set aside, many of the traditional maxims and presumptions of interpretation will seem like a jumble of mutually contradictory directives, able to be selectively marshalled to support whatever interpretation is preferred on policy grounds. The American legal realist, Karl Llewellyn, provided the classic account of that predicament.[20] On the other hand, when it is understood that clarification of a statute's meaning requires taking into account all admissible evidence of legislative intention, it can be appreciated that there may be many items of evidence — some pointing one way, some another — and that a final judgment requires weighing them against one another. Sceptics about legislative intention lack an intelligible criterion or object to determine how to weigh these items, and can only play the game depicted by Llewellyn.

Second, the orthodox principles of statutory interpretation are not tightly fixed, and leave open room for disagreement among interpreters. For example, even though it is generally agreed that the best evidence of legislative intention is the statutory text, there is continuing disagreement between so-called 'textualists' and 'purposivists', especially in America, about the relative weight that should be given to textual considerations compared with contextual evidence of purpose.[21] If legislative intention really exists, and is the object that interpreters should aim to discern, then it provides the main criterion for resolving this disagreement: is the textualist or the purposivist methodology more likely accurately to discern the legislature's intention? Much of the American debate does indeed turn on this

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[20] Karl N Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1949–50) 3 *Vanderbilt Law Review* 395.

[21] See, eg, Caleb Nelson, 'What is Textualism?' (2005) 91 *Virginia Law Review* 347; John F Manning, 'Textualism and Legislative Intent' (2005) 91 *Virginia Law Review* 419; Caleb Nelson, 'A Response to Professor Manning' (2005) 91 *Virginia Law Review* 451; John F Manning, 'What Divides Textualists from Purposivists?' (2006) 106 *Columbia Law Review* 70.

criterion, which is often expressed in terms of which methodology is more faithful to the principle of legislative supremacy.[22] But if there is no such thing as legislative intention, it cannot provide a criterion for resolving the disagreement, and indeed, that part of the debate ceases to make sense. Textualists and purposivists could not sensibly disagree about the best method for discerning legislative intention if no such thing exists. Their disagreement would have to be motivated by other concerns, such as the rule of law (the meaning of a law should not be too difficult for those subject to it to grasp) and efficiency (the interpretive process should not be too costly in terms of time and resources). Both of these considerations seem to favour textualism, perhaps suggesting that the viability of purposivism depends on the existence of legislative intention.[23] Indeed, the most powerful objections to textualism, which stem from the nature of communication through a natural language and the actual practice of statutory interpretation, presuppose the existence of legislative intention.

Third, it is doubtful whether sceptical judges could apply the orthodox principles without changing them. This is because many of the principles presuppose that their function is to ascertain an independently existing intention. We have already noted how often this has been described as *the* fundamental principle of statutory interpretation, and, in pt IV, we will explain why it is also presupposed by many specific maxims.[24] The sceptics' view threatens to generate a vicious cycle. If legislative intention is a product of applying the principles of statutory interpretation, but those principles direct the courts to infer the legislature's intention, then the dog is chasing its own tail. To break the cycle, something would have to be changed. Thus, the new sceptical view is inherently unstable.

Fourth, quite apart from any need to break the cycle, without any conviction that the interpretive process is anchored by actual legislative intentions, the courts would constantly be tempted to change the principles, and even if change were a gradual process, the end result might be a new set of principles that departed more or less drastically from what Parliament had obviously chosen or decided. A possible example is the way the so-called 'principle of legality' seems to be evolving, from a genuine presumption of legislative intent, into a 'constitutional principle' operating like a manner and form requirement that express words are needed to qualify 'fundamental rights', regardless of how obvious the legislature's intention actually is.[25] Were the courts to change the principles of statutory interpretation, it would make no sense to criticise the new principles on the ground that they did not help to ascertain legislative intentions, or to object that applying them would cut across the intentions of the Parliament that enacted a particular statute in the past. On the new sceptical view, a change in the principles of

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22 See Nelson, 'What is Textualism?' and 'A Response to Professor Manning', above n 21.

23 See pt IV G below, on the nature of 'purpose'.

24 See pt IV E, below.

25 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 267, 304–11; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449; Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *University of Melbourne Law Review* 372.

interpretation could not involve departure from legislative intentions; instead, it would, by hypothesis, simply change them.

Some judges might be more comfortable if they were able to rebut any criticism that they had thwarted Parliament's intention, by saying that 'the intention of Parliament' is nothing more than a label affixed to whatever meaning is produced by applying common law principles of statutory interpretation. We suspect that this is, indeed, one reason why some are attracted to the new view that legislative intention is the product of the interpretive process rather than its object. Some judges might like to be able to say, even of an *express* statutory declaration of legislative intention (for example, in a privative clause or a 'no invalidity' clause), that it is merely one item among a large number of considerations that they are required by the principles of statutory interpretation to take into account in 'constructing' the fictional or metaphorical 'legislative intention'. The attractive 'bottom line' is that ultimately the judges, not Parliament, construct Parliament's intention. But in our submission, this view is not consistent with the constitutional grant of legislative power to Parliament, nor is it conducive to the health of a democracy.

The best argument for something like the new view, and for its conflation of legislative intention with *whatever* the principles of interpretation dictate, relies on actual legislative intention. The argument is that this is all that Parliament could possibly intend; in other words, the actual intention of Parliament is to change the law in whatever way the courts identify when they apply those principles.[26] This argument at least attempts to square the principles of interpretation with the constitutional separation of powers, rather than taking the separation of adjudicative from legislative authority to entail that the courts, in interpreting statutes, have some kind of authority to curb clearly expressed legislative choices. Still, the argument fails because it misrepresents the content and point of the practice of statutory interpretation itself, and because it understates the capacity of Parliament, like any other natural language user, to rely on more than just the words it uses to communicate its intended meaning.[27]

Much, therefore, turns on whether legislative intentions exist and how they are constituted. One cannot see clearly the constitutional fundamentals that concern the separation of legislative and adjudicative authority, or understand how statutes should be intelligently interpreted, without perceiving the reality and indispensability of legislative intentions. In what follows, we attempt the following. In pt III, we acknowledge the dangers of excessive reliance on the 'subjective' intentions of individual legislators, and propose an account of the supposed 'objectivity' of pertinent legislative intentions that we hope will satisfy the sceptics. In pt IV, we provide many reasons why it is very difficult to square the new sceptical view with a sound account of the actual practice of statutory interpretation. In pt VI, we outline an account of legislative intention that is and should be the object of the interpretive exercise, and which avoids plausible reasons for scepticism about some alternative accounts of it.

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[26] See Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2011) ch 11, 265. Cf Ekins, above n 9, 109–16, 185–8, 210–11.

[27] Ekins, above n 9, ch 7, 193–217.

Part V discusses some of those reasons for scepticism. It might be helpful to pre-empt one potential misunderstanding at the outset. We do not argue that for every interpretive difficulty there is a 'right answer' waiting to be found by identifying a legislative intention. As we acknowledge in pt V, in some cases the legislature may not have had a pertinent intention, due to oversight or confusion, while in other cases, objective evidence of its intention may be unavailable or inconclusive. In these 'hard cases', legislation may remain insufficiently determinate to resolve the difficulty, even after all admissible evidence of legislative intention has been examined. Judges may then have no alternative but to act creatively, and choose which way of resolving the indeterminacy would be preferable, all things considered, including the purpose of the legislation, justice and the public interest. But even if such hard cases predominate in litigation before appellate courts (which we do not concede), it does not follow that pertinent legislative intentions never exist, are never discoverable or can never resolve interpretive difficulties.

