

ARE LEGISLATIVE INTENTIONS REAL?

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In Lacey v Attorney-General (Qld), six members of the High Court asserted that the legislative intention is not an objective collective mental state and that such a state is a fiction. They also asserted that the legislative intention is ascertained by applying the rules of construction. This article considers whether it follows from these assertions that there is no such thing as a true intention behind an Act. The article contends that legislative intentions should be conceptualised as intentions taken to have been acted on, rather than formed, by the legislature. It further contends that when conceptualised that way, it can be seen that the intentions ascertained by applying the rules of construction can be real or fictional. The article concludes that acceptance of that proposition would not affect the way the courts interpret legislation under the existing rules of construction, but that it would limit the extent to which those rules can be modified.

I INTRODUCTION

In *Lacey v Attorney-General (Qld)*, six members of the High Court of Australia made the following assertions regarding the concept of legislative intention:

The legislative intention ... is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. 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.¹

Does it follow from these assertions that there is no such thing as a true intention behind an Act of Parliament? The purpose of this article is to consider that question, which has significant implications for the functioning of democracy and the rule of law. The High Court's basic approach to statutory construction, including the above assertions, will not be questioned in this article. Instead, this article considers whether there can be a true intention behind an Act of Parliament and, if so, whether such a conclusion has any relevance to the law in a practical sense.

For this article, a 'real' or 'true' legislative intention means an intention formed or adopted by a legislator, while participating in the lawmaking process, as to

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1 (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted) ('*Lacey*').

the meaning, application or purpose of the proposed law or any specific part or parts of it. Only some intentions prevail in the lawmaking process. Those that do — whether real or fictional — will be referred to as intentions ‘recognised by the law’. A real legislative intention can be a ‘blanket intention’ formed by a legislator at the final reading to adopt the whole of the proposed law, including the manifested intentions that determine its meaning.

It will be argued that Parliament acts on prevailing intentions formed or adopted by individual legislators during the lawmaking process. Based mainly on that argument and the following associated propositions, it will be contended that there are true intentions behind each Act of Parliament.

Firstly, each Act is the product of intentions formed or adopted by individuals who participate in the lawmaking process.

Secondly, although the intentions formed or adopted by those individuals are true intentions, they are not always consistent or knowable; nor do they always qualify as being a legislative intention recognised by the law.

Thirdly, an intention formed or adopted by such an individual qualifies as being a legislative intention recognised by the law if it prevails in the lawmaking process. This occurs when Parliament acts on the intention by enacting legislation that gives effect to the intention according to the rules of construction. It is therefore possible for a legislative intention recognised by the law to be an actual, prevailing intention formed or adopted by one or more of the individuals who participated in the lawmaking process.

Fourthly, the courts are sometimes compelled by necessity to construct potentially fictional legislative intentions in order to interpret laws that are ambiguous, obscure, absurd, uncertain, inconsistent or partially invalid. Moreover, the rules of construction sometimes require the courts to disregard evident intentions or construct potentially fictional ones. For these reasons, the legislative intentions ascertained through the application of the rules of construction can be real or fictional.

Finally, the legislative intentions ascertained through the application of the rules of construction should be conceptualised as intentions taken to have been acted on by Parliament through the enactment of legislation. This would mean that the action of acting on the intention, rather than the intention itself, would be attributed to Parliament. Conceptualising legislative intentions in this way is consistent with the recognition that the constitutional lawmaking authority is Parliament, not any individual or faction within Parliament.

As indicated above, consideration will also be given to whether there is any practical relevance to the proposition that legislative intentions can be real. It will be contended that acceptance of that proposition would not affect the way Australian courts interpret legislation under the existing rules of construction, but that it would limit the extent to which those rules can validly be modified. This view will be based on implications arising from the separation of powers and system of representative and responsible government prescribed by the *Constitution*.

II HIGH COURT CASE LAW ON THE ROLE OF LEGISLATIVE INTENTION IN STATUTORY CONSTRUCTION

The case law of the High Court on the role of legislative intention in statutory construction has evolved over time and will no doubt continue to do so.

The common law inherited from the United Kingdom ‘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”’.²

In 1989, the joint majority in *John v Federal Commissioner of Taxation*³ referred with approval to the following statement made in 1987 by Mason J in *Babaniaris v Lutony Fashions Pty Ltd*: ‘The fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute.’⁴

In 1997, notwithstanding the above reference to ‘legislative intention as it is expressed in the statute’, the joint majority in *CIC Insurance Ltd v Bankstown Football Club Ltd* indicated that the courts may have regard to extrinsic material to ascertain the legislative intention:

It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is *intended* to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was *intended* to remedy.⁵

In 1998, the joint majority in *Project Blue Sky Inc v Australian Broadcasting Authority* pointed out that the interpreted ‘legal meaning’ of a statutory provision, which the legislature ‘is taken to have intended’, does not always correspond with the literal or grammatical meaning of the provision, and that such an interpretation may be required by the context, consequences, statutory purpose or canons of construction:

the 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. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the

2 *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948, 951 (Viscount Dilhorne), quoting 4 Co Inst 330, cited in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 336–7 (Aickin J); *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J) (‘Mills’); *Momcilovic v The Queen* (2011) 245 CLR 1, 44 [37] (French CJ) (‘Momcilovic’).

3 (1989) 166 CLR 417, 439–40 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

4 (1987) 163 CLR 1, 13 (Mason J).

5 (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (emphasis added) (citations omitted) (‘*CIC Insurance Ltd*’).

consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.⁶

In 2010, the joint majority in *Saeed v Minister for Immigration and Citizenship* departed from the principle adopted in *CIC Insurance Ltd*⁷ that the statutory context should be considered in the first instance: ‘it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction’.⁸

In 2011, as previously mentioned, the joint majority in *Lacey* asserted that the legislative intention is not an objective collective mental state, that such a state is a fiction, and that the legislative intention is ascertained through application of the rules of construction.⁹

The above case law clarifies how the legislative intentions recognised by the law are ascertained. However, the existence of an intention does not depend on whether or how it is ascertained. Therefore, the fact that the legislative intentions recognised by the law are ascertained through the application of the rules of construction has no bearing on the question of whether there can be a true intention behind an Act.

III A NOTE OF CAUTION ABOUT USE OF THE TERM ‘RULES OF CONSTRUCTION’

Given the topic of this article, it is appropriate to express a note of caution about implications that could be drawn from the High Court’s use of the term ‘rules of construction’ in the landmark case of *Lacey*.¹⁰ Although that term aptly describes the nature of the relevant rules, it can be misleading. It arguably implies that the meanings of legislation do not exist until they are ‘constructed’ by the courts through application of the rules of construction. However, legislation comes into effect upon its commencement, which cannot occur unless its meanings also come into effect. The rules of construction are ‘known to parliamentary drafters’¹¹ and ‘accepted by all arms of government’.¹² Parliamentary drafters and members of Parliament take the rules of construction into account when drafting

6 (1998) 194 CLR 355, 384 (McHugh, Gummow, Kirby and Hayne JJ) (emphasis added) (citations omitted) (*Project Blue Sky*).

7 (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

8 *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 265 [33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (*Saeed*).

9 (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

10 *Ibid* 592 [44]. This is a landmark case, as it conclusively established that, for the purposes of statutory construction, the legislative intention is not ‘an objective collective mental state’, and is ascertained by applying the ‘rules of construction’: at 591–2 [43].

11 *Ibid* 591–2 [43].

12 *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

and amending proposed laws. They understand that each enacted law will, upon commencement, have the meanings that apply under the rules of construction. As pointed out by Keane J in *Magaming v The Queen*, '[t]he work of the legislature in laying down norms of conduct ... is anterior to the function of the judiciary'.¹³ This reflects the fact that the laws enacted by the legislature are posited laws that pre-exist their interpretation by the judiciary. Use of the term 'rules of construction' does not alter that fact.

It could be protested that the above reasoning is flawed as interpreting legislation is a judicial function and the meanings of legislation are constructed by the courts. The courts do sometimes construct new (as distinct from pre-existing) meanings of legislation (for example, when cases involving unforeseen circumstances arise), but that does not mean that every statute is devoid of any legal meaning until that meaning is constructed by a court. Hart theorised that every rule has a 'core of certainty' and a 'penumbra of doubt' as to its application.¹⁴ The distinction drawn by Hart between the core and the penumbra is open to question when the interpreter of the rule is the same authority that made it and controls its content and existence, as is often the case when the High Court interprets the common law. However, there must surely be some truth in that distinction when the interpreter of the rule did not make it and is bound by a constitutionally entrenched separation of powers, as is the case when a ch III court interprets Commonwealth legislation. Moreover, just as twilight does not invalidate the distinction between night and day, the fact that there is no clear line between the core and the penumbra does not invalidate the distinction between them.¹⁵ To use a common example, if a 'no vehicles in the park' rule applies to a particular park, there may be doubt as to whether the presence in the park of a military truck mounted on a pedestal as a war memorial would involve a breach of the rule. However, it would certainly be a breach of the rule to take a four-wheel-drive vehicle into the park, without any lawful excuse or defence, to practise off-road driving in the park.

The legislative meanings constructed by the courts are often readily identifiable ones that clearly already existed. Furthermore, the power of the courts to interpret legislation applies only to statutory provisions that require judicial interpretation in cases that come before the courts. Many statutory provisions have obvious meanings and are never judicially considered by the courts. Therefore, whilst the judiciary has the final say on the meanings of some statutory provisions, it does not have a monopoly on the interpretation of legislation and application of the rules of construction.

