

# LEGISLATIVE INTENTION

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## I INTRODUCTION

Almost exactly a century ago, the Governor-General of Australia, who was then located in Melbourne, received a cablegram sent from an authorised officer within the Department of State of the Imperial Government in London. The exact date was 5 August 1914. The exact time was 12.30 am in London and 12.30 pm in Melbourne. The cablegram read: ‘War has broken out with Germany. Send all State Governors.’<sup>1</sup> The Governor-General did not send all State Governors to the War. The Governor-General sent telegrams to all State Governors stating: ‘War has broken out between Great Britain and Germany.’<sup>2</sup>

History does not record whether the Governor-General saw any ambiguity in the instruction ‘Send all State Governors’, nor the reasoning the Governor-General adopted to interpret and act on the cablegram as he did. The Governor-General was confined, by the tyranny of distance and the constraints of time, to interpreting the text of the cablegram. No doubt, he was guided by conventions which then existed for constructing and construing cablegrams. No doubt, he was guided by the context which included established channels of communication with the Imperial Government and his own constitutional relationship with State Governors.

If the Governor-General saw any ambiguity in the instruction ‘Send all State Governors’, the Governor-General would have needed to ask himself: ‘What do those words mean?’ Asking that question would have been to acknowledge the ambiguity of the instruction. It would also have been to acknowledge his need to resolve that ambiguity. It would have said nothing about how he might resolve the ambiguity. That is because the question invoked no external frame of reference. Almost certainly, the Governor-General would not have asked, as if he were reading a poem or a novel: ‘What do those words mean to me?’ Almost certainly, he would have asked: ‘What does the Imperial Government mean by those words?’ or ‘What does the Imperial Government intend by those words?’ It is also possible that he might have asked that same question in another way: ‘What is the purpose or object or design of the Imperial Government in authorising the use of those words?’

Irrespective of precisely how he might have chosen to frame the question, the Governor-General would certainly have seen ambiguity in the instruction as giving rise to a question about what the Imperial Government intended when

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1 Sir Ernest Scott, *Australia During the War* (Angus and Robertson, 9<sup>th</sup> ed, 1943) vol 11, 14.

2 Ibid.

it authorised the inclusion of the words in the cablegram. As a faithful agent of the Imperial Crown, he would have seen it as incumbent on him to answer that question to the best of his ability taking into consideration all available inferences. It is unlikely that he would have distracted himself with misgivings that the Imperial Government, as a collective body, might not have been capable of having an intention. The Imperial Government governed the Empire, and the Empire was at war!

## II HISTORY

Had he seen ambiguity and had he so reasoned, the Governor-General would have adopted an approach to the resolution of ambiguity in a cablegram no different from the orthodox approach then adopted by a court to the resolution of ambiguity in a statute.

The principles applicable to construing a statute, Lord Blackburn had said in the House of Lords more than a quarter of a century earlier, were the same as the principles applicable to construing other instruments in writing: ‘In all cases the object is to see what is the intention expressed by the words used.’<sup>3</sup> ‘[T]he imperfection of language’, he had said, made it ‘impossible to know what that intention is without inquiring farther, 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’.<sup>4</sup> The ‘office of the Judges’, he had said, ‘is not to legislate, but to declare the expressed intention of the Legislature’.<sup>5</sup>

Lord Blackburn echoed the earlier language of Tindal CJ delivering to the House of Lords the opinion of seven of the common law judges of England in the celebrated *Sussex Peerage Case*.<sup>6</sup> ‘My Lords’, Tindal CJ had said, ‘the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act’:

If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which ... is ‘a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress’.<sup>7</sup>

3 *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763.

4 *Ibid.*

5 *Ibid* 764.

6 (1844) 11 Cl & Fin 85; 8 ER 1034.

7 *Ibid* 143; 1057.

Two years after Lord Blackburn spoke, the Judicial Committee of the Privy Council laid down the policy, which was to be maintained for almost a century afterwards, that it was ‘of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same’.<sup>8</sup> It is therefore unsurprising that the orthodox explanations of the principles of statutory construction enunciated by Lord Blackburn<sup>9</sup> and by Tindal CJ<sup>10</sup> were adopted and applied in the first year of the operation of the High Court.