III The Objectivity of Interpretation

Sceptics who deem legislative intention to be a fiction are happy to impute so-called 'objective' intentions to legislatures or statutes, while dismissing the 'subjective' intentions of actual legislators as irrelevant. This position seems to assume that only subjective intentions are real, while 'objective' intentions imputed to groups or institutions are merely useful fictions. The concern that may in part animate the new sceptical view — that the interpretation of statutes, as with other legal documents, should be objective rather than subjective — is neither unreasonable nor novel. However, no one should use the term 'objective intention' without providing a plausible account of what that term means. We will argue that objective intentions are necessarily dependent on subjective intentions. An 'objective' intention amounts to this: what a reasonable audience would conclude was the author's 'subjective' intention, given all the publicly available evidence of it. We will demonstrate that no other account of the object referred to by the term both makes sense and offers a plausible rationale for that object being central to statutory interpretation. Further argument in pt VI will then show that there is good reason to think that legislatures do act on intentions, which make objective intentions, properly understood, an intelligible object of statutory interpretation.

The many judicial affirmations of the traditional common law understanding have often stressed the importance of *expressed* intention. For its part, the High Court has emphasised that only 'objective' legislative intentions are determinative, and not the 'subjective' intentions of individual legislators. In *Byrnes v Kendall*, which dealt with the interpretation of trusts, objective intentions were described as 'expressed' or 'outwardly manifested' intentions.[28] As Lord Diplock once explained:

> [T]he relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or

[28] *Byrnes v Kendle* (2011) 243 CLR 253, 273 [53], 274 [55], 274–5 [57], 275 [59] (Gummow and Hayne JJ); 282 [94] (Heydon and Crennan JJ).

> conduct notwithstanding that he did not consciously formulate that intention in his own mind, or even acted with some different intention which he did not communicate to the other party.[29]

The distinction drawn is between the actual mental state of a party, which might have been unknown to other parties, and evidence of that party's intentions that was publicly expressed or manifested. The same principle applies to statutory interpretation. Lord Radcliffe stated that 'the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention'.[30]

This principle is sound, and is of general application to communication in everyday life. After famously summarising the modern principles of contractual interpretation, which ask what a reasonable person would infer was the parties' intended meaning given the text and all the background knowledge that was reasonably available to them, Lord Hoffmann observed that:

> The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life.[31]

The exception was that '[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent'.[32] But even in ordinary life, we would be very hesitant to allow — if we allowed at all — post hoc revelations of a previously hidden subjective intention to unsettle our conclusion about the meaning of what was said or written. We would hold the speaker or author to the hearer's or reader's entirely reasonable — and yet mistaken — understanding of the meaning the speaker or author intended to convey. We might say: 'That may be the meaning you intended to communicate, but it is not the meaning you did communicate'; or 'That may have been what you meant, but it is not what your statement meant.'[33] Or we might just say that while the hearer or reader was mistaken about the meaning the speaker or author in fact intended to convey, the mistake was entirely reasonable and we should protect reliance on the reasonable mistake. As one of us has argued previously:

> [T]he full meaning of what people say to us depends partly on what we know about their intentions; but it does not depend on esoteric information such as what they confide only to their spouses or write in their private diaries. The meaning of an utterance depends partly on what its intended audience knows, or can reasonably be expected to know, about the speaker's intentions, but not about concealed intentions. In the case of laws, the courts have therefore distinguished between whatever hidden intentions the law-makers may have had, and those intentions they have communicated by the law they have

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29 *Gissing v Gissing* [1971] AC 886, 906, quoted in *Byrnes v Kendle* (2011) 243 CLR 253, 287 [107] (Heydon and Crennan JJ).

30 *A-G (Canada) v Hallet & Carey Ltd* [1952] AC 427, cited in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 345–6 (McHugh J).

31 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912.

32 Ibid 913.

33 See Jeffrey Goldsworthy, 'Moderate Versus Strong Intentionalism: Knapp and Michaels Revisited' (2005) 42 *San Diego Law Review* 669.

> enacted, given readily available knowledge of its context and purpose. While the former are irrelevant, the latter may be crucial.[34]

For these reasons it was correctly observed in *Project Blue Sky Inc v Australian Broadcasting Authority* that '[t]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have'.[35] This is true even if this meaning differs from the meaning that the legislature actually intended those words to have. The point of that observation was surely not that the legislature is taken to have had an intention when in fact it had none, but rather, that it is necessarily taken to have had some intention, even if its actual intention was somewhat different because interpreters were provided with insufficient evidence of its actual intention. In this regard there is nothing special about legislatures; there can be no guarantee that *any* speaker or author will be taken to have intended to mean precisely what he or she actually intended.

Interpretation is thus 'objective' in the sense that we do not allow argument from private information about hidden intentions; our interest is instead in ascertaining meaning from publicly available information. However, this does not entail that 'subjective' intentions are irrelevant. As previously observed, an 'objective' intention is whatever a reasonable audience would infer, from the publicly available evidence, was the author's 'subjective' intention. The existence of a subjective intention is a crucial presupposition of our attribution of an objective intention to the author of a text. If we knew that the creators of a text had no relevant subjective intention (for example, they were monkeys pounding randomly on keyboards), we would have no rational basis for attributing any objective intention to them either.

The sceptics might object that this is an unfair caricature of their position, because they fully realise that a statute reflects the intentions of individuals involved in sponsoring and drafting legislation. But it is very difficult for a sceptic about legislative intention to interpret a statute in the light of intentions held by certain individual legislators, such as those who helped to sponsor or draft it. The High Court's sceptics repeatedly disavow the relevance of the 'subjective' intentions of individual legislators. The problem is that sceptics must deny that any of these intentions can be attributed to the legislature itself, because it cannot have had any actual intention to adopt or endorse them. It follows that these intentions cannot contribute to the meaning of the statute, since it is an act of the legislature as a whole. Logically, the statute should be treated by sceptics *as if* it expresses no intentions at all. Their continued use of the term 'objective intention' is therefore very puzzling, and requires an explanation.

It is difficult even to conceive of a plausible alternative explanation of objective legislative intentions than the one we have offered. Sometimes 'objectivity' is equated with 'reasonableness'. One possibility is that an objective intention is one that would be imputed to a statute by a 'reasonable reader'.[36] This

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[34] Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 10–11.

[35] (1998) 194 CLR 355, 384 [78] (emphasis added).

[36] See Manning, 'What Divides Textualists', above n 21, 75, 85, 96.

is true in a sense, but it does not provide an alternative explanation, because readers are reasonable only if they aim to identify, from the publicly available evidence, the actual intentions on which the author — Parliament — acted.[37] Readers who ignored that aim, and instead foisted onto the text whatever meanings best suited them, would be unreasonable readers, who had abandoned objective interpretation. It might be suggested that an objective intention is an intention that *would* be imputed to the actual legislature by reasonable readers, considering both text and context, *if it were* capable of having an intention. But what would be the point of pretending that a legislature has an intention, if in fact it does not and cannot have one?

Another possibility is that an 'objective' intention is whatever a 'reasonable legislature' or 'ideal legislature' would have intended had it enacted the statute.[38] But that would be an entirely imaginary intention, which critics of 'fictional' intentions should be reluctant to conjure with. Moreover, it is equivalent to what the judges think the legislature *ought* to have intended — or, in other words, what *they* would have intended had they enacted the statute. This would plainly usurp the lawmaking authority of the legislature. How could it possibly be legitimate for judges to refashion legislation so that it better approximates what would have been enacted by an imaginary legislature more to their liking than the actual legislature elected by voters?