It follows that the meanings of legislation are not merely judicial constructions.

13 (2013) 302 ALR 461, 484 [104].

14 H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 123.

15 This twilight analogy was inspired by a similar use of it in relation to the distinction between merits review and judicial review: see Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4, 11.

IV SOME PREVIOUS CRITICISMS OF THE SUGGESTION THAT THERE IS NO TRUE INTENTION BEHIND AN ACT OF PARLIAMENT

In 2007, Justice French delivered a speech in which he referred to criticism by Francis Bennion¹⁶ of the suggestion that there is no true intention behind an Act of Parliament:

Bennion has written of legislative intention as ‘not a myth or fiction, but a reality founded in the very nature of legislation’ and has criticised as ‘anti-democratic’ the idea that there is no true intention behind an act of Parliament. He argues that the concept of legislative intention involves proper recognition of the source of the words being construed. On that basis its text will be seen as:

- (a) a text validated by a legislature which is treated by the constitution as sovereign and infallible, and whose members are all taken to share in the intention embodied in the text notwithstanding that certain of them may in fact have disagreed with, or been unaware of, some or all of the Act’s provisions; and
- (b) a text produced by a fallible drafter who is not a legislature but possesses an intention taken to be adopted by the legislature.

It would seem, with respect, that what is being spoken of by Bennion is an attributed and not a ‘true intention’, and consistently with his approach, legislative intention is not used in statutory construction to describe some antecedent mental state of the Parliament but rather an attributed intention based on inferences drawn from the statute itself.¹⁷

Chief Justice French revisited this topic in 2012 when he presented a paper on the relationship between the courts and Parliament. The published version of that paper¹⁸ includes the following comments on criticism by Professor Jeffrey Goldsworthy¹⁹ of the suggestion that there is no true intention behind an Act of Parliament:

This approach has been criticised by Professor Goldsworthy. He has referred to a number of matters which, in his view, militate in favour of the reality of legislative intention:

- the long history of courts asserting that the discernment of legislative intention is the object of statutory interpretation;

16 F A R Bennion, *Statutory Interpretation: A Code* (Butterworths, 4th ed, 2002).

17 Justice R S French, ‘Dolores Umbridge and Policy as Legal Magic’ (2008) 82 *Australian Law Journal* 322, 331–2 (citations omitted).

18 Chief Justice Robert French, ‘The Courts and the Parliament’ (2013) 87 *Australian Law Journal* 820.

19 Jeffrey Goldsworthy, ‘The High Court Term 2011’ (Paper presented at the Gilbert + Tobin Centre of Public Law 2012 Constitutional Law Conference, Sydney, 17 February 2012) 3–4.

- the application of maxims which only make sense on the basis that they clarify legislative intention;
- the use of legislative intention to justify the correction of drafting errors; and
- the making of implications, the use of statutory purpose and of context which are only meaningful as based upon or reflecting legislative intention.

I refer to those objections not to rebut them but because they make serious points which help inform ongoing discussion of this important issue affecting the theory of the relationship between the courts and the Parliament.²⁰

Chief Justice French's above reference to 'ongoing discussion of this important issue' signifies a recognition that the common law is still evolving in relation to the concept of legislative intention. Indeed, the High Court has not determined that there is no true intention behind an Act of Parliament. Rather, it has rejected as fictional the notion that the legislative intention is 'an objective collective mental state'.²¹

In late 2012, Richard Ekins' book defending the concept of real legislative intent was published.²² Ekins contends that the legislature forms and acts on intentions and that these intentions constitute the legislative intent:

The sceptical arguments fail to see the possibility of and the need for the legislature to constitute an agent. They assume that institutions or groups at large are incapable of joint action, coordinated by joint intention. I explain the social reality of joint action and intention in chapter 3, rejecting as wholly unsound accounts (which have been extended to the legislature) of group intention as the sum of the intentions of each member of the group. Such accounts fail even to grasp the nature of the relevant type of group, which is an association whose members act for some common end. Joint intention is, I argue, the common plan of action adopted by all members of the group to that end. The plan of action arises out of the interlocking intentions of the members of the group, but does not reduce to the intention of any one or more individual members.²³

As will be seen, Ekins' conception of legislative intent is in some respects similar to the corresponding conception expounded in this article. For example, he contends that 'the common plan of action adopted by all members' constitutes the legislative intent. Similarly, it will be argued in this article that a decision by Parliament to enact a law manifests a prevailing intention of individual members of Parliament to adopt the 'whole package' of that law, including the manifested intentions that determine its meaning. However, there is a significant difference

20 French, 'The Courts and the Parliament', above n 18, 825–6 (citations omitted).

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

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

23 *Ibid* 35.

between the two relevant conceptions of legislative intention. Ekins contends that the legislature forms and acts on intentions, whereas it will be argued in this article that the legislature acts on prevailing intentions formed or adopted by individuals.

In 2014, a joint article by Ekins and Goldsworthy supporting the reality of legislative intention was published.²⁴ That article summarises the conception of legislative intent expounded in Ekins' book.²⁵ It also reiterates the arguments (previously made by Goldsworthy)²⁶ listed in the above extract from Chief Justice French's paper on the relationship between the courts and Parliament.²⁷ The joint article also raises the following additional points supporting the reality of legislative intention: radical scepticism about legislative intention 'is not consistent with the constitutional grant of legislative power to Parliament' and is not 'conducive to the health of a democracy';²⁸ '[t]extual and contextual evidence of legislative intention is routinely used to resolve ambiguities';²⁹ '[s]tatutes sometimes refer to [the] legislative intention';³⁰ and 'sceptics about legislative intention cannot avoid resorting to it in practice because it is essential to the sensible interpretation of statutes'.³¹

V THE RELATIONSHIP BETWEEN LEGISLATIVE INTENTION AND STATUTORY PURPOSE

The proposition that legislative intentions can be real could be viewed as being inconsistent with the purposive approach to statutory construction mandated by the common law and legislation in each Australian jurisdiction. It is therefore appropriate in the current context to examine the relationship between legislative intention and statutory purpose. For the purposes of this article, it is convenient to examine that relationship before commencing the analysis of whether legislative intentions can be real.

The rules of statutory construction, both common law and statutory, require the courts to have regard to the statutory purpose when interpreting statutes.

Each of the Australian jurisdictions has a legislative requirement that interpretations promoting the statutory purpose are to be preferred to other

24 Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39.

25 Ekins, above n 22.

26 Goldsworthy, above n 19.

27 See French, 'The Courts and the Parliament', above n 18, 825–6.

28 Ekins and Goldsworthy, above n 24, 45.

29 *Ibid* 53.

30 *Ibid*.

31 *Ibid* 60.

interpretations.³² In addition, Victoria and the Australian Capital Territory have statutory bills of rights requiring statutes to be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.³³

With respect to common law requirements, the High Court has determined that '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute'.³⁴

The common law also recognises that the purpose of the statute 'may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning',³⁵ provided the construction chosen is 'reasonably open'.³⁶

In *Lacey*, the joint majority indicated the ways in which the statutory purpose may be identified:

The application of the rules [of construction] will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.³⁷

The High Court has also indicated that there are certain restrictions on what the courts can validly do when seeking to identify the statutory purpose. In *Australian Education Union v Department of Education and Children's Services*, the joint majority said: 'In construing a statute it is not for a court to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose'.³⁸

French CJ and Hayne J identified several other relevant restrictions in *Certain Lloyd's Underwriters v Cross*:

Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had

32 *Acts Interpretation Act 1901* (Cth) s 15AA; *Interpretation Act 1987* (NSW) s 33; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35; *Interpretation Act 1984* (WA) s 18; *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1978* (NT) s 62A.

33 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32 ('Charter Act'); *Human Rights Act 2004* (ACT) s 30.

34 *Project Blue Sky* (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).

35 *Ibid* 384 (McHugh, Gummow, Kirby and Hayne JJ).

36 *CIC Insurance Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

37 (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

38 (2012) 248 CLR 1, 14 [28] (French CJ, Hayne, Kiefel and Bell JJ) (citations omitted).

in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative ‘intention’ is to use a metaphor. ...

The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention. ...

The purpose of legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions.³⁹

Furthermore, as pointed out by Gleeson CJ in *Carr v Western Australia*, legislation rarely pursues a single purpose at all costs:

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. ... That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.⁴⁰

Crennan, Kiefel, Bell, Gageler and Keane JJ quoted the above (excluding its final sentence) passage with approval in *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd*.⁴¹

Both of the Australian statutory bills of rights⁴² are examples of legislation that does not pursue a single purpose at all costs. Each of these Acts strikes a particular balance between the general purpose of protecting the prescribed rights and the need to prioritise conflicting rights and ensure non-absolute rights are appropriately limited. The balance struck in each Act is that the prescribed rights may be subject under law only to limits that are reasonable and demonstrably justified in a free and democratic society.⁴³ This has significant implications for courts interpreting Victorian or Australian Capital Territory statutes. Uncritical application of the principle of legality by these courts could result in reasonable and demonstrably justified limits on the prescribed rights being interpreted out

39 (2012) 248 CLR 378, 389–90 [25]–[26] (citations omitted) (‘*Cross*’).

40 (2007) 232 CLR 138, 142–3 [5] (‘*Carr*’).

41 (2013) 248 CLR 619, 632–3 [40]–[41].

42 *Charter Act*; *Human Rights Act 2004* (ACT).