The inherited understanding that the object of statutory construction is to give effect to the intention of the legislature expressed, or communicated, in the words of the statute continued largely unquestioned in Australian courts for most of the 20<sup>th</sup> century, including during and after the period of progressive abolition of appeals to the Privy Council between 1966 and 1986. As the inherited understanding was largely unquestioned, it was also rarely articulated. Sometimes, but not always, giving effect to the intention of the legislature was explained as the major premise of second-order ‘rules’ of statutory construction. The most frequently invoked of those rules, often labelled the ‘literal rule’ and the ‘mischief rule’, unpacked the two limbs of the statement of principle by Tindal CJ in the *Sussex Peerage Case* in emphasising respectively that ‘[i]f the words are plain, effect must be given to them’,<sup>11</sup> and that ‘if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances’.<sup>12</sup> Sometimes, but not always, giving effect to the intention of the legislature was also explained to underlie the reading down of words in a statute by reference to various ‘presumptions’ about ‘objects which the legislature is presumed not to intend’,<sup>13</sup> or ‘principles that [the legislature] would be prima facie expected to respect’,<sup>14</sup> or by reference to generally applicable rules of the common law which the legislature would not be taken to have displaced absent ‘a sufficient indication of an intention of the legislature to the contrary’ which indication ‘must satisfactorily appear from express words of plain intendment’.<sup>15</sup>

Members of the High Court articulated the inherited understanding in 1981 in the course of explaining that the object of giving effect to the intention of the legislature also underlay another second-order ‘rule’ of statutory construction — then sometimes referred to as the ‘golden rule’<sup>16</sup> — that inconvenience or

8 *Trimble v Hill* (1879) 5 App Cas 342, 345.

9 *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 239.

10 *Shire of Arapiles v Board of Land and Works* (1904) 1 CLR 679, 686.

11 *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329, 359. See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2.

12 *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329, 359. See, eg, *Federated Engine-Drivers and Fireman’s Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398, 436–7, quoting *Heydon’s Case* (1584) 3 Co Rep 7a, 7b; 76 ER 637, 638.

13 See, eg, *Potter v Minahan* (1908) 7 CLR 277, 304.

14 *Ex parte Walsh & Johnson; In Re Yates* (1925) 37 CLR 36, 93.

15 *Commissioner of Police v Tanos* (1958) 98 CLR 383, 396.

16 *Grey v Pearson* (1857) 6 HLC 61, 106; 10 ER 1216, 1234.

improbability of consequences are relevant to be taken into account by a court choosing between competing constructions of ambiguous words.<sup>17</sup> Specifically adopting the language of Lord Blackburn, Gibbs CJ described it as ‘an elementary and fundamental principle that the object of the court, in interpreting a statute, “is to see what is the intention expressed by the words used”’.<sup>18</sup> Mason and Wilson JJ were equally direct. They said that ‘[t]he fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole’.<sup>19</sup> Citing the first edition of Professor Dennis Pearce’s *Statutory Interpretation in Australia*, which had been published in 1974, they said that the so-called ‘rules’ of statutory construction were not ‘rules of law’ but ‘no more than rules of common sense, designed to achieve this object’.<sup>20</sup>

Yet coexisting with the inherited understanding that the object of statutory construction was to give effect to the intention of the legislature communicated in the words of the statute was an inherited understanding that the material to which a court could look to ascertain that intention was limited. O’Connor J reflected that further inherited understanding of the limited scope of permissible inquiry when he explained in the first year of the operation of the High Court:

In all cases in order to discover the intention you may have recourse to contemporaneous circumstances — to the history of the law, and you may gather from the instrument itself the object of the legislature in passing it. ... You may deduce the intention of the legislature from a consideration of the instrument itself in the light of these facts and circumstances, but you cannot go beyond it.<sup>21</sup>

Excluded from consideration by a court was any record of any executive process which might have been involved in framing the statute together with any record of the legislative process which must necessarily have been involved in enacting the statute. Some but not all of those records could be used to indicate the ‘mischief’ which the legislature intended to address in enacting the words of the statute; none could be used to indicate the meaning or effect which the legislature intended those words to have in addressing that mischief.<sup>22</sup>

The rule of limitation was applied in Australia with initial vigour,<sup>23</sup> but with waning enthusiasm in the last quarter of the 20<sup>th</sup> century as the volume and complexity of legislation increased. The justification most often advanced for

17 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297.

18 *Ibid* 304, quoting *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 763.

19 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320. See also *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13.

20 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320, citing D C Pearce, *Statutory Interpretation in Australia* (Butterworths, 1974) 14.

21 *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329, 359.