If a so-called 'objective intention' is none of these things — if it is not to be understood as concerned with the intention of *any* legislature, either actual *or* imaginary, or with any intentions of individual legislators — then why use the word 'intention' at all? Why not call it an 'objective thingamajig', or — since it has no object, nothing that makes it true or false — just a 'thingamajig'? This is a serious question. Continued use of the word 'intention' implies that *some* kind of intention is being referred to. If not — if, instead, what is being referred to is the output of a process of dealing with statutes, understood just as sets of unintended sentences, that is unconcerned with any intention — then the word 'intention' should be replaced by a less misleading label. 'Thingamajig' seems to us as good a label as any other. Of course this sounds bizarre: what could possibly be the rationale for constructing this non-existent 'thingamajig'? But that is our point. There is an obvious and straightforward rationale for interpreting statutes in the light of contextual evidence of legislative intention. But there is no apparent rationale for subjecting them to some kind of 'contextual' processing that oddly mimics, but is actually unrelated to, an enquiry into legislative intention.[39]

Our account of the objectivity of interpretation helps answer a common ground of concern about legislative intentions, which is that the subjects of a statute should be able to ascertain, without excessive difficulty, exactly what it requires of them.[40] It follows that what the statute requires — and therefore, what it

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37 Nelson, 'What is Textualism?', above n 21, 356.

38 Manning, 'What Divides Textualists' above n 21, 78, 83, 85–6, 102, 110; see also T R S Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority' (2004) 63 *Cambridge Law Journal* 685, 690, 694–5.

39 See further pt IVH below.

40 *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339 (Gaudron J).

means — cannot be a function of esoteric matters such as legislators' hidden intentions.[41] Lord Diplock eloquently expressed this concern:

> Elementary justice or … the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely on that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.[42]

This concern is entirely legitimate, but it should not lead us to deny the reality or relevance of legislative intentions, or to limit ourselves to those intentions that can be inferred only from the semantic content of the statute's words. Notwithstanding assertions that what counts is what the legislature said rather than what it meant,[43] it is well established that statutes can include implications, which are examples of the legislature not 'saying' exactly what it meant.[44] It is also well established that provisions should sometimes be understood in ways that depart from ordinary grammar and usage. As the High Court has said, considerations of context and purpose 'may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning'.[45] Gleeson CJ explained that, when interpreting both statutes and contracts, the courts seek to give effect to the intention manifested in the instrument.

> But the test is objective and impersonal. The common intention is to be ascertained by reference to what a reasonable person would understand by the language used by the parties to express their agreement … This is not to say that the exercise is formal and literalistic. On the contrary, common law and statutory principles of construction frequently demand consideration of background, purpose and object, surrounding circumstances, and other matters which may throw light on the meaning of unclear language.[46]

Provided that objective legislative intention is the object of enquiry, there is no threat to legal certainty or the rule of law. As we have explained, objective intention is inferred from publicly available evidence of subjective intention, which

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41 *Byrnes v Kendle* (2011) 243 CLR 253, 262 [15], 263 [17] (French CJ), 274–75 [57] (Gummow and Hayne JJ).

42 *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279.

43 *R v Hertford College* (1878) 3 QBD 693, 707 (Lord Coleridge); *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, 236–7 (Lord Simon); Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law* (Princeton University Press, 1997) 18.

44 For further discussion see pt IV below.

45 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78]. See also text accompanying n 51 below.

46 *Wilson v Anderson* (2002) 213 CLR 401, 418 [8]–[9].

includes the ordinary grammatical meaning of the text, the context in which it was produced, and common sense understandings of the likely purpose of its authors. With respect, Kitto J got the matter almost exactly right when he said this:

> The intention … is not … conjured up by judges to give effect to their own ideas of policy and then 'imputed' to the legislature. The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation … It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the light of all its surrounding circumstances.[47]

Our only possible quibble is with his denial that it is 'a question of the actual intention of the legislators', depending on exactly what that means. What could possibly be the object of the process of inference that Kitto J describes, if it is not some kind of actual intention? The imaginary intention of an ideal legislature would not be inferred from evidence of context and purpose; as we previously suggested, it is precisely the kind of thing that would be 'conjured up by judges to give effect to their own ideas of policy'.[48] We argue that while statutory interpretation is objective, its object is the actual intention of Parliament. The best understanding, from the publicly available evidence, of the meaning Parliament actually intended to convey is the legal meaning of the statute. Indeed, it is this focus that makes sense of the existing practice of statutory interpretation and without this focus the subjects of legislation would not know where they stood.

IV The Indispensability of Legislative Intention in Statutory Interpretation

The practice of statutory interpretation does not involve the application of a set of principles apart from inference about the intentions (means-ends) of the legislature. Rather, the relevance and point of particular interpretive rules and practices centre on their connection to legislative intentions. In the following nine points we make clear the many ways in which legislative intention is a central, indispensable object of intelligent statutory interpretation. In short, the new view's jettisoning of actual legislative intention is not at all a rational tidying up of existing interpretive practice — dispensing with illusions, one might say — but rather entails a radical rejection of existing practice.

A *Common Sense Perceptions of Legislative Intention*

We commonly *perceive* what was intended when we read provisions in statutes whose language does not communicate that intention with absolute accuracy and comprehensiveness. Consider the *Road Traffic Act 1972* (UK) s 8(1), which

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47 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405.

48 Ibid; see also text following n 38 above.

provided that in certain circumstances any person 'driving or attempting to drive' a vehicle could be required to take a breath test. One man drove through a red light, stopped, and changed seats with his passenger. By the time he was asked to take a breath test he was clearly no longer 'driving or attempting to drive' the vehicle (indeed, given that he had stopped the car, that would have been true even if he had remained in the driver's seat). But the court interpreted the section in the light of its obvious purpose, rather than literally, and held that he was required to take the test.[49] Section 8(1) of the *Food and Drugs Act 1955* (UK) prohibited the sale of 'any food intended for, but unfit for, human consumption'. Some children asked for lemonade, were instead given corrosive caustic soda, and drank some of it. Read literally, s 8(1) did not apply: the vendor had not sold the children food unfit for human consumption, because caustic soda is not food. But plainly the purpose of the provision was to protect the public from harmful products being sold *as* food, and it was interpreted accordingly.[50]

As Lord Hoffmann said in the leading contracts case quoted previously:

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The [contextual] background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.
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> …
>
> The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.
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> …
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> Many people, including politicians, celebrities and Mrs Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean.[51]

As the previous examples show, the same is true of legislatures.[52] As soon as we read statutory provisions, we infer something about the intentions that explain their enactment. We do so on the basis of simple common sense and shared cultural understandings, given the assumption that members of Parliament are sensible people trying to achieve rational (even if sometimes controversial) objectives.[53]

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49 See Bennion, above n 6, 668–9, discussing *Kaye v Tyrrell* (1984) *The Times* 9 July.

50 *Meah v Roberts* [1977] 1 WLR 1187, 1195–6; see also Bennion, above n 6, 611–12 (discussing *Meah v Roberts*).

51 *Investors Compensation Scheme Ltd v West Bromwich Building* [1998] 1 WLR 896, 913.

52 See also text to n 45 above.

53 See Roscoe Pound, 'Spurious Interpretation' (1907) 1 *Columbia Law Review* 379, 381.

Indeed, whenever we read a statutory provision, common sense naturally — irresistibly — leads us to treat it as the product of intelligent design, intended to communicate a rule or principle in order to achieve some objective, even if initially our understanding of the objective is quite abstract and not very helpful. Any assertion that legislatures *never* have ascertainable intentions (other than to enact a text with a literal meaning) is implausible, partly because it entails that common sense cannot play this role.

B *Resolution of Ambiguities*

Textual and contextual evidence of legislative intention is routinely used to resolve ambiguities in the literal meaning of legislative provisions. It would be difficult to explain or justify this if legislative intention did not exist.