43 *Charter Act* s 7(2); *Human Rights Act 2004* (ACT) s 28.

of existence. That result would be contrary to the manifest legislative intention to allow the prescribed rights to be subject under law to such limits.

Murray Gleeson has also pointed out that some legislation ‘pursues inconsistent purposes. In the case of a complex statute that has been amended many times, and is the work of dozens of differently constituted legislatures, this is highly likely’.⁴⁴

In Chief Justice French’s paper on the relationship between the courts and Parliament, he identifies that it is possible in some circumstances to determine a purpose of a law without exploring the intention of Parliament: ‘It is possible to determine the purpose of a constructed thing, be it a tool or a law, without exploring the intention of its maker. I may look at the human eye and say its purpose is to enable its possessor to see. That does not answer the question whether it evidences a creator’s intention.’⁴⁵

As identified by Chief Justice French, a purpose served by a constructed thing might not be an intended purpose. If a human eye supports a cancerous growth, it does not necessarily follow that an intended purpose of that eye is to support a cancerous growth. If a law regulating the treatment and transportation of live cattle reduces the exportation of live cattle, it does not necessarily follow that an intended purpose of that law is to reduce the exportation of live cattle. It is therefore contended that a purpose served by a law should not be counted as being a statutory purpose unless the statutory text or context indicates that the relevant law is intended to serve that purpose. According to that view, statutory purpose is a product of legislative intention.

In *Lee v New South Wales Crime Commission*, French CJ expressed the view that the concept of statutory purpose ‘is not logically congruent with that of legislative intention, although the two may coincide’.⁴⁶ However, if it is accepted that statutory purpose is a product of legislative intention, it follows that the concept of legislative intention relates to the intended purposes of statutes, not just to their intended meaning and application. Intentions as to purpose are therefore a category of legislative intention. Nevertheless, it is acknowledged that the text and context of a law sometimes manifest conflicting intentions. For example, the intended meaning of a provision may be inconsistent with the intended purpose of the involved law or the intended meaning of another provision.

The notion that the legislative intention as to the purpose of a statute may affect the legal meaning of that statute appears to be inconsistent with Bennion’s view of the relationship between legislative intention and statutory purpose. He contends that ‘[t]he distinction between the purpose or object of an enactment and the legislative intention governing it is that the former relates to the mischief to which the enactment is directed and its remedy, while the latter relates to the legal meaning of the enactment’.⁴⁷ It is true that the legislative intention as to the

44 Murray Gleeson, ‘Statutory Interpretation’ (Paper presented at the 24th National Convention of the Taxation Institute of Australia Justice Hill Memorial Lecture, Sydney, 11 March 2009) 13.

45 French, ‘The Courts and the Parliament’, above n 18, 826.

46 (2013) 302 ALR 363, 386 [45].

47 Bennion, above n 16, 418.

meaning of a statute may affect the legal meaning of that statute, but so may the legislative intention as to the purpose of the statute. This much is evident from the rule of construction requiring preference to be given to interpretations that promote the intended statutory purpose.

The existence of that rule of construction does not mean that legislative intentions can be disregarded when the rule is applied. Rather, it means that in cases where the apparent intention as to the meaning or application of a statutory provision is inconsistent with the apparent intention as to the purpose of the involved law, preference is to be given to an interpretation that is consistent with the latter intention, *provided* that interpretation is ‘reasonably open’⁴⁸ and there is no ‘contrary intention’.⁴⁹ Such a contrary intention will exist if the relevant statutory text or context manifests an intention to modify or limit the statutory purpose, or to strike a balance between that purpose and other interests.⁵⁰ Thus, the purposive approach to construction applied by Australian courts is informed by the legislative intentions ascertained by the courts.

It is not clear why the High Court has adopted the principle that the purpose of a statute ‘resides in its text and structure’.⁵¹ There is no constitutional requirement that each statute must expressly or impliedly convey its intended purpose. For example, the validity of an Act prescribing a dog registration scheme would not depend on whether the intended purpose of the scheme is indicated in the Act. On the other hand, it makes sense that an intention or intended purpose expressed by individual members of Parliament should not determine the meaning of an Act unless the intention or intended purpose has been acted on through the words of the Act. Perhaps that is the reason, or one of the reasons, why the High Court has adopted the above principle. Nevertheless, as indicated above, it is constitutionally permissible for an intended purpose to be acted on through the words of an Act without that purpose being indicated in the Act. In light of this fact, the principle that the purpose of a statute resides in its text and structure appears to be merely a legal fiction. In any event, that principle makes little difference in practice as the High Court has clarified that it is permissible for the courts to identify the statutory purpose ‘by appropriate reference to extrinsic materials’.⁵²

48 *CIC Insurance Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ). Obviously there are some unavoidable exceptions to the requirement for the construction to be reasonably open. For example, the partial invalidity of a law may force a court to give a construction that is not reasonably open.

49 With the exception of South Australia, all of the Australian jurisdictions have a general provision in their Interpretation Acts to the effect that the application of the respective Act is subject to a contrary intention: *Acts Interpretation Act 1901* (Cth) s 2(2); *Interpretation Act 1987* (NSW) s 5(2); *Acts Interpretation Act 1954* (Qld) s 4; *Acts Interpretation Act 1931* (Tas) s 4(1); *Interpretation of Legislation Act 1984* (Vic) s 4(1); *Interpretation Act 1984* (WA) s 3(1); *Legislation Act 2001* (ACT) s 6; *Interpretation Act* (NT) s 3(3). Although the *Acts Interpretation Act 1915* (SA) does not contain a similar general provision, s 22(1) of that Act prevents the adoption of a construction, promoting the statutory purpose, that is not ‘reasonably open’.

50 *Carr* (2007) 232 CLR 138, 142–3 [5] (Gleeson CJ).

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

52 *Ibid.*

Moreover, regardless of whether or not the purpose of a statute resides in its text and structure, the purpose of each Act is part of the overall package that determines its meaning. As explained later in this article, that package comprises not just the words in the Act but also the intentions, including intentions as to purpose, that clarify and thus determine the meanings of those words.

As identified earlier, French CJ and Hayne J cautioned in *Cross* that '[d]etermination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted'.⁵³ Mason CJ, Wilson and Dawson JJ provided a similar caution in *Re Bolton; Ex parte Beane* when they said that '[t]he words of a Minister must not be substituted for the text of the law'.⁵⁴

In a similar vein, Lord Steyn has pointed out that 'a minister speaks for the government and not for parliament' and that '[t]he statements of a minister are no more than indications of what the government would like the law to be'.⁵⁵ Although that is true, it is also true that the statements of a Minister in a second reading speech are made in his or her official capacity as a member of Parliament in accordance with parliamentary standing orders that apply to every member who presents a Bill. Such statements are relevant to the task of interpretation because they were presented to Parliament as part of its deliberative processes, not because they indicate the Minister's intentions. For example, if a second reading speech provides evidence that a statutory provision is intended to implement a particular recommendation from a coronial inquest, it makes sense that the courts should be permitted to take that evidence into account when seeking to identify the intended purpose of the relevant provision.

It is true that the information provided in the second reading speech might be inconsistent with the statutory text, but that possibility should not prevent the courts from taking the second reading speech into account. Any intention or purpose indicated in a second reading speech can be disregarded if it has not been acted on by Parliament through the words of the involved Act. As stated by Kirby J in *Nominal Defendant v GLG Australia Pty Ltd*, 'the Second Reading and other speeches in Parliament may only be used to throw light on the meaning of legislative words, to the extent that such speeches are sustained by the legislative text as subsequently adopted'.⁵⁶

This examination of the relationship between legislative intention and statutory purpose raises two important points of relevance to the suggestion that there is no true intention behind an Act of Parliament. Firstly, the concept of legislative intention relates to the intended purposes of statutes, not just to their intended meaning and application. Secondly, if statutory purpose is a product of legislative intention, and if there is no such thing as a real legislative intention, it must be

53 (2012) 248 CLR 378, 389 [25].

54 (1987) 162 CLR 514, 518.

55 Johan Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5, 14.

56 (2006) 228 CLR 529, 555 [82] (citations omitted).

concluded that there also is no such thing as a real statutory purpose. However, if the following analysis is accepted, that conclusion does not apply as the legislative intentions acted on by Parliament can be real.

VI ANALYSIS OF WHETHER LEGISLATIVE INTENTIONS CAN BE REAL

A *The Common Law Approach to Intentions in the Fields of Criminal Law and Contract Law*

In the field of criminal law, the principle of mens rea recognises the reality of intentions and that their existence is provable in some circumstances:

Where the offence charged is the commission of a proscribed act, a guilty mind exists when an intention on the part of the accused to do the proscribed act is shown. The problem then is one of proof. How does one prove the existence of the requisite intention? Sometimes there is direct evidence in the form of an admission by the accused that he intended his conduct to involve the forbidden act. More often, the existence of the requisite intention is a matter of inference from what the accused has actually done. The intention may be inferred from the doing of the proscribed act and the circumstances in which it was done.⁵⁷

It is further recognised in the field of criminal law that it is possible for two or more members of a group individually to intend that a ‘common design’ should be carried out: ‘the present state of the authorities suggests that there can be no conspiratorial agreement unless the accused and his or her co-conspirators ... intend that the common design should be carried out’.⁵⁸

The common law also recognises the reality of intentions in the field of contract law: ‘Contractual construction depends on finding the meaning of the language of the contract — the intention which the parties expressed, not the subjective intentions which they may have had, but did not express’.⁵⁹

The above reference to ‘the intention which the parties expressed’ and ‘the subjective intentions which they may have had’ is an implicit recognition that parties to contracts are capable of forming or adopting real contractual intentions.