22 See, eg, *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503, 509, 520–1.

23 See, eg, *South Australia v Commonwealth* (1942) 65 CLR 373, 385, 409–10; *Bitumen & Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200, 212.

excluding recourse to extrinsic material, that the words of the statute alone are authoritative,<sup>24</sup> hardly seemed a reason for excluding recourse to material which might help to understand the meaning of those words. Another justification, that persons governed by the statute ought to be entitled to know, in advance of taking action, the legal consequences that would flow from the words of a statute,<sup>25</sup> might well justify the exclusion of unpublished or inaccessible material but hardly seemed a reason for excluding recourse to readily accessible published records of public processes by which those words came into existence. Another justification, that recourse to those records would tend to confuse the intention of the legislature with the motivations of individual legislators,<sup>26</sup> seemed to underestimate the capacity of courts to distinguish between the ultimate question and considerations bearing on the answer to the ultimate question. Suggestions that to frame the ultimate question by reference to such a 'slippery phrase' as the 'intention of the legislature' would set courts off on what could only be an elusive and unrewarding enquiry<sup>27</sup> did not seem to square with the assistance obviously to be gained in many cases from consideration of those records. Pragmatic concerns about the potential for adding complexity to the judicial process, broadening the scope of judicial inquiry, and increasing the time and cost of litigation,<sup>28</sup> seemed more appropriately directed to case-by-case assessment of the utility of having recourse to particular public records in the construction of particular statutes.

Those, in any event, were the dominant views of participants in a symposium on statutory interpretation sponsored in 1983 by the Attorney-General of the Commonwealth, Senator Peter Durack. Lord Wilberforce, who had defended the exclusionary rule in the House of Lords in 1975,<sup>29</sup> said at that symposium that he had been wrong.<sup>30</sup> Statutory interpretation, he said, was about searching for the meaning of statutory words: the purpose of using extraneous aids was not to substitute some different process for the understanding of words but to 'enlarge the matrix' within which that search was to occur.<sup>31</sup> That enlargement, he said, was legitimate and useful. The dividing line between mischief and effect was 'illogical, and hard to trace in practice':<sup>32</sup> the mischief intended to be addressed by statutory words and the intended effect of those words in addressing that mischief were opposite sides of the same coin. The notion that it was not permissible to look at commentary on draft legislation to see what legislation means could have 'no validity whatever' if the draft legislation was enacted without change, and the

24 See, eg, *Black-Clawson International Ltd v Papierwerke A-G* [1975] AC 591, 638.

25 See, eg, *Black-Clawson International Ltd v Papierwerke A-G* [1975] AC 591, 638; *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279.

26 See, eg, *South Australia v Commonwealth* (1942) 65 CLR 373, 410.

27 See, eg, *Salomon v A Salomon & Co Ltd* [1897] AC 22, 38.

28 See, eg, *South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd* (1977) 139 CLR 449, 461.

29 *Black-Clawson International Ltd v Papierwerke A-G* [1975] AC 591, 629.

30 Attorney-General's Department (Cth), *Symposium on Statutory Interpretation, Canberra, 5 February 1983* (Australian Government Publishing Service, 1983) 8.

31 *Ibid* 7.

32 *Ibid* 8.

notion that looking to the draft legislation or to the commentary would involve construing two documents instead of one was ‘specious’:

You are only construing one document — the Act — with such help as you can get from the other document. If that other document is not clear, well then, it is no help. If it is, why not use it?<sup>33</sup>

Other participants in the conference, including Mason and Murphy JJ, were in general agreement.<sup>34</sup>

The following year, a Bill to amend the *Acts Interpretation Act 1901* (Cth) by inserting a new s 15AB was introduced into the Commonwealth Parliament by Senator Gareth Evans, Senator Durack’s successor as Attorney-General. The purpose of that Bill, said Senator Evans in his second-reading speech, was ‘to facilitate the giving of effect to the intentions of the Parliament when the Acts of the Parliament fall to be interpreted’.<sup>35</sup> A court construing a provision of a Commonwealth statute was thenceforward to be permitted to consider any extrinsic material capable of assisting in the ascertainment of the meaning of the provision for the purpose of confirming the ordinary meaning of the provision or for the purpose of determining the meaning of the provision if ambiguous or obscure or if the ordinary meaning is manifestly absurd or unreasonable. The mischief Senator Durack, speaking from the Opposition benches in favour of the Bill, then identified as being addressed by s 15AB is significant.<sup>36</sup> The problem, as he explained it, was not the inherent ambiguity or obscurity of enacted statutory language but rather the inherent difficulty in the drafting process of finding clear statutory language to reflect a clear legislative policy. The section, as he saw it, would enhance the legislative process by permitting those involved in the process of framing and enacting legislation to focus on its policy content without needing to be distracted by its precise verbal form.

Section 15AB of the *Acts Interpretation Act* was enacted with bipartisan support. It was ground-breaking. Save for the introduction of a modest statutory provision in Ghana in 1960,<sup>37</sup> no other country to emerge from the former British Empire had then taken such a step. The section’s enlargement of the matrix of material to which a court was entitled to look to ascertain the intention of the legislature set a precedent for similar provisions to be introduced soon afterwards into the interpretation legislation in all but one of the Australian states and territories.<sup>38</sup> That significant and widespread statutory development in Australia preceded judicial development along similar lines in the United Kingdom in 1993<sup>39</sup> and in

33 Ibid.

34 Ibid 39–40, 81–5.

35 Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 582.