C *Statutory References to Legislative Intention*

Statutes sometimes refer to legislative intention: for example, the *Road Safety Remuneration Act 2012* (Cth) s 10 states that '[t]his Act is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory that is capable of operating concurrently with this Act'. It would seem to be very difficult for sceptics about legislative intention to make any sense of such provisions; they are in the same predicament as someone attempting to make sense of a statutory reference to unicorns.

D *Drafting Errors*

It would be impossible for judges to identify and correct obvious drafting errors in statutes if legislative intentions did not exist. Drafting errors can result in the literal meaning of a provision being quite different from its obviously intended meaning, sometimes even absurdly different. When the provision's context and purpose make it obvious that this has happened, and also obvious what the legislature intended to provide, the courts may be prepared to correct the error and give effect to the intention. The legislature is deemed to have succeeded in communicating its intention despite its clumsy mode of expression.

Those who deny the reality of legislative intentions must find this very difficult to justify. The provision must be understood as if some word or words were either added to or subtracted from it. But how could this be justified, except on the basis that it is necessary to give effect to what the provision was obviously intended to mean? Indeed, how could one even identify a drafting error, except by comparing the words the legislature actually enacted with what their context and purpose clearly indicates it intended to enact? If the concept of legislative intention were discarded, or all extra-textual evidence of intention disregarded, only the words of the provision would be left. The idea that the wording is mistaken could then mean only that the interpreter regarded it as undesirable. But how could judges be justified in rewriting a provision on the ground that they regard it as undesirable? That would amount to an unbounded power of amendment, because

there would be no way to confine it to correcting drafting errors as opposed to making any supposedly desirable improvements.

The sceptic might attempt to confine this power of amendment to the elimination of absurdities or incoherencies. But this would still be hard to square with constitutional principle. The orthodox justification for the correction of absurdities is that the legislature is presumed not to have intended them. That is what makes the correction a matter of interpretation rather than legislation. If that is dismissed as a fiction, then judges must either apply statutory provisions they deem to be absurd, or claim legislative authority to amend them.

E *Application of Interpretive Maxims*

Application of interpretive maxims such as *noscitur a sociis*, *ejusdem generis*, *expressio unius*, and so on, makes sense only on the assumption that they sometimes help us understand the intention that guided the framing of a provision. Consider the *ejusdem generis* maxim. It makes sense to understand a general term, which follows a list of more specific terms that belong to a single genus, as being itself confined to that genus, only if this appears to have been the intention of the legislature. Indeed, the maxim is not applied in cases where there is stronger evidence of a contrary intention.[54] The same is true of most other maxims: they are defeasible, depending on the balance of the admissible evidence of what the legislature intended. These maxims are based on how authors usually arrange their texts to communicate their intentions. If a text could not be treated as an attempt to communicate some intention, then none of the maxims could sensibly be applied to it.

The precise drafting of statutes may be the responsibility of parliamentary counsel, but it does not follow that their intentions in doing so cannot be imputed to Parliament. They are Parliament's faithful agents, acting like ghostwriters or speechwriters who prepare texts to express someone else's intentions — initially, those of the legislators sponsoring the legislation, and eventually, Parliament itself.[55]

To pre-empt misunderstanding, note that we do not claim that every interpretive principle is concerned with clarifying legislative intention. Interpretive maxims and presumptions must be scrutinised individually to determine their function in the interpretive process. We return to this point in pt V.

F *Inexplicit Content*

Evidence of legislative intentions is necessary to identify or clarify inexplicit content in statutes. Inexplicit content includes ellipses, tacit assumptions that are taken for granted and deliberate implications.

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54 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) 135–40.

55 Ekins, above n 9, 235; Bennion, above n 6, 350–1.

Let us start with ellipses. In law, as in everyday life, what we say or write is often elliptical in the sense that we omit details that we expect our audience easily to infer from the context. If I say 'Everyone has gone to Paris' I expect to be understood as saying that every member of some contextually defined group has gone to Paris, not that everyone who has ever lived has done so. When I ask the bus driver, 'Do you go to Blackburn?' I am asking whether he drives the bus to Blackburn as part of its scheduled route, not whether he ever goes there when he is off duty. Ellipses can be found in legal texts if we look closely enough. This is partly because it is so difficult to pack into them everything that is needed to express completely and exactly what is intended. It is also because doing so is unnecessary and would even be counterproductive; when context supplies the missing ingredients, ellipses contribute to brevity without reducing clarity or precision. Examples of ellipses can be found in the *Australian Constitution*. The Commonwealth Parliament's express power to make laws 'with respect to taxation' is rightly taken to be power to make laws 'with respect to Commonwealth taxation' and not 'with respect to all taxation [including state taxation]'.[56] Section 92 of the *Constitution* is notoriously elliptical: it provides that interstate trade, commerce and intercourse shall be 'absolutely free', which is now rightly understood to mean 'absolutely free from discriminatory protectionism', and not 'absolutely free from all constraint'.[57] This is an unfortunate ellipsis that did undermine clarity, as shown by decades of uncertainty and disagreement about the provision's intended meaning.

A legal text can also include or depend on presuppositions (tacit assumptions) and other implications. As we use the term, presuppositions differ from what the philosopher Paul Grice famously called 'implicatures'.[58] The latter are meanings that a speaker deliberately attempts to communicate through implication, by providing the audience with clues that they need to 'read between the lines'. Grice's best known example involves a professor who, asked to provide a reference for a student seeking an academic position in Philosophy, writes (damningly) that he is fluent in English and regularly attends tutorials.[59] Deliberate implications are rare in legal texts, because lawyers usually attempt to be as explicit as possible to avoid any chance of misunderstanding. But presuppositions, or tacit assumptions, are not deliberately communicated by implication. Instead, they are taken for granted; they are so obvious that they do not need to be mentioned or (sometimes) even consciously noticed.[60]

If presuppositions are not grasped, almost anything we say is open to being misunderstood in unpredictable and bizarre ways. To use an example one of us has discussed previously: if I order a hamburger in a restaurant, and carefully list all the ingredients I want, I do not think it necessary to specify that they should be

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56 *Australian Constitution* s 51(2).

57 Or 'absolutely free from all unreasonable constraint': see *Cole v Whitfield* (1988) 165 CLR 360, especially 393–4, 403–4.

58 Paul Grice, *Studies in the Way of Words* (Harvard University Press, 1991) 22–57, 138–43, 268–82.

59 Ibid 33.

60 See Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law, Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 150.

fresh and edible, the meat cooked, and so on. If I thought about this at all, I would expect it to be taken for granted. Even if I did specify those requirements, I would not think to add that the hamburger should not be encased in a cube of solid lucite plastic that can only be broken by a jackhammer.[61] My order implicitly requires a hamburger that can be immediately eaten without much difficulty.

The meaning of legal texts also inevitably depends on tacit assumptions that are taken for granted. Despite the attempts of lawyers who draft such documents to be very explicit, some dependence on presuppositions is inescapable. They include simple common sense, which is why the old 'golden rule' requires that provisions sometimes be understood non-literally to avoid patent absurdities.[62] They may also include pre-existing legal principles such as mens rea, which is usually held to be implicit in statutes creating new criminal offences that do not expressly refer to it.[63] Most, if not all, the presumptions used in statutory interpretation can arguably be justified on this ground, in principle if not always in practice; the context provided by the general law often implicitly limits language that, read literally, would be over-inclusive.[64] They include the presumption that statutes are not intended to extend beyond territorial limits, to be retrospective, to override fundamental common law freedoms, and so on. These standard presumptions are defeasible, and can be outweighed by evidence of a contrary intention; therefore, they cannot be treated like rules and just mechanically applied.