57 *Bahri Kural v The Queen* (1987) 162 CLR 502, 504 (Mason CJ, Deane and Dawson JJ) (*‘Bahri Kural’*).

58 *Peters v The Queen* (1998) 192 CLR 493, 516 [55] (McHugh J).

59 *Byrnes v Kendle* (2011) 243 CLR 253, 284 [98] (Heydon and Crennan JJ) (citations omitted).

B Arguments in Favour of the View That Legislative Intentions Cannot Be Real

Why does the common law recognise the reality of criminal and contractual intentions, but regard the concept of legislative intention as being a metaphor?⁶⁰ The apparent answer to that question is twofold: firstly, ‘neither individual Members of Parliament necessarily mean the same thing by voting on a Bill “or, in some cases anything at all”’;⁶¹ and secondly, legislative intentions are ascertained through application of ‘the rules of construction’.⁶² Ironically, the common law recognises that groups of judges are capable of acting on intentions formed by individual judges,⁶³ but apparently fails to recognise that groups of legislators are capable of acting on intentions formed by individual legislators.

The following points also support the view that there is no true intention behind an Act of Parliament. Firstly, the votes of individual members of Parliament are not necessarily indicative of their true intentions as they sometimes vote against their own wishes out of loyalty to their party or fear of the consequences of displeasing a group or individual such as a party whip, party faction or the voting public. Secondly, members of Parliament sometimes vote for a Bill but do not support some of it. Thirdly, members of Parliament sometimes have no or very limited knowledge of the provisions of a Bill, or may be mistaken in their understanding of its meaning. Fourthly, as pointed out by Lord Steyn, a legislative intention expressed in one house of a bicameral legislature might not be known or shared by members of the other house.⁶⁴ Fifthly, Max Radin, Ronald Dworkin, Jeremy Waldron and others contend that because an intention can be formed only in an individual’s mind, it is not possible for Parliament to form an intention.⁶⁵ Finally, Jeremy Waldron argues that the procedures and voting rules of Parliament operate as a machine that produces legislation that may not reflect the intentions of any of the legislators who enacted it.⁶⁶

The above points provide grounds for the view that it is not possible to identify and aggregate the true intentions of individual members of Parliament to reveal real legislative intentions shared by a majority of Parliament. This article concurs with this view but argues that it is nevertheless possible for Parliament to act on real legislative intentions.

60 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 132 [389] (Hayne and Kiefel JJ) (*‘Pape’*); *Cross* (2012) 248 CLR 378, 389 [25] (French CJ and Hayne J), 405 [70] (Crennan and Bell JJ).

61 French, ‘The Courts and the Parliament’, above n 18, 824–5, quoting *Mills* (1990) 169 CLR 214, 234 (Dawson J) (citations omitted).

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

63 Each judge’s formal written opinion as to the decision to be given by the court is an expression of intention as to what decision should be given. When the judges are divided in opinion, the question is decided according to the decision of the majority, if there is a majority. See *Tasmania v Victoria* (1935) 52 CLR 157, 184–5 (Dixon J). In this way, courts act on the prevailing intentions of individual judges.

64 Steyn, above n 55.

65 Max Radin, ‘Statutory Interpretation’ (1930) 43 *Harvard Law Review* 863, 869–70; Ronald Dworkin, *Law’s Empire* (Hart Publishing, 1998) 336–7; Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) ch 6.

66 Waldron, above n 65.

C A Proposed Concept of Prevailing Legislative Intentions Acted on by Parliament

Like courts, Parliaments are decision-making bodies. The enactment of a law requires a decision by Parliament. The making of a decision by a person or group of persons requires choosing between options, which in turn requires the formation or adoption of an intention or intentions. Therefore, a decision by a person or group of persons cannot be made without an intention or intentions being formed or adopted.⁶⁷ This applies even in cases where the only real intention formed or adopted is to choose the option identified by a machine, process or toss of a coin. It follows that each Act of Parliament is the product of human intentions.

Although a decision by a person or group of persons cannot be made without an intention or intentions being formed or adopted, it is possible that such a decision may not reflect any actual intention of any individual. For example, the decision-making rules of a group may provide for a system of preferential or sequential voting that makes it possible for an option to be acted on by a decision of the group even though none of its members intended that option to be chosen. This can occur when there is no final vote on the final proposal resulting from the preferential or sequential voting. Paradoxically, in that situation the decision may be an unintended outcome of the intentions that led to it. As explained later, however, Parliament's decision-making rules do include a final vote on the final proposal.

If it is accepted that an intention can be formed only in an individual's mind, it must also be accepted that it is not possible for a group to form an intention.⁶⁸ However, that proposition is highly contested,⁶⁹ and this article neither accepts nor rejects it. Instead of arguing for or against the possibility of group intentions, this article argues that, provided the necessary decision-making rules are in place, it is possible for a group to act on an intention formed or adopted individually by one or more persons.

Consider the case of a selection panel that has acted on an intention, formed or adopted individually by one or more of its members, to nominate a particular candidate for appointment. The panel has acted on an intention, regardless of whether or not it is capable of forming one. Some of the panel members may have intended to nominate other candidates, but the panel did not act on those intentions. The intention acted on by the panel can be described as the prevailing intention as it prevailed in the decision-making process. The prevailing intention is not fictional or metaphorical; it is an actual intention individually formed or adopted by one or more real persons and acted on via a decision of the panel.

This article argues that this concept of prevailing intentions applies to legislative intentions. It is contended that the legislative intentions recognised by the law

67 It is acknowledged that people sometimes act without any intention to do so. However, not all actions are decisions. An action cannot be a decision if no decision-making occurred.

68 See the sources cited at above n 65 and accompanying text.

69 See, eg, Bennion, above n 16; Goldsworthy, above n 19; Ekins, above n 22; Ekins and Goldsworthy, above n 24.

should be conceptualised as prevailing intentions taken to have been acted on by Parliament through the enactment of legislation. Such intentions are prevailing intentions because they prevailed in the lawmaking process. An intention prevails in the lawmaking process when Parliament acts on it by enacting legislation that gives effect to the intention according to the rules of construction. It is therefore possible for a legislative intention recognised by the law to be an actual, prevailing intention formed or adopted by one or more of the individuals who participated in the lawmaking process.

Regardless of which or how many members of Parliament individually formed or adopted such an intention, it qualifies as being a legislative intention recognised by the law because it has been acted on by Parliament through legislation. Conversely, if an intention has not been acted on by Parliament through legislation, it does not qualify as being a legislative intention recognised by the law. This conclusion applies regardless of which or how many members of Parliament individually formed or adopted the intention. Accordingly, it is neither necessary nor appropriate for courts interpreting statutes to attempt to identify and aggregate the intentions of individual members of Parliament.

This concept of legislative intention is consistent with the recognition that the constitutional lawmaking authority is Parliament, not any individual or faction within Parliament. It is also consistent with Ekins' view that '[i]t is a mistake to take the importance of majority voting within the legislative process to establish that the majority has legislative authority such that intentions that are shared amongst its members count as the legislative intent'.⁷⁰ The proposed concept of prevailing intentions is not based on any particular view of the importance of majority voting. Rather, it is based on what actually happens when a law is enacted; namely, individual legislators form or adopt intentions, and some of those intentions (the ones that prevail in the lawmaking process) are subsequently acted on by Parliament through the enactment of legislation that gives effect to the prevailing intentions.

The intention of any individual member of Parliament has no relevance to the prevailing intention, except to the extent that the manifestation of an individual's intention (for example, a Minister's second reading speech) may in some circumstances⁷¹ assist in identifying the prevailing intention. Ultimately, what matters is the prevailing intention manifested by the statutory text and context, not the intention of any individual or faction.

In *Byrnes v Kendle*, Heydon and Crennan JJ expressed agreement with Charles Fried's view that 'words and text are chosen to embody intentions and thus replace inquiries into subjective mental states'.⁷² That view does not support the suggestion that there is no true intention behind an Act of Parliament. On

70 Ekins, above n 22, 52.

71 In *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518, Mason CJ, Wilson and Dawson JJ made the following statement regarding a Minister's second reading speech which was inconsistent with the statutory text: 'The words of a Minister must not be substituted for the text of the law.'

72 (2011) 243 CLR 253, 282–4 [95]–[97], quoting Charles Fried, 'Sonnet LXV and the "Black Ink" of the Framers' Intention' (1987) 100 *Harvard Law Review* 751, 759.

the contrary, it recognises that parliamentary drafters and legislators use words and text to convey their intentions. The proposition that legislative intentions should be conceptualised as prevailing intentions taken to have been acted on by Parliament is consistent with Fried's view. The prevailing intentions are often acted on through the enactment of statutory words that embody those intentions. As stated by Heydon and Crennan JJ, '[t]he construction of the statute depended on its intention, but only in the sense of the intention to be gathered from the statutory words in the light of surrounding circumstances'.⁷³

As pointed out by Fried, authors choose words and text to embody their intentions, but his suggestion that this means there is no need for 'inquiries into subjective mental states'⁷⁴ is confusing. It is true that an intention can be formed subjectively or objectively, but that has no relevance to the question whether it existed. For interpretative purposes, what matters is how the intention is identified, not how it was formed. Perhaps what Fried meant to suggest is that intentions can and should be identified objectively, without reference to extrinsic materials or other surrounding circumstances, by examining the words and text chosen by authors to embody their intentions. If that is what Fried meant, it appears he overlooked the fact that the construction of a statute depends on 'the intention to be gathered from the statutory words *in the light of surrounding circumstances*'.⁷⁵ Those circumstances are not always indicated by the statutory words. Not all legislative intentions are embodied in statutory words; sometimes they are revealed by consideration of the statutory context. In common with the intended meanings of words used in everyday communications, the intended meanings of words used in statutes cannot reliably be identified without having regard to the context in which the words were used. Under the existing rules of construction, legislative intentions are identified objectively having regard to the statutory words *and surrounding circumstances*.