36 Commonwealth, *Parliamentary Debates*, Senate, 30 March 1984, 955–7.

37 *Interpretation Act 1960* (Ghana) s 19.

38 *Interpretation Act 1987* (NSW) s 34; *Interpretation of Legislation Act 1984* (Vic) s 35(b); *Acts Interpretation Act 1954* (Qld) s 14B; *Interpretation Act 1984* (WA) s 19; *Acts Interpretation Act 1931* (Tas) s 8B; *Interpretation Act 1967* (ACT) s 11B; *Interpretation Act* (NT) s 62B.

39 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

Canada in 1998.<sup>40</sup> It also prompted analogical judicial development of the common law of statutory interpretation in Australia. Quite apart from s 15AB, the ‘modern approach’, the High Court declared in 1997, is to insist that the statutory text is in every case to be interpreted in its ‘context’, using that word ‘in its widest sense’.<sup>41</sup>

The High Court had in 1987 made plain, however, that the enlargement of the material to which a court was permitted to give consideration made no difference to the nature of the task in which a court was engaged in construing a statute. Section 15AB did not result in extrinsic material being substituted for the words of the statute. Legislative intention might not always be translated into statutory text. The function of a court remained throughout ‘to give effect to the will of Parliament as expressed in the law’.<sup>42</sup> Four members of the High Court reiterated that point in 1998. ‘[T]he duty of a court’, they said, ‘is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have’.<sup>43</sup>

### III REASSESSMENT

The legislature, of course, is a legislative body following a legislative process. The legislature has no psychological state of mind. The intention of the legislature is not the psychological state of mind of any one or more legislators. The intention of the legislature is an objective construct — an attributed or imputed characteristic. Inevitably, the intention of the legislature will be constructed differently when the legislative process can be disaggregated and each component legislative step examined separately from how the intention of the legislature will be constructed when the legislature can only be considered from the outside as if it were a single entity.

It was therefore inevitable that enlargement of the material to which courts were to be permitted to consider for the purpose of construing statutes, so as to include records of executive and legislative processes feeding into the enactment of a statute, would lead to some reassessment by courts of the nature of legislative intention. Against the background of the traditional understanding that giving effect to the intention of the legislature communicated in the words of the statute was the object of statutory construction, it was also inevitable that reassessment of the nature of legislative intention would lead to some reassessment of the nature of the task in which a court is engaged in construing a statute.

The process of reassessment in Australia was heralded by Dawson J in 1990.<sup>44</sup> Having observed that ‘[i]t has always been the cardinal rule of statutory interpretation that a court should strive to give effect to the intention of Parliament’,

40 *Re Rizzo & Rizzo Shoes Ltd* [1998] 1 SCR 27.

41 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

42 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518.

43 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78].

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

Dawson J added that '[t]he difficulty has been in ascertaining the intention of Parliament rather than in giving effect to it when it is known'. He continued:

Indeed, as everyone knows, the intention of Parliament is somewhat of a fiction. 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.<sup>45</sup>

That sceptical note was echoed by French J in the Federal Court when he referred to legislative intention as a 'phantom'.<sup>46</sup>

The process of reassessment intensified in the first decade of this century. The principal catalyst was the enactment by the Commonwealth Parliament in 2001 of an amendment to the *Migration Act 1958* (Cth) to insert a privative provision designed to limit the scope for judicial review of certain administrative decisions made under that Act.<sup>47</sup> The Commonwealth Parliament in the text of that privative provision used words which said one thing (that the jurisdiction of courts was to be excluded) in circumstances where the extrinsic material made plain that the Minister who introduced the amendment and those members of the Parliament who participated in debate acted on the understanding that those words would likely be interpreted by the High Court in accordance with previous authority to mean quite another thing (that the authority of the administrative decision-makers was to be expanded subject to certain unexpressed provisos). The High Court in 2003 held that the privative clause on its true construction did not result in such an expansion of the authority of administrative decision-makers.<sup>48</sup>

Increasingly since 2004, judicial references to the object of statutory construction being to give effect to the intention of the legislature communicated in the words of the statute have waned (although they have not disappeared),<sup>49</sup> while judicial references to legislative intention as a 'fiction',<sup>50</sup> and sometimes as a 'metaphor',<sup>51</sup> have waxed. Ascertaining legislative intention has on occasions been described (non-exhaustively) as a statement of compliance by a court with common law and statutory 'rules of construction',<sup>52</sup> and legislative intention has on at least one occasion been described (exhaustively) as nothing more than a label that gets applied to a construction reached by a court through the application of those rules.<sup>53</sup>

45 Ibid.

46 *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429, 443.