Other tacit assumptions are even more particular and context specific. For example, s 7 of the *Australian Constitution* empowers the federal Parliament to increase or decrease the number of Senators for each state, subject to a guarantee that 'equal representation of the several Original States shall be maintained'. This guarantee conspicuously fails to mention new states, which can be established by the federal Parliament under s 121 subject to 'such terms and conditions, including the extent of [their] representation in either House of Parliament, as it thinks fit'. Does it follow from these words that Parliament could give a new state more Senators than the original states each have? Obviously not, given what we know about the intended role of the Senate: an undoubted purpose of s 121, when read with s 7, is to enable new states to be given fewer — but not more — Senators than the original states.

Ellipses and presuppositions are difficult, if not impossible, to explain except in terms of intention or purpose. It is rare for legal implications to be logically entailed by express words. Most legal implications therefore depend on some ingredient in addition to the words of the text, and this can only be evidence of their intended meaning or purpose. Ellipses depend on our understanding that speakers intend to communicate more than their bare words mean literally. Gricean implicatures depend on evidence of the speaker's intention to communicate something by implication.[65] Even when we say that something is implicit in or

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61 John R Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge University Press, 1979) 127.

62 Bennion, above n 6, 407.

63 *R v Tolson* (1889) 23 QBD 168, 187; see also *Sweet v Parsley* [1970] AC 132, 162–3 (Lord Diplock).

64 For many examples, see Bennion, above n 6, 531–94, 727–802.

65 See text accompanying nn 58–9 above.

presupposed by an utterance, in the sense that it is taken for granted, we are saying that the speaker took it for granted. Texts cannot meaningfully be said to take anything for granted, at least, not when their meaning is confined to literal meaning, severed from their authors' intentions. Strictly speaking, words do not have intentions or purposes. Only the people who make or use them do, and in the case of a legal text, it is natural to think that the pertinent people are those who made or enacted it.

G *Purpose*

The courts frequently employ the concept of a statutory 'purpose', possibly because it seems more objective.[66] But a genuine purpose is surely a kind of intention.[67] As we have just explained, statutes — like other inanimate objects — do not have purposes; only the people who make or use them do. A purpose that a law seems designed to serve is a purpose that we have good reason to believe the lawmakers designed (intelligently fashioned) it to serve. It is self-contradictory to dismiss legislative intentions as fictions but to keep talking about statutory purposes.

High Court judges often qualify their references to 'purpose' in the same way they qualify their references to 'intention'. Kirby J once said that 'purpose', like legislative intention, is 'an objective construct' that is 'declared by the courts after the application of relevant interpretive principles'.[68] In *Lacey*, six judges said that a statutory purpose 'is not something which exists outside the statute. It resides in its text and structure'.[69] This suggests that a statute's purpose is not something in the minds of any one or more lawmakers. Yet the same judges also acknowledged that a purpose may be found not only in express statements in the relevant statute or by inference from its terms, but also 'by appropriate reference to extrinsic materials'.[70]

In *Richardson v Forestry Commission*, Deane J said:

> The reference to such a purpose or object is not, of course, to the subjective motives or purposes of the various members of the Parliament which enacted the law. It is a reference to the purpose or object of the law itself — that which it can be seen to be designed to serve or achieve. As Dixon J commented in *Stenhouse v Coleman*: 'No doubt it is possible that the "purpose" here may be another example of what Lord Sumner described as "one of those so-called intentions which the law imputes; it is the legal construction put on something done in fact": *Blott's Case.*' Dixon J went on to note that 'apparently the purpose must be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth'.[71]

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66 *Commonwealth v Yarmirr* (2001) 208 CLR 1, 117–18 (Kirby J) ('*Yarmirr*').

67 In *Momcilovic* (2011) 245 CLR 1, Gummow J said that reference to 'purpose' in provisions such as *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1) is a reference to legislative 'intention': at 92 [170].

68 *Al-Kateb v Godwin* (2004) 219 CLR 562, 609 [167].

69 *Lacey* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

70 Ibid.

71 *Richardson v Forestry Commission* (1988) 164 CLR 261, 311 (citations omitted).

This is slightly puzzling, because if a statute was 'designed to serve or achieve' some purpose or object, then some person or people designed it to do this, and they could have had such a design only by having certain subjective intentions (albeit ones that must be objectively manifested). It therefore cannot be a purpose or object that is merely 'imputed' to the statute by operation of law. Nevertheless, what was previously said about legislative intentions being 'objective' applies equally to legislative 'purposes'.[72] An objective purpose, in that sense, must be expressed or manifested and may differ from 'the subjective motives or purposes of the various members of the Parliament which enacted the law'.[73]

H *Context*

The courts regularly refer to 'context' when interpreting legal texts including statutes. Even self-proclaimed sceptics about the existence or relevance of legislative intentions often insist on the relevance of 'context'. For example, in a speech arguing that the concept of legislative intention is irrelevant to statutory interpretation, Lord Steyn explicitly disavowed any commitment to literalism, and insisted that statutes must be 'construed against the contextual setting in which they come into existence'.[74] 'After all', he adds, 'a statement is only intelligible if one knows under what conditions it was made.'[75] Now, this is indeed undeniable, but why? Surely it is because information about the circumstances in which a statement was made illuminates the intentions or purposes of the speaker or writer. As Lord Blackburn explained:

> In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used.[76]

For what other reason could contextual information possibly be relevant? Any suggestion that it is relevant to the 'construction' of an 'objective intention' simply returns us to the puzzles about the latter term that we canvassed in pt III. Context is not some kind of free-floating resource that can be appropriated for any theoretical purpose. It is a body of information relevant to communicative acts that speakers and their audiences reasonably expect one another to rely upon, in order to reduce the amount of information that must be explicitly communicated.

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72 See pt III above.

73 Quoted in the text to n 71 above.

74 Johan Steyn, 'Interpretation: Legal Texts and Their Landscape' in B S Markesinis (ed), *The Clifford Chance Millennium Lectures; The Coming Together of the Common Law and the Civil Law* (Hart, 2000) 79, 81.

75 Ibid. See also 86.

76 *River Wear Commissioners v Adamson* [1877] 2 AC 743, 763; see also his remarks in *Edinburgh Street Tramways v Torbain* [1877] 3 AC 58, 68.

I *The Practice of the Sceptics*

Judges who deny the reality of legislative intentions find it impossible to avoid regular and apparently orthodox reference to them. When they put theory aside, and actually read statutes, they rarely practise what they preach. They invariably resort to some kind of intentionalism. Lord Steyn, for example, commenced his lecture by announcing that his 'main thesis' is 'that the intent of the framers of a [legal] text is irrelevant to interpretation'.[77] Yet, later in the same lecture, he himself relied on the notion of legislative intention: he argued that a court might be justified in regarding the *Scotland Act 1998* (UK) as 'constitutional in character', on the ground that 'the intention was that there should be a durable settlement in favour of Scotland'.[78] Prominent American sceptics about legislative intention, including Oliver Wendell Holmes Jr and Antonin Scalia, have also been shown not to have acted consistently with their scepticism.[79]

On the High Court, the two most articulate sceptics about legislative intention have been McHugh and Kirby JJ.[80] But in 2001, McHugh J relied on Ministerial statements as evidence of the purpose of the statute,[81] and said:

> In attempting to determine the purpose of the Act, his views as to the construction of the Act are of special weight because he probably played a greater role in getting the Bill through the Parliament than any other member of either House.[82]

He also discussed the parliamentary debates at length, as evidence of what 'the Parliament intended'.[83] In 2004, he said:

> Given the widespread nature of the sources of international law under modern conditions, it is impossible to believe that, when the Parliament now legislates, it has in mind or is even aware of all the rules of international law. Legislators intend their enactments to be given effect according to their natural and ordinary meaning. Most of them would be surprised to find that an enactment had a meaning inconsistent with the meaning they thought it had because of a rule of international law which they did not know and could not find without the assistance of a lawyer specialising in international law or, in the case of a treaty, by reference to the proceedings of the Joint Standing Committee on Treaties.[84]

Kirby J objected that in this passage McHugh J 'appears to adopt an interpretation of detention legislation that implies that the subjective intentions of

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77 Steyn, above n 74, 81.