A decision by Parliament to enact a law manifests a prevailing legislative intention that the relevant law is to take effect according to its terms and the intentions manifested by those terms. In effect, individual members of Parliament voting for the proposed law adopt the intentions manifested by that law. Thus, the intentions manifested by the law are included in the prevailing intentions of the members of Parliament. In the same way that a signature on a document manifests an intention to adopt the intentions recorded in and manifested by the document, a decision by Parliament to enact a law manifests a prevailing intention of individual members of Parliament to adopt the intentions recorded in and manifested by the relevant law. This blanket intention (described as such because it covers the whole of the proposed law) should not be confused with Ekins' concept of the 'standing intention' of the legislature, which is 'to form, consider, and adopt coherent, reasoned lawmaking proposals, such that on majority vote the legislature acts

73 *Byrnes v Kendle* (2011) 243 CLR 253, 283 [97] (citations omitted).

74 Fried, above n 72.

75 *Byrnes v Kendle* (2011) 243 CLR 253, 283 [97] (Heydon and Crennan JJ) (emphasis added) (citations omitted).

on the relevant proposal'.⁷⁶ The blanket intention is formed by individuals, not Parliament, and applies only to the proposed law under consideration by the individual forming the intention.

It could be argued that this analysis is flawed, as one supposedly cannot adopt an intention without knowing what it is. The answer to that argument is that the whole package of the proposed law is knowingly adopted, even though some members voting for the proposed law might not be aware of or support some of its provisions. Members of Parliament do know what they are adopting — the whole package. Ekins makes a similar argument:

The key move that I propose is to shift the focus from the aggregate of the intentions of individual legislators and towards the plan of action that is open to all legislators. ...

The intention of the group is the plan of action that its members adopt, and hold in common, to structure how they are to act if they are jointly to achieve some end. When the members play their part in the plan, and carry it out to completion, the group has acted on its intention.⁷⁷

When individual members of Parliament vote for a Bill at the third reading, they do so in the knowledge that their understanding of the meanings of particular provisions may differ from that of some of their parliamentary colleagues. They also know that the judiciary has the final say on the interpretation of legislation and legislative intentions in accordance with the rules of construction. Moreover, they know that their vote for the Bill is a vote for all of it to take effect according to its terms and the intentions manifested by those terms, including any provisions that they are unaware of or do not support. They adopt the whole package of the proposed law, including the manifested intentions that determine its meaning, as they are aware that voting on a Bill at the third reading is an all-or-nothing proposition. Of course, they do not consciously turn their minds to these considerations when voting. Rather, they simply intend that the proposed law be given effect, which necessarily entails giving effect to its manifested intended meanings.

Intentions are an indispensable part of the package of each law, as they are a determinant of its meaning. As pointed out by Ekins and Goldsworthy, 'every statute includes "inexplicit content", including ellipses and tacit assumptions, *which is revealed by attention to context and purpose*'⁷⁸ Laws are not just words; they are words with particular, *intended* meanings. An interpretative approach of strict textualism that disregards intentions is incapable of reliably identifying the *intended* meanings. In the same way that the surrounding light shining on an object is a determinant of its colour appearance, the intentions manifested by the circumstances surrounding the making of a verbal or written communication are a determinant of its meaning. For example, the meaning of the clause 'bill

76 Ekins, above n 22, 219.

77 Ibid 9–10.

78 Ekins and Goldsworthy, above n 24, 67 (emphasis added).

posters will be prosecuted' necessarily depends on the intention manifested by the relevant text and context — not just on dictionary definitions. That clause would have a particular meaning were it to appear in a prosecutor's report on whether to prosecute William ('Bill') Posters for an alleged assault. The same clause would have an entirely different meaning were it to appear on a sign attached to a wall bordering a public thoroughfare. In both cases, the manifested intention determines the applicable meaning. This principle applies equally to legislation. For example, if a traffic law provides that it is an offence to contravene a 'don't walk' signal at a pedestrian crossing, the intention behind that law (rather than the literal meaning of its words) would clarify and thus determine that in this context 'don't walk' also means 'don't run'.

Thus, although it is true that the role of the courts in interpreting legislation is to determine 'the meaning of the words which Parliament used',⁷⁹ such an interpretation cannot occur without ascertaining the manifested intentions that determine the meaning.

The common law recognises that individuals are capable of adopting in full the terms and intentions expressed in an instrument without knowing what they are:

It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents ... whatever they might be. ...

Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution.⁸⁰

For example, when a party acting in good faith enters into a contract containing detailed specifications for the construction of a thing, that party adopts all of the specifications and intentions expressed in the contract, even if he or she has not read them. In subsequent litigation, that party could honestly and correctly claim that he or she actually intended the involved thing to be constructed according to the specifications set out in the contract.

The same principle applies where a member of Parliament votes for a Bill at the third reading. As already explained, the member adopts all of the terms of the Bill and the intentions manifested by those terms. The manifested intentions become the actual intentions of the member, even if he or she does not know what they are.

It is acknowledged that there are exceptions to the principle that a member of Parliament who votes for a Bill at the third reading adopts all of the terms of

79 *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591, 613 (Lord Reid).

80 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 180–2 [45]–[47] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

the Bill and the intentions manifested by those terms. As identified by Ekins, it is conceivable that a legislator may vote for a Bill although he or she does not have any intention for it to take effect: ‘Perhaps surprisingly, a legislator in the majority may also vote intending to defeat the proposal. This is possible if he reasons that his support for the bill may lead others to vote against it.’⁸¹ In such cases, however, the hidden intention does not qualify as being a legislative intention recognised by the law for the simple reason that it did not prevail in the lawmaking process and was not acted on by Parliament.

The concern could be raised that the possibility of some legislators holding such hidden intentions, or expressing false intentions through their votes, means that there is no way of knowing with certainty whether a majority intended the relevant law to take effect according to its terms and the intentions manifested by those terms. However, questions in Parliament are determined by aggregating members’ votes, not their actual intentions. As explained earlier, if an intention has been acted on by Parliament through legislation, it qualifies as being a legislative intention recognised by the law regardless of which or how many members of Parliament individually formed or adopted the intention. What counts is whether the intention has been acted on by Parliament through the enactment of legislation, not the number of members who formed or adopted the intention. The legislative power of Parliament is a power to enact legislation; it is not a power to govern by unlegislated intentions. As stated earlier, the constitutional lawmaking authority is Parliament, not any individual or faction within Parliament. This is why the focus of interpretation must remain on the intentions manifested by the statutory text and context, rather than on the intentions of any individual or faction.

There is also an argument that voting for a Bill at the final reading merely signifies an intention that it *be treated as law*, leaving open the question of how it is to be construed.⁸² That argument is analogous with arguing that a party’s signature on a contract merely signifies an intention to enter into *a* contract, as distinct from an intention to enter into *that* contract and accept all of its terms. As already explained, voting for a Bill at the final reading signifies an intention to adopt all of *that* proposed law — the whole package — including the manifested intentions that determine its meaning. The relevant intention does not relate to *how* the enacted law is to be construed, but it does relate to *what* is to be construed and given effect. As pointed out by Hayne and Kiefel JJ in *Pape*, ‘[i]t may greatly be doubted that legislation is ever passed with legislators intending less than full and complete operation of the statute according to its terms’.⁸³ For any enacted law, it will always be the case that some members of the enacting Parliament intended that law to take effect according to its terms and the manifested intentions that determine its meaning. Even if the members who voted with that intention constitute only a minority of the members who voted on the law, their intention prevailed by virtue of the fact that the law was enacted.

81 Ekins, above n 22, 12.

82 Thanks are due to one of the anonymous referees for raising this point.

83 (2009) 238 CLR 1, 132 [389].

Waldron rejects the suggestion that an enacted statute reflects an intention of those members of Parliament who vote for it at the final reading to adopt the whole package of the statute.⁸⁴ He argues that the final reading 'is purely an artefact of our particular parliamentary procedures'.⁸⁵ In support of that argument, he asserts that it would be possible to have procedures that enable the content of legislation to be determined without any final reading:

There might be a preliminary discussion during which all the issues likely to provoke a division were identified. General debate would ensue, at the conclusion of which members would feed their votes on the various issues into a machine which would produce the statute in its final form on the basis of the voting and promulgate it automatically to judges, officials, and the population at large.⁸⁶

Waldron appears to overlook the fact that the final reading is the culmination of the lawmaking process. It determines whether the final version of the proposed law, encompassing any amendments to it made by Parliament during earlier deliberations, is to be enacted. The fact that every clause of a Bill has been agreed to during voting on individual clauses does not guarantee that the Bill will be passed. At the final reading, a minority faction opposed to particular clauses may join with another minority faction opposed to different clauses to form a majority opposed to the Bill. For example, on 16 June 2009 the Australian Senate rejected the Australian Business Investment Partnership Bill 2009 (Cth) at the third reading when the Opposition and Greens joined in opposing the Bill, even though the Senate had agreed to its clauses, as amended.⁸⁷

Clearly, under Parliament's existing procedures, the final reading is an integral part of the lawmaking process. Waldron's description of the final reading as 'purely an artefact' of parliamentary procedures is inapt and misleading. Although it may be possible to devise procedures that would enable the content of legislation to be determined without any final reading, that possibility is irrelevant for present purposes. As explained above, under existing procedures, the final reading is an integral part of the lawmaking process. Parliament operates under those procedures, not hypothetical ones.