47 *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), inserting s 474.

48 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. See also *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 410–12.

49 See, eg, *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 411–12 [88].

50 See, eg, *Zheng v Cai* (2009) 239 CLR 446, 455 [28]; *Dickson v The Queen* (2010) 241 CLR 491, 507 [32]; *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43].

51 See, eg, *Singh v Commonwealth* (2004) 222 CLR 322, 385 [159]; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 132 [389]; *Momcilovic v The Queen* (2011) 245 CLR 1, 85 [146].

52 See, eg, *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43].

53 *Momcilovic v The Queen* (2011) 245 CLR 1, 141 [341].



In 2009,<sup>54</sup> and again in 2011,<sup>55</sup> the High Court unanimously referred to ‘judicial findings as to legislative intention’ as ‘an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws’ and explained that ‘the preferred construction ... of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy’.

Those carefully crafted references are open-textured. They serve to highlight and to continue the process of reassessment of the nature of legislative intention and of the nature of the task in which a court is engaged in construing a statute in Australia. To describe judicial findings of legislative intention as an expression of the constitutional relationship between the arms of government and to explain that the preferred construction of a statute in question is reached by the application of rules of interpretation accepted by all arms of government within our system of representative democracy, is to raise questions which demand further principled inquiry.

One question for further inquiry concerns the reality of legislative intention. Is legislative intention just a label for a judicial process or a judicial outcome? Can legislative intention meaningfully be seen to have an independent objective existence?

An overlapping question concerns the incidents, and consequences for statutory interpretation, of the constitutional relationship between the arms of government. The structural separation of constitutional powers means that it is the exclusive province of the legislature to make legislation and the exclusive province of the courts to determine what that legislation means. A statute takes effect only through the words in which it is expressed, as properly interpreted by the courts. The courts are not bound by any statement of executive or legislative opinion as to what those words mean. But those bare truisms do not comprehensively describe the constitutional relationship between the arms of government within a system of representative democracy. Much less does their statement begin to address how judge-made rules of interpretation are, or should be, framed to express the courts’ role in that constitutional relationship or to reflect what is, or can be taken to be, accepted by the legislature and the executive.

Questions of that nature are not wholly without precedent. Recourse by courts to records of legislative proceedings for the purpose of interpreting statutes became commonplace in the United States by the early part of the twentieth century. The intention of the legislature was called into question in academic literature in the United States in the 1930s<sup>56</sup> and has been debated in that literature with some

54 *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28].

55 *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43].

56 Max Radin, ‘Statutory Interpretation’ (1930) 43 *Harvard Law Review* 863; James M Landis, ‘A Note on Statutory Interpretation’ (1930) 43 *Harvard Law Review* 886.

intensity since the 1980s<sup>57</sup> including in recent popular writings of prominent current members of the federal judiciary.<sup>58</sup>

The questions are beginning to be explored in Australian legal academic literature.<sup>59</sup> I do not here attempt to provide definitive answers; I do seek to encourage their continued exploration.

#### IV DO LEGISLATURES HAVE INTENTION?

One recurring argument against the existence of legislative intention is that the legislature, even if it is scient, cannot be omniscient. The legislature cannot possibly have an intention as to how the words it enacts in a statute are to be applied in myriad circumstances thrown up by myriad cases in which courts will be required to apply those words. The refutation of the argument is that it conflates the legislative function of enacting rules with the judicial function of applying those rules to particular cases including, through the accumulation of collective judicial experience and the application of the doctrine of precedent, applying those rules in considered and consistent ways to particular categories of cases.<sup>60</sup> It is no part of the function of the legislature to determine individual cases. Equally, it is no part of the function of a court to consider how the legislature might have determined an individual case. Courts often refer to whether the legislature would or would not have intended enacted words to operate in a particular way on particular facts,<sup>61</sup> but those references are best seen as attempts by courts sympathetically to understand and to test what the legislature might or might not have intended those words to mean — not to ask how the legislature would have decided the case were the legislature to exercise the exclusive function of the courts.

Another recurring argument is that a distinction can and must be drawn between the purpose of a statute, said to inhere in the text and structure of the statute and to be capable of illumination by its context, and the intention of the legislature in enacting the words of the statute, said to be elusive if not unknowable. The distinction corresponds at one level to a distinction between the creature (the statute) and its creator (the legislature). The distinction corresponds at another level to a distinction between mischief and remedy: between the legislatively

57 For a useful recent review of the voluminous literature see Victoria Nourse, 'Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers' (2011) 99 *Georgetown Law Journal* 1119.

58 Compare Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012) 369–96 with Richard A Posner, *Reflections on Judging* (Harvard University Press, 2013) 178–219.