78 Ibid 89.

79 See Lawrence M Solan, *The Language of Statutes, Laws and Their Interpretation* (University of Chicago Press, 2010) 101–3, 110.

80 *Eastman v The Queen* (2000) 203 CLR 1, 46 (McHugh J); *Singh v Commonwealth* (2004) 222 CLR 322, 348 [52] (McHugh J). As for Kirby J, see below n 86.

81 *Yarmirr* (2001) 208 CLR 1, 77 [132].

82 Ibid.

83 Ibid 79 [141]; see generally 77–9 [132]–[141].

84 *Al-Kateb v Godwin* (2004) 219 CLR 562, 590 [65]; see also *Malika Holdings v Stretton* (2001) 204 CLR 290, 299 [32].

the legislators must prevail', which was contrary to the modern approach to interpretation 'that has been greatly influenced by McHugh J's own decisions'.[85]

That is a fair criticism. But Kirby J is guilty of the same inconsistency. In 2001, he said that:

> it would be preferable for courts to drop altogether the fiction of parliamentary 'intention'. I do not use it. The more objective word 'purpose' reminds the searcher that the object of the inquiry is something other than the subjective intentions (if any) of the legislators. A court seeks to ascertain the purpose of the law, ultimately derived objectively from the language in which the law is expressed.[86]

But he has continued to refer to legislative intentions ever since. For example, in a recent journal article, he observed that '[t]oday, there is no satisfaction for a court (as there sometimes appeared to be in earlier times) in holding that the enacted text has failed to hit its obviously intended mark';[87] 'the mind … repeatedly asks itself whether the law in question was intended to operate on such facts';[88] and so on.[89] In one case he remarked:

> Had the legislature of Western Australia intended the construction now accepted in this Court to prevail, there would have been obvious ways of expressing that intention … I cannot accept that the present case is one in which infelicitous drafting has served to obscure the legislative intention. The intention is all too clear.[90]

Kirby J might say, in his defence, that he was only concerned with 'the purpose of the law, ultimately derived objectively from the language in which the law is expressed'.[91] Yet in a 2004 case, he referred not only to 'the history of the legislation' but also to 'the record of the parliamentary debates' in order to establish the 'clear' and 'substantive purpose' of statutory provisions, the effect that they were 'designed to have', what the law was 'intended to' accomplish, 'the real purpose of the State Parliament' and 'the legislative object'.[92]

This is not an allegation of hypocrisy. The point is that sceptics about legislative intention cannot avoid resorting to it in practice because it is essential to the sensible interpretation of statutes, for all the reasons we have given. They are naturally and irresistibly drawn back to this traditional mode of analysis, without even noticing its inconsistency with their theoretical scruples.

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85 *Al-Kateb v Godwin* (2004) 219 CLR 562, 622 [167].
86 *Yarmirr* (2001) 208 CLR 1, 117–18.
87 Michael Kirby, 'Statutory Interpretation: the Meaning of Meaning' (2011) 35 *Melbourne University Law Review* 113, 132.
88 Ibid 122.
89 Ibid 116, 125, 127, 130.
90 In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 573 [87].
91 *Yarmirr* (2001) 208 CLR 1, 118 (Kirby J).
92 *Baker v The Queen* (2004) 223 CLR 513, 548 [99]–[100], 551 [108], 552 [111], 555 [122], 556 [125], 561 [141].

V Causes of Scepticism about Legislative Intention

The new sceptical view about legislative intention may have several causes. One is the belief that any such intention must be 'objective' rather than 'subjective', because otherwise those subject to law would be bound by intentions that were concealed from them. But as we showed in pt III, it does not follow from this that legislative intent is a fiction.

Another cause may be the experience of judges who seek the legislature's intention, in order to resolve some interpretive difficulty, without success. Although we maintain that legislatures frequently do have relevant intentions, they may not have an intention with respect to every interpretive dispute that arises. In addition, in some cases objective evidence of their intentions may be unavailable or inconclusive: as Kirby J once said: 'A "purposive" approach founders in the shallows of a multitude of obscure, uncertain and even apparently conflicting purposes.'[93] Consequently, legislation may remain stubbornly ambiguous, vague or otherwise insufficiently determinate to resolve an interpretive dispute, after all admissible evidence of legislative intent has been examined. Judges who find themselves in this predicament tend to be reluctant to acknowledge that they have no alternative but to act creatively, and choose which way of resolving the indeterminacy would be preferable, all things considered, including the purpose of the legislation, justice and the public interest. Rather than admitting that they are forced to embroider the statute, they tend to attribute their own handiwork to legislative intention. This does involve attributing a fictional intention to Parliament.

In addition, some interpretive principles may not function to clarify the legislature's actual intended meaning: they may, instead, be concerned with modest and legitimate judicial rectification of statutes. Consider, for example, the presumption that the legislature intends that its statutes not violate constitutional requirements, because they would be invalid if they did. The legislature might, on occasion, inadvertently enact a statutory provision whose intended meaning does violate a constitutional requirement. A court that relied on this presumption to 'read down' the offending provision, to keep it intra vires, might best be regarded as rectifying the provision, not expounding it according to the legislature's intended meaning — even if this can perhaps be justified by the legislature having a more general, standing intention that the courts should intervene in this way to save it from its errors. Consider also the principle that the courts should sometimes 'read into' or 'imply into' a legal instrument words that are necessary to ensure its practical efficacy. The application of this principle, too, might sometimes best be justified in terms of legitimate judicial rectification of statutes, rather than the clarification of actual legislative intention.[94] If judges implausibly claim that, in such cases, they are merely giving effect to the legislature's intended meaning, they may once again be hiding their own creativity behind a fiction.

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93 *Avel Pty Ltd v A-G (NSW)* (1987) 11 NSWLR 126, 127.

94 See Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) *30 University of Queensland Law Journal* 9, 18–22.

The use of fictions to conceal even legitimate judicial creativity has been noted since John Austin discussed the phenomenon, although theorists have disagreed about whether or not it has been conscious.[95] In Australia, the doctrine of the separation of powers may have reinforced judicial reluctance to acknowledge their interstitial lawmaking function. Gummow J recently said that 'the Parliament of the Commonwealth cannot delegate to the courts exercising the judicial power an authority conferring a discretion or choice as to the content of a federal law'.[96] As a generalisation, this proposition is sound. But when a federal law remains in some vital respect indeterminate, even after all admissible evidence of legislative intention has been exhausted, judicial discretion or choice is inescapable. As Kirby J said: '[W]hatever approaches and tools are used, puzzles often remain. Courts can generally do no more than provide the meaning that appears preferable. That meaning becomes the correct construction.'[97] A limited judicial role in rectifying certain kinds of errors in statutes is also justifiable. But none of this proves, or even suggests, that legislative intentions never exist. It merely shows that sometimes, judges should be more careful or candid in their reasoning. They should distinguish more clearly between, on the one hand, when they are attempting to clarify the legislature's intended meaning, and on the other hand, when they are (quite properly) supplementing or rectifying it.