The final reading also has significant implications for Waldron's argument that the procedures and voting rules of Parliament operate as a machine that produces legislation that may not reflect the intentions of any of the legislators who enacted it.⁸⁸ It is true that the final version of a Bill might not reflect any legislator's wishes or preferences, or the intentions held by any legislator during earlier deliberations on the Bill. However, the vote at the third reading forces each participating member of Parliament to express an intention (real or false) as to whether the whole of the final version of the Bill should take effect according to its terms and

84 Waldron, above n 65, 126.

85 Ibid.

86 Ibid.

87 Commonwealth, *Parliamentary Debates*, Senate, 16 June 2009, 3362–5.

88 Waldron, above n 65.

the intentions manifested by those terms. Although the final version of the Bill is arguably produced by a machine, it cannot take effect unless enough members of Parliament individually express an intention (real or false) for that to occur.

Even if it is assumed that the intentions manifested by the final version of the Bill were fictional (as they supposedly were produced by a machine rather than in an individual's mind), those intentions became real when the individual legislators who voted for the Bill, intending it to take effect in full, adopted them.

Most of the key propositions raised above can be clarified by using a simple analogy. Imagine the following scenario. While taking a stroll you see a 'no junk mail' sign attached to a letter box. You do not know who owns or resides in the relevant dwelling. In this scenario, would there be a true intention behind the words on the sign? In view of the following points, which can equally be applied to any Act of Parliament, it is considered the answer to that question must be 'yes'. The sign (the instrument) conveys an intention, even though it is incapable of forming or adopting one. If there were no intention, the instrument would not be in place. The intention is a prevailing intention in the sense that it prevailed in the decision-making process. Even if the intention conveyed by the instrument was originally produced by a machine, process or committee rather than in an individual's mind, that intention is nevertheless real by virtue of the fact that it has been adopted individually by one or more persons. The intention is evidenced by what has been done and the surrounding circumstances. Although there may be uncertainty as to the intended meaning or application of the instrument in some circumstances (for example, whether a particular item is 'junk mail'), in many other circumstances the intended meaning and application of the instrument would be obvious and beyond doubt.

According to this analysis, legislative intentions are formed or adopted without Parliament operating as if it were a human mind. The prevailing legislative intentions acted on by Parliament are formed or adopted in the minds of individuals. Therefore, the conundrum of how a group can exercise a mental capacity unique to individuals need not be addressed.

If this analysis is accepted, it follows that the word 'legislative' in the phrase 'the legislative intention' should be understood as denoting that the legislature has acted on the involved intention through the enactment of legislation.⁸⁹

This focus on what Parliament has actually done reflects the approach taken in identifying intentions under the principle of *mens rea*. The existence of the intention is a matter of inference from what the accused 'has actually done' and 'the circumstances in which it was done'.⁹⁰ The High Court has adopted a similar approach, focusing on what has actually been done, in identifying the intentions of parties to contracts: 'Contractual construction depends on finding the meaning of the language of the contract — the intention which the parties expressed'.⁹¹

89 The same meaning could be conveyed simply by using the term 'the legislated intention'.

90 *Bahri Kural* (1987) 162 CLR 502, 504 (Mason CJ, Deane and Dawson JJ).

91 *Byrnes v Kendle* (2011) 243 CLR 253, 284 [98] (Heydon and Crennan JJ).

As explained below, acceptance of the proposition that legislative intentions can be real would not mean that every legislative intention identified by the courts is real.

D Potentially Fictional Legislative Intentions

Although the legislative intentions acted on by Parliament can be real, they are not always knowable or provable. Furthermore, it is impossible for members of Parliament to form or adopt intentions covering the meaning and application of legislation in every situation. As pointed out by Kirby J in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*, ‘in the nature of legislation, required, as it commonly is, to address multiple and unforeseeable circumstances, it is almost impossible to envisage, and provide for, every case to which the statute will apply’.⁹² The courts are sometimes compelled by necessity to construct potentially fictional legislative intentions in order to interpret laws that are ambiguous, obscure, absurd, uncertain, inconsistent or partially invalid. In addition, the accepted rules of construction sometimes require the courts to disregard evident intentions or construct potentially fictional ones.⁹³ It is therefore acknowledged that the concept of legislative intention applied by the courts is a metaphorical construct. But this does not mean that there can be no true intention behind an Act of Parliament.

E The Circumstances in Which Specific Legislative Intentions Can Be Real

All of the intentions formed or adopted by individual legislators are real, but the only intentions that qualify as being a legislative intention recognised by the law are those that prevail in the lawmaking process. It follows that a real legislative intention recognised by the law is an intention formed or adopted by one or more legislators that has been acted on by the legislature through the enactment of legislation that gives effect to the intention according to the rules of construction. This does not mean that every legislative intention ascertained through application of the rules of construction is real. Such an intention will not be real unless it was formed or adopted by one or more legislators during the lawmaking process.

It is true that the task for any interpreter of legislation is to ascertain its meaning by applying the rules of construction — not to ascertain whether there is any *real* intention affecting that meaning. Nevertheless, it is inevitable that the intentions ascertained through application of the rules of construction will often be the actual, prevailing intentions formed or adopted by individuals during the lawmaking process. This is to be expected, given that parliamentary drafters

92 (2005) 228 CLR 294, 341 [155].

93 For example, it is a presumption of the common law that ‘courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language’: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ) (*‘Plaintiff S157/2002’*), citing *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) (*‘Coco’*).

and legislators choose or adopt words and text to embody their intentions.⁹⁴ The prevailing intentions of those individuals are *real* because they were formed or adopted in the minds of individuals, and they are *legislative* because the legislature acted on them through legislation.

The statutory text and context often provide clear and conclusive evidence of a specific legislative intention. Consider the case of a law that prohibits certain conduct in ‘unmistakable and unambiguous language’.⁹⁵ In the absence of any contrary indication, it would be obvious that the law in question was intended to prevent the prohibited conduct. There could be doubt as to why it was intended to prevent the conduct, but the intention to do so would be beyond reasonable doubt. To say that such an intention did not exist until it was ‘constructed’ by a court is akin to saying that Australia did not exist until it was ‘discovered’ by Captain Cook. The intention may be uncertain in a penumbra of hard cases, but that is no reason to deny its certainty in the core of cases in which the intention is beyond reasonable doubt.⁹⁶

F Does the Suggestion That There Is No True Intention Behind an Act of Parliament Withstand Scrutiny When Applied to Real Acts?

The questionable nature of the suggestion that there is no true intention behind an Act of Parliament becomes readily apparent when that view is applied to real Acts. For example, the *Commonwealth Electoral Act 1973* (Cth) lowered the voting age to 18 years by amending s 39 of the *Commonwealth Electoral Act 1918* (Cth). That amendment manifests an unmistakable legislative intention to lower the voting age to 18 years.

It is acknowledged that there may also have been other legislative intentions behind the decision to lower the voting age to 18 years. Perhaps there was an intention to remove the anomaly of some young Australians being deemed old enough to die for their country in combat, but not old enough to vote. Some members of Parliament may have intended to support lowering the voting age in order to improve the electoral prospects of their political party. Nevertheless, despite the uncertainty as to whether such additional intentions existed, there remains, beyond reasonable doubt, a clearly manifested legislative intention to lower the voting age to 18 years.

It is an error of reasoning to think that because language is inherently ambiguous, multiple constructional choices are always available when determining the meaning a statutory provision. When the words of a statutory provision are considered in context, it is often the case that the meaning of the provision and

94 Fried, above n 72.

95 *Plaintiff S157/2002* (2003) 211 CLR 476, 492 [30] (Gleeson CJ); *Coco* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

96 See Hart, above n 14, 123, regarding the theory that every rule has a ‘core of certainty’ and a ‘penumbra of doubt’.

the underlying intention are beyond reasonable doubt. In truth, the attributed intentions ascertained by applying the rules of construction are often the real intentions of parliamentary drafters and legislators who chose or adopted the statutory words ‘to embody [their] intentions’.⁹⁷

Unlike the meaning of a work of art, the meaning of an Act of Parliament is not ‘in the eye of the beholder’. In any given set of circumstances, the meaning of an Act must remain constant.⁹⁸ The choices available to the interpreter of an Act are restricted by the pre-existing statutory text and context. Sometimes the intention acted on by Parliament is so manifestly clear that the interpreter has no choice but to recognise that intention, rather than to construct an alternative one. Just as any rational interpreter of Leonardo da Vinci’s *Mona Lisa* would agree that the painting undoubtedly manifests an intention to portray the image of a person, any rational interpreter of the *Commonwealth Electoral Act 1973* (Cth) would agree that it undoubtedly manifests an intention to lower the voting age to 18 years. That intention was formed or adopted by individuals who participated in the lawmaking process. It was embodied in legislation during that process, not at some later time by an interpreter or court. As identified in extrinsic material,⁹⁹ the introduction of legislation lowering the voting age to 18 years fulfilled an election commitment of the Whitlam government.¹⁰⁰ In light of the statutory text and context, the notion that there is no true intention behind that legislation is simply not credible.