59 See, eg, Jeffrey Goldsworthy, 'Legislative Intention Vindicated?' (2013) 33 *Oxford Journal of Legal Studies* 821; Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39.

60 Cf Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37 *Monash University Law Review* 1.

61 See, eg, *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 668 [62]; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493, 508 [43], 509 [48].

chosen target of the statute or some part of the statute, and the legislatively chosen meaning of particular enacted words.

The difficulty with maintaining the distinction at the first of those levels is that it becomes blurred where the objective purpose of the statute, considered as an independent creature of its legislative creator, becomes doubtful. As Professor Jeffrey Goldsworthy has put it, 'strictly speaking, statutes like other inanimate objects do not have purposes: only the people who use them do'.<sup>62</sup> The same razor can have the objective purpose of shaving a beard, sharpening a pencil or slitting a throat. The same nylon rope might have the objective purpose of tying down a load or serving as a line for the hanging of washing. Does it also have the objective purpose of bungee jumping? To find out, it might be prudent to check the manufacturer's specifications. The information contained in those specifications is unlikely to be thought unreliable merely because the manufacturer is an organisation and merely because the specifications were written by a group of individuals within that organisation.

The difficulty with maintaining the distinction at the second level, to return to the words of Lord Wilberforce in 1983, is that the distinction between mischief and remedy is between opposite sides of the same coin. It is difficult to maintain that recourse to the record of the legislative process might sometimes help to understand the mischief which a statute or part of a statute is designed to remedy but might never help to understand the sense in which words in the statute have been used to remedy that mischief. Experience teaches that the record can reveal the sense in which a particular statutory word or phrase has been used with at least as much precision as the record reveals the aim to be achieved by its inclusion.

The most substantial of the recurring arguments against the existence of legislative intention to be revealed by the academic literature in the United States is that to which Dawson J alluded in 1990 when he first described legislative intention in Australia as 'somewhat of a fiction'. The argument focuses on the collective nature of a legislative body. It proceeds from the premise that, when attributed to a group, 'intention' can never be more than a metaphor: an anthropomorphic description of a process or an outcome. The argument in its most extreme form states that, because the outcome of the legislative process is the enactment of words in a statute and because the meaning of those words can only be authoritatively determined by a court, the legislature can have no intention other than that which a court ultimately attributes to the words of the statute.

What might flow from the collective nature of the legislature can be, and has been, informed by reference to interdisciplinary analysis of the nature of decision-making by deliberative groups. That body of analysis emerged only in the late 20<sup>th</sup> century. Rediscovery in the 1950s and 1960s of Condorcet's paradox (showing that a group applying a majority decision-making rule to choose between three or more options cannot guarantee outcomes which rank those options in a rational order of preference) and its generalisation into Arrow's theorem (showing that

62 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 233.

a group consistently applying any plausible decision-making rule to choose between three or more options cannot guarantee outcomes which rank those options in a rational order of preference),<sup>63</sup> fed into widespread scepticism in the 1970s and 1980s about the possibility of a deliberative group (whether it be a social club, a trade union, a legislature or a court) ever having anything that might meaningfully be described as an objective intention which was separate from the individual subjective intentions of some or all of its members. Writing in 1975, Professor Anthony Quinton reflected that scepticism when he said:

We do, of course, speak freely of the mental properties and acts of a group in the way we do of individual people. Groups are said to have beliefs, emotions, and attitudes and to take decisions and make promises. But these ways of speaking are plainly metaphorical. To ascribe mental predicates to a group is always an indirect way of ascribing such predicates to its members.<sup>64</sup>

Reflecting that same scepticism, Judge Frank Easterbrook wrote in 1983:

Because legislatures comprise many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.<sup>65</sup>

In 1992, Professor Kenneth Shepsle provocatively referred to the legislature as a ‘they’ not an ‘it’, and to ‘legislative intent’ as an ‘oxymoron’.<sup>66</sup>

More recent interdisciplinary analysis has brought a different perspective. Analysis published to international acclaim since 2000 by Professor Christian List and Professor Philip Pettit, who worked for a time together in the Research School of Social Sciences at the Australian National University,<sup>67</sup> has shown that (short of choosing to be ruled by a dictator) it is impossible to devise a procedure for the aggregation of judgments of the members of a group that at once meets the conditions of being universal, systematic, equally respectful of the attitudes or beliefs of individual members, and productive of outcomes which are consistent with each other over time and over a range of subjects. But what that analysis has also shown is that plausible relaxation of one or more of those conditions for group decision-making can result in a group behaving as a single rational entity. Without needing to postulate any social forces other than those that derive from the action and interaction of rational individuals, Professors List and Pettit have

63 Kenneth J Arrow, *Social Choice and Individual Values* (John Wiley, 2<sup>nd</sup> ed, 1963).

64 Anthony Quinton, ‘The Presidential Address: Social Objects’ (1975) 76 *Proceedings of the Aristotelian Society* 1, 17.