A further cause for scepticism about the reality of legislative intent is the worry that it is impossible for an institution like a legislature to have intentions. In short, actual legislative intention is, and should remain, irrelevant to statutory interpretation because there is no such thing. This stark proposition is grounded in a legitimate concern, which is that it seems unclear how the intention of Parliament is to be reliably ascertained by piecing together expressions of the subjective intentions of individual legislators. Dawson J was (surprisingly) the first High Court judge to suggest that legislative intention is 'somewhat of a fiction'.[98] He said that although '[i]t has always been the cardinal rule of statutory interpretation that a court should strive to give effect to the intention of Parliament',[99]

> The difficulty has been in ascertaining the intention of Parliament … Individual members of Parliament, or even the government, do not necessarily mean the same thing by voting on a Bill or, in some cases, anything at all. The collective will of the legislature must therefore be taken to have been expressed in the language of the enactment itself, even though that language has been selected by the draftsman, who is not a member of Parliament.[100]

In *Wik*, Gummow J said that:

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95 John Austin, *Lectures on Jurisprudence* (John Murray, 5th ed, 1885) vol II, 610; see also Michael Kirby, *Judicial Activism* (Sweet & Maxwell, 2004) 6, 11, 28–9, 35, 46, 52, 61, 69. Jerome Frank said it was unconscious: *Law and the Modern Mind* (Transaction Publishers, 1930, Anchor Books reprint, 1963) 10, 40–1. But Martin Shapiro disagreed: Martin Shapiro, 'Judges as Liars' (1994) 17 *Harvard Journal of Law & Public Policy* 155.

96 *Momcilovic* (2011) 245 CLR 1, 92 [169] (citations omitted).

97 *Pfeiffer v Stevens* (2001) 209 CLR 57, 82 [92].

98 *Mills v Meeking* (1990) 169 CLR 214, 234.

99 Ibid, citing Viscount Dilhorne's statement that 'it has been recognised since the 17th century that it is the task of the judiciary in interpreting an Act to seek to interpret it "according to the intent of them that made it" (Coke 4 Inst 330)': *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, 234.

100 *Mills v Meeking* (1990) 169 CLR 214, 234.

> 'intention' does not refer to any particular state of mind of the legislators … [S]tatute law may be the result of a compromise between contending factions and interest groups and of accommodations between and within political organisations which are not made public and cannot readily be made apparent to a court.[101]

This is no doubt why the High Court has recently asserted that 'what is involved here is not the attribution of a collective mental state to legislators',[102] and that 'legislative intention … is not an objective collective mental state'.[103] And to similar effect, Kirby J has said that:

> It is difficult to attribute an 'intention' of a document such as a statute. Typically, it is prepared by many hands and submitted to a decision-maker of many different opinions, so that to talk of a single 'intention' is self-deception.[104]

This judicial scepticism was preceded by, and is elaborated at length in, the jurisprudential literature. In the early 20th century, Max Radin and Gustav Radbruch each argued that legislative intention was unintelligible because impossible and undiscoverable (strikingly, these two grounds of scepticism are logically inconsistent: the latter presupposes that intentions exist).[105] More sophisticated and compelling are the more recent sceptical arguments made by leading legal philosophers, such as Ronald Dworkin and Jeremy Waldron,[106] and by political scientists and legal scholars working in public choice or social choice theory.[107] However, all these arguments have a very narrow reach, extending only to implausible accounts that take legislative intention to be the aggregate of the intentions of each individual legislator, considered for his part only.[108] And all these arguments entail highly implausible accounts of legislating, in which the legislature is thought to be incapable of exercising its constitutional authority to choose to change the law in some reasoned way.[109] They also entail theories of statutory interpretation that depart sharply from existing practice, to which legislative intention remains indispensable.[110]

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101 *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–9 (citations omitted).

102 *Zheng v Cai* (2009) 239 CLR 436, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

103 *Lacey* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

104 Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2003) 24 *Statute Law Review* 95, 99. For an earlier expression of this concern, see *South Australia v Commonwealth* (1942) 65 CLR 373, 410 (Latham CJ).

105 Max Radin, 'Statutory Interpretation' (1930) 43 *Harvard Law Review* 863; G Radbruch, *Einführung in die Rechtswissenschaft* (Quelle & Meyer, 1910) 118, cited in Stanley Paulson, 'Statutory Positivism' (2007) 1 *Legisprudence* 1, 21–2.

106 Ronald Dworkin, *Law's Empire* (Hart, 1998); Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999).

107 Kenneth A Shepsle, 'Congress is a "They," Not an "It": Legislative Intent as Oxymoron' (1992) 12 *International Review of Law and Economics* 239; Jerry L Mashaw, 'The Economics of Politics and the Understanding of Public Law' (1989) 65 *Chicago-Kent Law Review* 123; Frank H Easterbrook, 'The Role of Original Intent in Statutory Construction' (1988) 11 *Harvard Journal of Law & Public Policy* 59, 64; Manning, 'Textualism and Legislative Intent' above n 21, 423, 430–2.

108 Ekins, above n 9, 19–20, 29–30, 40, 45–6.

109 Ibid 77–107.

110 Ibid 103–5, 181–93; Richard Ekins, 'Legislative Intent in *Law's Empire*' (2011) 24 *Ratio Juris* 435.

VI The Reality of Legislative Intention

Thoughtful judges understandably worry about whether the traditional common law understanding of the object of statutory interpretation is premised on a fiction. As French CJ said at a recent seminar:

> Are the real intentions of the legislators who voted for a statute to be inquired into and somehow assembled by the court into a collective mental state, which may then inform the interpretation of the statute. In my opinion, the answer to that question is no.[111]

Our answer is also no. But it does not follow that legislative intention is therefore a fiction. There are certainly good reasons to reject such an aggregative conception of legislative intention, at which Dworkin and Waldron take aim.[112] But this is not the only, or the best, way to understand legislative intention. The trend in recent theoretical work is to defend the existence of legislative intentions by drawing on new philosophical accounts of how group intentions and actions differ from individual ones.[113]

Consider an alternative theory of legislative intent, developed by one of us in a recent book.[114] The premise of this alternative theory is that the legislature is a complex purposive group — an institution — that forms and acts on intentions, which arise from but are not reducible to the intentions of the members of the group (the individual legislators). This premise has extensive support in the philosophy of social action. There are several possible explanations for group intention,[115] including Michael Bratman's influential account. He argues that group intentions arise out of the interlocking intentions of individuals.[116] That is, the members of the group intend to act with one another, so their reasoning is structured by reference to action by all towards some commonly shared end.

It follows that group intention does not involve spooky group mental states.[117] Intentions are plans that persons adopt as a means to ends they seek. The intention of a group is the plan of action that its members adopt, and hold in common, to structure how they are to act in order to achieve some end that they want to reach together. When the members play their part in the plan, and carry it

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111 Chief Justice Robert French, 'The Courts and the Parliament' (2013) 87 *Australian Law Journal* 820, 825.

112 See above nn 105–7.

113 See Ekins, above n 9; Solan, above n 79, ch 4, especially 89–100; Kent Greenawalt, *Statutory and Common Law Interpretation* (Oxford University Press, 2013) ch 3, 43, especially 59–75; Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2012) ch 4, 82, 92, especially 106–7, 110–15.

114 Ekins, above n 9. The next paragraphs draw on Ekins, above n 110, 440–2.

115 John Searle, *The Construction of Social Reality* (Free Press, 1997); Raimo Tuomela, *The Philosophy of Sociality: The Shared Point of View* (Oxford University Press, 2010); Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge University Press, 2007); Margaret Gilbert, *Sociality and Responsibility: New Essays in Plural Subject Theory* (Rowman and Littlefield, 2000).

116 Michael E Bratman, *Faces of Intention* (Cambridge University Press, 1999) 109–29.

117 Dworkin, above n 106, 168.

out to completion, the group has acted on its intention.[118] The plan that the members adopt will structure the action of the group in the same way as the intention on which any individual person acts. The plan exists and has significance only because of the interlocking intentions of the individual members, but to explain what is going on one must do more than state their individual intentions. They understand themselves to be acting as part of a group and each of their acts is coordinated by the group plan. Thus, the various individual acts, each intentional, form part of a larger order, which is after all the reason for the individual acts. The plan held in common among the members of the group is its intention.