Another relevant example is the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth), which manifests an unmistakable legislative intention to allow for the resumption of offshore processing of asylum seekers. The text and context of that Act, including the following amendments to the *Migration Act 1958* (Cth), provide conclusive evidence of that intention:

1 At the end of section 4

Add:

- (5) To advance its object, this Act provides for the taking of offshore entry persons from Australia to a regional processing country ...

25 Section 198A

Repeal the section, substitute:

97 Fried, above n 72.

98 A given set of circumstances includes the applicable statutory and common law. For example, the meaning of the statute being interpreted may have changed as a result of an express or implied legislative amendment, or of a common law development that affects the application of the involved statute. Also, the set of circumstances in a case will not be the same as the set of circumstances in an earlier case if the facts are not analogous.

99 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 1973, 486 (Leonard Keogh).

100 Gough Whitlam, ‘It’s Time for Leadership’ (Speech delivered at the Blacktown Civic Centre, Sydney, 13 November 1972).

Subdivision B — Regional processing

198AA Reason for Subdivision

This Subdivision is enacted because the Parliament considers that:

- (a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and
- (b) offshore entry persons, including offshore entry persons in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and
- (c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and
- (d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country ...

To suggest that there is no true intention behind the Act of Parliament in these circumstances is to entertain a fiction and ignore reality. The intention to allow for the resumption of offshore processing is beyond reasonable doubt, albeit there may be doubt as to whether or how such an intention applies in some circumstances.¹⁰¹

The suggestion that there is no true intention behind an Act of Parliament appears even more questionable when considering laws of historical significance and laws enacted in fulfilment of election commitments. Was there no true intention behind the *Slavery Abolition Act 1833* (Imp) 3 & 4 Will 4, c 73? Is it merely coincidence that laws enacted after elections often correspond with intentions expressed in election commitments?¹⁰²

G The Relationship between Real and Attributed Legislative Intentions

When a statement is made that a specified person or persons had or shared an intention, or acted on an intention, that intention or action inevitably is attributed to the specified person or persons. It is therefore true that the courts can only ever

101 Thanks are due to one of the anonymous referees for raising this point and drawing attention to this aspect of the High Court's decision in *Saeed* (2010) 241 CLR 252. In that case it was held that a provision which manifested an intention to exclude the natural justice hearing rule did not apply to offshore visa applicants. That ruling was based on the fact that the relevant provision included the qualifying words 'in relation to the matters it [the involved subdivision] deals with'.

102 It is acknowledged that the government's legislative intentions might not be shared by some or even a majority of the members of Parliament. After elections, however, it is often the case that intentions expressed in election commitments are acted on by Parliament through the enactment of legislation.

attribute legislative intentions, or the action of acting on them, to members of Parliament. It is also true that those intentions are constructed through application of the accepted rules of construction.¹⁰³ However, those facts do not preclude the existence of real legislative intentions.

To explain why this is so, it is useful to use again the analogy of a contract containing specifications for the construction of a thing. Suppose that the thing to be constructed is a concrete slab and that the specifications include a requirement for the slab to be 50 metres in length. In proceedings involving the contract, a court applies the accepted rules for construing contractual intentions and then attributes to the parties an intention for the slab to be 50 metres in length. In these circumstances, no rational person would consider that the intention as to the length of the slab cannot be real as it is merely an attributed intention, or that the intention did not exist until it was constructed by the court through application of the accepted rules of construction. When an attributed intention is identical to a real one, they are the same intention.

As demonstrated by this analogy, attributed intentions and real ones are not mutually exclusive. It is possible that a court may construct an attributed intention that is identical to or different from a real one. As the existence of any real intention does not depend on whether it is provable, the fact that an attributed intention is identical to or different from a real one will be knowable in some circumstances and unknowable in others. If the two are different, the attributed intention will prevail over the real one for interpretative purposes, but that is no reason to suppose that there can be no true intention behind an Act of Parliament.

The existence of a real legislative intention does not depend on whether or how it is ascertained. Conversely, an attributed legislative intention recognised by the law need not be real. The construction of a statute depends on its intention ‘only in the sense of the intention to be gathered from the statutory words in the light of surrounding circumstances’.¹⁰⁴ The attributed legislative intentions recognised by the law are ascertained by applying the rules of construction, not by searching for real intentions. There would be no point in searching for the real legislative intentions formed or adopted by individuals. Such intentions are often unknowable or inconsistent or do not assist in resolving the particular interpretative question faced by the court. In any event, what matters is whether the intention has been acted on through the statutory words, not whether the intention is real. Once again, none of these considerations provide any reason to suppose that there can be no true intention behind an Act of Parliament.

Although the courts do not search for real intentions when construing legislation, real intentions undoubtedly play a major role in determining the content and meaning of legislation. As pointed out earlier, each Act is the product of human intentions. Inevitably, many of the legislative intentions ‘to be gathered from the

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

104 *Byrnes v Kendle* (2011) 243 CLR 253, 283 [97] (Heydon and Crennan JJ) (citations omitted).

statutory words in the light of surrounding circumstances¹⁰⁵ are the prevailing real intentions of individuals who participated in the lawmaking process.

To accept that it is possible for there to be a true intention behind an Act of Parliament is simply to recognise that it is possible for Parliament to act legislatively on an intention formed or adopted by one or more individuals who participated in the lawmaking process.

VII DOES THE PROPOSITION THAT LEGISLATIVE INTENTIONS CAN BE REAL HAVE ANY RELEVANCE TO THE LAW IN A PRACTICAL SENSE?

The key proposition of this article is that the legislative intentions ascertained through application of the rules of construction can be real (or fictional) when they are conceptualised as prevailing intentions taken to have been acted on by Parliament through the enactment of legislation.

As indicated earlier, acceptance of that conception of legislative intention would require an interpretative approach that focuses on what Parliament has actually done. However, the existing rules of construction in Australia already require that approach. Saying that legislative intentions should be identified by focusing on what has been done is really just another way of saying that legislative intentions should be identified by focusing on the statutory text and context, which is what the courts in Australia already do.

Moreover, the fact that Parliament acts on intentions by giving legislative effect to them does not mean that every effect of a law is the manifestation of a legislative intention. Laws can have unintended effects. Even if it is accepted that Parliament acts on real intentions, the interpretation of any statute would still depend on 'the intention to be gathered from the statutory words in the light of surrounding circumstances'.¹⁰⁶

Therefore, acceptance of the proposed conception of legislative intention would not affect the way Australian courts identify legislative intentions under the existing rules of construction. Nor would any of the propositions made in this article make it easier for the courts to identify legislative intentions. There is no magic formula for doing so.

Nevertheless, conceptualising legislative intentions as prevailing intentions taken to have been acted on by Parliament, rather than as intentions taken to have been formed by Parliament, has potentially significant implications for the evolution of the rules of statutory construction in Australia. When legislative intentions are conceptualised that way, a compelling case can be made that many of the prevailing intentions taken to have been acted on by Parliament are real intentions that pre-exist their 'construction' by the courts.

105 Ibid.

106 Ibid.

If this proposition is accepted, it could limit the extent to which Australian courts can be empowered by legislation or the common law to depart from the manifested intentions acted on by Parliament. This is not merely a hypothetical question. It has relevance to the law in a practical sense.

In *Momcilovic*, for example, the appellant submitted that s 32 of the *Charter Act* was intended to enact a strong rule of construction akin to that found in s 3(1) of the *Human Rights Act 1998* (UK) c 42 ('*UK Act*'),¹⁰⁷ which imposes 'a very strong and far reaching'¹⁰⁸ interpretative obligation that 'may require the court to depart from the legislative intention'¹⁰⁹ to an extent greater than that permitted by the principle of legality.¹¹⁰ During the special leave hearing, Crennan J observed that '[t]he case bristles with some constitutional issues which do not really surface in the submissions before us today'.¹¹¹ At the close of that hearing, French CJ granted special leave and foreshadowed the issuing of s 78B notices covering certain constitutional issues, including the question whether s 32 confers a legislative function and, if so, whether this raises a question as to validity in the light of ch III of the *Constitution*.

Ultimately, a majority in *Momcilovic* rejected the appellant's submission that s 32 of the *Charter Act* was intended to enact a strong rule of construction akin to that found in s 3(1) of the *UK Act*.¹¹² As a result, the High Court did not decide whether Australian courts can validly be empowered to depart from the legislative intention to an extent greater than that permitted by the principle of legality. That question therefore remains open.

The concept of legislative intention is likely to become the subject of further consideration by the High Court within the next few years. The *Momcilovic* decision did not resolve the question of whether the proportionality test prescribed by s 7(2) of the *Charter Act* is intended to be applied as part of the process of interpreting statutes.¹¹³ When another case involving that question comes before the High Court, the Court may need to consider the extent to which courts interpreting Victorian statutes can validly be empowered to depart from the manifested intentions acted on by the Victorian Parliament.¹¹⁴

107 Vera Momcilovic, 'Appellant's Submissions', Submission in *Momcilovic v The Queen*, M134/2010, 17 January 2010, 13 [58].

108 *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264, 303 [28] (Lord Bingham) ('*Sheldrake*'), citing *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571 [30] (Lord Nicholls).

109 *Sheldrake* [2005] 1 AC 264, 303 [28] (Lord Bingham).

110 *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534, 646 [112] (Lord Phillips).