65 Frank H Easterbrook, ‘Statutes’ Domains’ (1983) 50 *University of Chicago Law Review* 533, 547. See also Jerry L Mashaw, ‘The Economics of Politics and the Understanding of Public Law’ (1989) 65 *Chicago-Kent Law Review* 123.

66 Kenneth A Shepsle, ‘Congress as a “They”, not an “It”: Legislative Intent as Oxymoron’ (1992) 12 *International Review of Law and Economics* 239.

67 See, eg, Christian List and Philip Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford University Press, 2011); Christian List, ‘Collective Wisdom: Lessons From the Theory of Judgment Aggregation’ in Hélène Landemore and Jon Elster (eds), *Collective Wisdom: Principles and Mechanics* (Cambridge University Press, 2012) 203.

established that ‘it is possible, at least in principle, for a group to aggregate the intentional attitudes of its members into a single system of such attitudes held by the group as a whole’.<sup>68</sup> The result, as they put it, is that groups can function ‘as relatively autonomous entities — agents in their own right, as it is often said, groups with minds of their own’.<sup>69</sup> The implications of their analysis for the nature of legislative intention are just now beginning to be explored in academic legal literature.<sup>70</sup>

It might be thought ironic that the potential for a deliberative group to have a mind of its own has been emerging through international interdisciplinary analysis during the same period as the objective reality of the legislature having an intention or a will as traditionally understood by courts has been subjected to reassessment within Australia. It might also be thought opportune.

## V WHAT IS TO BE MADE OF THE CONSTITUTIONAL RELATIONSHIP BETWEEN ARMS OF GOVERNMENT

At a time when the Appellate Committee of the House of Lords still stood at the apex of the judicial system of the United Kingdom, the constitutional significance of its interpretation of statutes enacted by the Parliament of the United Kingdom was brought into sharp relief by one of its most distinguished members, Lord Devlin, when he said this:

The law is what the judges say it is. If the House of Lords were to give to an Act of Parliament a meaning which no one else thought it would reasonably bear, it is their construction of the words used in preference to the words themselves that would become the law.<sup>71</sup>

More recent references to judicial findings as to legislative intention as an expression of the constitutional relationship between the arms of government are to be understood against the background of that stark reality.

Of legislative intention as traditionally considered by an Australian court seeking to attribute meaning to the text of a statute, Kitto J observed in 1967:

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 whole range of circumstances relevant upon a question of statutory interpretation ... It is not a question

68 List and Pettit, above n 67, 59.

69 Ibid 77–8.

70 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2013) 110–15; John Ferejohn, ‘Legislation, Planning and Deliberation’ in Hélène Landemore and Jon Elster (eds), *Collective Wisdom: Principles and Mechanics* (Cambridge University Press, 2012) 95; Kent Greenawalt, *Statutory and Common Law Interpretation* (Oxford University Press, 2013) 59–75.

71 Patrick Devlin, *Samples of Law Making* (Oxford University Press, 1962) 2, quoted in The Law Commission and Scottish Law Commission, *The Interpretation of Statutes* (1969) 48 [79].

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.<sup>72</sup>

Having set out that observation, Gleeson CJ said in 2004:

The danger to be avoided in references to legislative intention is that they might suggest an exercise in psychoanalysis of individuals involved in the legislative process; the value of references to legislative intention is that they express the constitutional relationship between courts and the legislature.<sup>73</sup>

Gleeson CJ continued:

As Kitto J said, references to intention must not divert attention from the text, for it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intention, and it is from the text, read in that light, that intention is inferred. The words ‘intention’, ‘contemplation’, ‘purpose’, and ‘design’ are used routinely by courts in relation to the meaning of legislation. They are orthodox and legitimate terms of legal analysis, provided their objectivity is not overlooked.<sup>74</sup>

Whether or not legislative intention is appropriate to describe an objective attribute of the legislature, the quest objectively to find legislative intention is not inappropriate to describe the self-restraint which courts have traditionally brought to their role as the ultimate interpreters of legislated texts. Legislative intention, if it is nothing more, is ‘a message for *judges* about *judging*’;<sup>75</sup> even if conceived as a fiction, it is:

a fiction with a purpose: to help judges better serve the separation of powers ... remind[ing] judges that it is not *their* decisions, but the *people’s* decisions, that count in a democracy ... the point [being] not to supplant text ... but to constrain judges’ ideological and cognitive biases.<sup>76</sup>

One potential benefit of re-conceiving legislative intention more broadly as an expression of the constitutional relationship between the arms of government is that it allows judge-made rules of statutory interpretation to be conceived in more complex and dynamic terms, as the ‘product of ... the interaction between the three branches of government established by the *Constitution*’.<sup>77</sup> That conception of judge-made rules of statutory interpretation facilitates consideration of the extent to which the objective determination of legislative intention by courts is, or should be, shaped by interpretative principles self-consciously fashioned by

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

73 *Singh v Commonwealth* (2004) 222 CLR 322, 336 [19].