With simple groups, all plans are held and known in full by all members of the group. When an ad hoc team of amateur footballers adopts a plan to win a match, the plan is the team's plan, or intention. Complex groups are different: instead of having a single, specific objective, they may be devoted to the ongoing pursuit of some general purpose by adopting and implementing an indefinite number of particular plans. Consider how an army or trading corporation pursues general purposes by adopting or changing particular plans as and when needed. Such a group may adopt procedures to settle how plans for group action are to be formed, and the plans so formed may not be known in full by all members. The group has, one might say, two types of intention: secondary (standing) intentions, which are plans to form and adopt other plans, and primary (particular) intentions, which are plans that directly concern how the group is to act on this or that occasion. Their action is still based on unanimity, because all members of the group have the same secondary intention, which is that the group use agreed procedures to develop and adopt primary plans, to be implemented by individual members insofar as the plans require them to act.

The legislature is a complex group that consists mainly, if not wholly, of a legislative assembly or assemblies. Its general purpose is to make law deliberately and for good reasons, which is to say for the common good. That is the purpose for which legislators act jointly and it is also the purpose that defines the enduring institution of the legislature, which particular legislators join for a time. The secondary intention that defines the legislature, and which all legislators share, is therefore to stand ready to change the law when there is good reason to do so, acting on particular occasions in accordance with established procedures. Its members enjoy decision-making equality (in voting, not in agenda-control) and the group structures their interaction in various stages by detailed procedural rules including the eventual passage of legislation by majority vote.

The legislature acts to change the law. The act of the legislature, the exercise of its capacity to legislate, is the enactment of this or that statute. The legislature acts on a proposal for legislative action — a Bill — whose content is the particular plan on which the legislators act, and thus the primary intention of the legislature (to be distinguished from the secondary intention noted above). The Bill is a proposal for legislative action because it is a plan to change the law. It is a detailed text, setting out how the law will change if it is enacted. One finds the

[118] John Searle, 'Collective Intentions and Actions', in Philip R Cohen, Jerry L Morgan and Martha E Pollack (eds), *Intentions in Communication* (MIT Press, 1990) 401, 408–13.

legislative intention in the plan that coordinates legislators, which explains their joint action. The detail of the proposal is the focal point for argument and action. It is the proposal that legislators deliberate about and which, if they assent, they will act to introduce. That is, the proposal is what legislators hold in common. They act together by reference to that proposal and the legislature acts when they act to adopt it (a proposal that is rejected is not adopted and so there is no legislative act).

In working up legislative proposals, the coordination among members of political parties and the agenda-setting capacity of ministers are very important. These features of the structure of the modern legislature enable it to coordinate the diverse abilities, interests and opinions of its members in order to develop proposals that are coherent and reasoned (but not necessarily reasonable, all things considered), which it makes sense for legislators and interpreters alike to understand as the choice of a single agent. That is, the way legislators develop and respond to proposals for legislative action is intended to make it possible for all the legislators jointly to make reasoned choices. In enacting a statute, the legislature promulgates (utters) a statutory text that makes clear to the community at large how it — the legislature — has chosen to change the law. As in the case of simple group intention and action, the text embodies the legislature's primary plans, or intentions.[119] It need not matter if a plan embodies some compromise between contending policies: legislators must have believed there were good reasons to compromise, and the nature of their compromise may be discernible from the text and publicly available contextual and purposive evidence.[120] Nor does it matter if some or even many individual members know very little about the details of a particular plan, even if they were among the majority of members who voted to adopt it.[121] The size and complexity of the modern legislative agenda requires a division of labour in the formulation and consideration of Bills.[122] Of necessity, members develop specialised interests and expertise, and rely on the guidance of their peers in relation to the many other matters that must be decided.

When interpreters read that statutory text, in the rich context of enactment, it makes good sense for them to strive to infer, from the publicly available evidence, the plan that the legislature has chosen to enact. It would make little sense for interpreters to refuse to stray from the bare literal meaning of the text; that would frequently defeat the plan that the text was designed to communicate. Recent work in the philosophy of language, particular its sub-branch known as 'pragmatics', shows that the meaning of any communication is considerably more substantial than the bare literal meaning of its text, which provides only part (even if the largest part) of the evidence from which that intended meaning is inferred.[123] Communication through the medium of a natural language generally and necessarily relies on the ability of its intended audience to infer the speaker's intended meaning from contextual as well as textual clues. It would be impractical for a legislature to resist this truth, and attempt to communicate everything explicitly through the literal meaning of the statutory text, partly because this

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119 Ekins, above n 9, 52–3, 58, 243.
120 Ibid 237–40.
121 Ibid 109, 113–14, 234.
122 Ibid 114.
123 Ibid ch 7, 180.

would be impossible, and partly because it would generate inefficient prolixity, complexity and confusion.[124] That is why, as we have explained in pt IV, every statute includes 'inexplicit content', including ellipses and tacit assumptions, which is revealed by attention to context and purpose.

Hence, when reasonable legislators vote for or against a Bill, they understand what is before them not to be a text with a sparse literal meaning, but a complex and reasoned plan to pursue particular means to achieve certain ends. Even if they have not given much thought to its detailed provisions or even bothered to read them, when they vote for or against it, they vote for or against not only the text, but the plan that the text has been designed by their colleagues to communicate. The plan is 'open' to them, in that they could learn more about it if they wanted to, by using much the same methods as subsequent interpreters, who infer the plan from its text and publicly available contextual evidence of its purpose. This plan is what the legislature as a whole is reasonably taken to have intended, due to the supporting structure of interlocking individual intentions that constitute the legislature's secondary or standing intentions.

VII Conclusion

The unpalatable practical implications of radical philosophical scepticism about legislative intention confirm that recently expressed judicial scepticism is a serious business. Jettisoning what common law judges have long taken to be the object of statutory interpretation is likely to have drastic consequences, namely, departing from the constitutional grant of legislative authority and rendering unintelligible the orthodox practice of statutory interpretation.[125]

The emergence of the new sceptical view threatens to recast the practice of statutory interpretation, tacitly authorising the courts to stipulate the meaning of Parliament's enactments, rather than to find and give effect to the intended meaning that exists prior to judicial intervention. This mode of 'interpretation' is proscribed by the constitutional grant of legislative authority, which entails that interpreters must strive to find and give effect to the legislature's lawmaking intentions. The centrality of legislative intention to the practice of statutory interpretation is consistent with the truth that interpretation is objective, for the task of the interpreter is to infer Parliament's actual intention from publicly available evidence. This relationship between legislative authority and statutory interpretation is confirmed by the details of interpretive practice itself, in which inferring legislative intention from that evidence is indispensable. Severing actual intentions from interpretation, as some High Court judges now seem to propose, would be no mere tidying-up exercise; rather, it would invite arbitrary judicial action. These conclusions are confirmed by the inconsistency of leading judicial sceptics, who, for good reason, find it much harder in practice than in theory to jettison reliance on legislative intention.

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[124] Ibid 213–16.

[125] See also Bennion, above n 6, 348–9.

We acknowledge that there are good reasons to be sceptical about some ways of thinking about legislative intention, such as aggregative accounts that aim to identify the intentions of individual legislators and fit them together like a jigsaw puzzle. But a more promising account, which our constitutional principles and interpretive practice take for granted, is available. Judges should be confident that in keeping faith with the common law tradition and in striving to identify actual legislative intentions they are not peddling a fiction.