74 *Ibid.*

75 Victoria F Nourse, ‘A Decision Theory of Statutory Interpretation: Legislative History by the Rules’ (2012) 122 *Yale Law Journal* 70, 85.

76 *Ibid.*

77 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97].

courts to reflect democratic values<sup>78</sup> or to enhance democratic processes.<sup>79</sup> To what extent, if any, is it appropriate for Australian courts to mould judge-made rules of interpretation to reflect contemporary perceptions of the functioning of other arms of government? Those are large questions. They are questions which have begun to be addressed in the context of fashioning and refashioning various ‘presumptions’ of statutory interpretation, such as: when is the executive government to be bound by a statute,<sup>80</sup> when procedural fairness is or is not to apply to the exercise of a statutory discretion,<sup>81</sup> and when and to what extent a statute is to be interpreted to accord with international obligations.<sup>82</sup>

In 1994, for example, four members of the High Court explained the longstanding presumption against statutory modification or abrogation of a fundamental common law right or freedom as founded in part on the positive consideration that it is ‘improbable that the legislature would overthrow fundamental ... rights ... without expressing its intention with irresistible clearness’<sup>83</sup> and in part on the normative consideration that ‘curial insistence on ... an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights’.<sup>84</sup> In terms that have often since been repeated,<sup>85</sup> Gleeson CJ in 2004 endorsed the description of the presumption as ‘an aspect of the principle of legality which governs the relations between Parliament, the executive and the courts’.<sup>86</sup> In 2013 Heydon J adopted the explanation that:

[T]he principle of legality means that [the legislature] must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words ... because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process.<sup>87</sup>

78 Cf Daniel A Farber, ‘Statutory Interpretation and Legislative Supremacy’ (1989) 78 *Georgetown Law Journal* 281.

79 Cf Jane S Schacter, ‘Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation’ (1995) 108 *Harvard Law Review* 593.

80 See, eg, *Bropho v Western Australia* (1990) 171 CLR 1, 21–3; *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, 35–7 [60]–[68].

81 See, eg, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658–9 [66], 666–8 [97]–[99].

82 See, eg, *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29].

83 *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J), quoting *Maxwell on Statutes* (Sweet and Maxwell, 4<sup>th</sup> ed, 1905) 122.

84 *Coco v The Queen* (1994) 179 CLR 427, 437–8.

85 See, eg, *Lacey v A-G (Qld)* (2011) 242 CLR 573, 582 [17], 583–4 [20]; *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622 [182]; *Monis v The Queen* (2013) 249 CLR 92, 209 [331]; *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 30–2 [42]–[44], 66 [148]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 264–5 [171]–[173], 306–10 [304]–[314].

86 *Electrolux Home Products Pty Ltd v The Australian Workers’ Union* (2004) 221 CLR 309, 329 [21], citing *R v Home Secretary*; *Ex parte Pierson* [1998] AC 539, 587.

87 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 66 [148], quoting *R v Secretary for Home Department*; *Ex parte Simms* [2000] 2 AC 115, 131.

A relationship in which one party is only ever allowed to speak and in which another party is only ever allowed to interpret is destined to lead to some awkward moments.<sup>88</sup> The working out of the relationship requires common sense and mutual respect.

In the interpretation of words that are indistinct, fidelity on the part of the interpreter to the interpretative task is not inconsistent with an assumption on the part of the interpreter of fidelity on the part of the speaker to precepts fairly assumed by the interpreter to be shared by both of them by reason not simply of their common language but also of their common culture and adherence to some basic common values and aspirations. That such an assumption on the part of the interpreter might sometimes be based on an idealised conception of the speaker is not necessarily a sign of ill-health in the relationship. Where the interpreter is a court and the speaker is a legislature, it is unlikely to be detrimental to the polity which both arms of government exist ultimately to serve.

For a court to approach the construction of a legislated text as if that text were the product of ‘reasonable persons pursuing reasonable purposes reasonably’,<sup>89</sup> might sometimes be unrealistic. But as a working hypothesis in a liberal democracy, it is hardly unreasonable.

88 I owe this way of putting it to Justice Nye Perram.

89 Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, William N Eskridge and Philip P Frickey (eds), (Foundation Press, 1994) 1378.