111 Transcript of Proceedings, *Momcilovic v The Queen* [2010] HCATrans 227 (3 September 2010) 486–8.

112 (2011) 245 CLR 1, 48–50 [47]–[51] (French CJ), 87–93 [150]–[171] (Gummow J), 123 [280] (Hayne J), 209–11 [542]–[546] (Crennan and Kiefel JJ), 250 [684] (Bell J).

113 For a detailed analysis of this aspect of the *Momcilovic* decision, see Will Bateman and James Stellios, 'Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1, 11–17.

114 Alternatively, the High Court might decide that 'the justification of limitations on human rights is a matter for the Parliament' and that the *Charter Act* does not have the effect of assigning that legislative function to the courts: *Momcilovic* (2011) 245 CLR 1, 44 [36] (French CJ).

When real legislative intentions are deemed to be non-existent, there is considerable scope for the courts to be empowered to depart from the manifested intentions acted on by Parliament. The deemed non-existence of real legislative intentions could be used to justify the introduction of new rules of construction extending the discretion of the courts in construing statutes. After all, if real legislative intentions do not exist, it is neither necessary nor possible to give effect to them.

As explained earlier, however, Parliament does have the power to act legislatively on the actual intentions of individuals involved in the lawmaking process. When legislative intentions are conceptualised as prevailing intentions taken to have been acted on by Parliament, it can be seen that many of the legislative intentions ascertained through application of the rules of construction are real intentions that pre-exist their ‘construction’ by the courts.

Once it is accepted that many of the legislative intentions ascertained through application of the rules of construction pre-exist their ‘construction’ by the courts, it becomes evident that there are constitutional limits to the extent to which Australian courts can be empowered by the common law or legislation to depart from the manifested intentions acted on by Parliament. Those limits do not involve any notion of parliamentary sovereignty or infallibility. Rather, they arise from the following constitutional requirements. Firstly, covering cl 5 of the *Constitution* states that all laws made by the Parliament of the Commonwealth under the *Constitution* ‘shall be binding on the courts’. Secondly, s 118 of the *Constitution* requires all Australian courts to give ‘[f]ull faith and credit’ to valid state laws. Thirdly, the separation of powers mandated by ch III of the *Constitution*¹¹⁵ requires the High Court ‘to keep within the province marked out for it as the judicial power of the Commonwealth’.¹¹⁶

The two potential constitutional impediments identified below also may limit the extent to which Australian courts can be empowered to depart from the manifested intentions acted on by Parliament.

Firstly, it is doubtful that an extensive power to modify valid legislation by way of interpretation, such as the power conferred by s 3(1) of the *UK Act*, can validly be conferred on any state or territory court. Such a conferral would undermine the operation of ch III of the *Constitution*. It would result in the High Court, which cannot exercise legislative power, losing its constitutionally mandated power to make final and conclusive determinations as to the meaning and validity of state and territory laws.¹¹⁷ The High Court would be unlikely to accept the proposition that the meaning of a law depends on the jurisdiction exercised by the court interpreting that law.

115 *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

116 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 403 (Windeyer J).

117 For a detailed explanation of this proposition, see Jim South, ‘Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)’ (2009) 28 *University of Queensland Law Journal* 143, 149–52.

Secondly, the legislative power of the Commonwealth must include the power of Parliament to act legislatively, subject to constitutional requirements, on the intentions of its members.¹¹⁸ The existence of that power to act is an inherent requirement of the constitutionally prescribed system of representative and responsible government. It is also an inherent requirement of democracy.

It is not suggested that the rules of statutory construction adopted by the common law or in legislation in Australia cannot be modified. Rather, it is contended that those rules cannot validly be modified *in a way that is incompatible with constitutional requirements*.

As explained earlier, Parliament acts on an intention when it enacts legislation that gives effect to that intention according to the rules of construction. Given that those rules determine the meanings of legislation and are modified from time to time, it could be argued that the question of whether legislative intentions can be real has no significance for constitutional purposes. According to that argument, the intentions that are given effect by a statute can change over time as a result of changes to the rules of construction. This could result in one real intention being substituted for another. This begs the question: why preference conformity to one legislator's intention over conformity to another's?¹¹⁹ The answer to that question is that not all real legislative intentions are equal for constitutional purposes. Only some of them prevail in the lawmaking process. Moreover, the rules of construction are a means to an end, not an end in themselves. In Australia, their purpose is to ascertain and give effect to the meanings of the laws enacted by Parliament, subject to constitutional requirements. The rules of construction undoubtedly can be modified, but they cannot validly be modified in a way that would require or permit a clearly manifested legislative intention to be disregarded for a reason that is incompatible with constitutional requirements.

If it is true that the intentions manifested by legislation are not real, this arguably constitutes a valid reason for disregarding them. That is why whether the reality of legislative intentions receives judicial recognition is a matter of importance. However, if it is accepted, as Heydon and Crennan JJ did in *Byrnes v Kendle*,¹²⁰ that 'words and text are chosen to embody intentions',¹²¹ then it must surely be accepted that many of the intentions manifested by statutory words are the real intentions of individuals who chose or adopted those words during the lawmaking process. In truth, many of the intentions manifested by legislation are real intentions that have been acted on by Parliament; they are not just products of the process of applying the rules of construction.

This article argues that the combined effect of the constitutional requirements listed above is that when the text and context of a valid Act manifest a clear and

118 Opinions may differ as to *how* Parliament acts on intentions. For example, the view could be taken that Parliament acts as a collective agent, or acts through the agency of its individual members, or simply acts through majority voting. Whichever view is taken on that question, the fact remains that Parliament can and does act legislatively on the prevailing intentions of its individual members.

119 Thanks are due to one of the anonymous referees for raising this question.

120 (2011) 243 CLR 253, 282–4 [95]–[97].

121 Fried, above n 72.

unmistakable legislative intention, the courts have a duty to give effect to that intention unless there is a constitutionally valid reason for not doing so. It could be protested that such an intention does not warrant judicial recognition as it is merely the intention of one or more individuals, not that of Parliament. That argument overlooks the fact that the intention is known beyond reasonable doubt and has been acted on by Parliament through the enactment of valid legislation. The intention is constitutionally significant because it has been acted on by Parliament, not because of who formed or adopted it. The courts should not undo that which Parliament is known to have done unless there is a constitutionally valid reason for taking that action.

It is impossible to envisage all of the constitutionally valid reasons for an Australian court not to give effect to a clear and unmistakable legislative intention acted on by Parliament through legislation. Such reasons would, for example, include that the intention is incompatible with the *Constitution*, or has been superseded by a more recent legislative intention, or would result in an unintended, manifestly absurd outcome. The mere fact judges disagree with the intention would not be a constitutionally valid reason not to give effect to the intention. Nor would the fact that giving effect to the intention would abrogate or limit a fundamental human right — unless, of course, there is an applicable constitutional impediment.

In raising these arguments, it is not suggested that the existing rules of statutory construction, both common law and statutory, are inappropriate. As pointed out by the High Court, those rules are known to parliamentary drafters and the courts.¹²² They play an important and democratically legitimate role in drafting and interpreting statutes. Nevertheless, the constitutionally mandated separation of powers and system of representative and responsible government limit the extent to which the rules of statutory construction can validly be modified.

In contrast to the United Kingdom, it is doubtful that Australian courts can validly be empowered by the common law or legislation to depart from the legislative intention (acted on by Parliament) to an extent greater than that permitted by the principle of legality. It could be argued that this limitation does not apply to the common law as it is ‘the ultimate constitutional foundation in Australia’.¹²³ However, the common law ‘must conform with the *Constitution*’ and its development ‘cannot run counter to constitutional imperatives’.¹²⁴ At the federal level, one of those imperatives is that ‘[t]he legislative power of the Commonwealth shall be vested in a Federal Parliament’.¹²⁵ As mentioned above, an inherent requirement of the constitutionally prescribed system of representative and responsible government is that the legislative power of the Commonwealth must include the power of Parliament to act legislatively (subject

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

123 *Wik Peoples v Queensland* (1996) 187 CLR 1, 182 (Gummow J), quoted in *Momcilovic* (2011) 245 CLR 1, 46 [42] (French CJ) (citations omitted); *Monis v The Queen* (2013) 249 CLR 92, 128 [60] (French CJ) (citations omitted).

124 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted).

125 *Constitution* s 1.

to constitutional requirements) on the intentions of its members. The introduction of a rule of construction that denies the existence of that power to act, or that renders the power ineffective, would be incompatible with the maintenance of the constitutionally prescribed system of government.

In an attempt to rebut the above propositions, a number of potential justifications could be advanced to support changing the rules of construction to empower the courts to depart from the legislative intention (acted on by Parliament) to an extent greater than that permitted by the principle of legality. Those potential justifications include:

- the need ‘to see the role of the judicial power ... as akin to that of a referee whose extraordinary constitutional responsibility is for the [political] game itself rather than a linesman whose only responsibility is to call in or out’;¹²⁶
- the consequent need for ‘judicial vigilance ... where political accountability is either inherently weak or endangered’;¹²⁷
- the associated desirability of improving the political process by ensuring that Parliament cannot abrogate or unjustifiably limit the human rights of minorities without appropriate electoral and political scrutiny;
- the need to circumscribe majoritarian democracy to prevent unjust or unfair outcomes for minorities;
- the need to ensure that Australia meets its obligations under international human rights instruments;
- an assumed acceptance by all arms of government of the relevant rule of construction; and
- the fact that Parliament has the power to override judicial interpretations of legislation.

The above factors may be relevant when considering whether to change Australia’s constitutional arrangements, but it is considered unlikely that they would suffice to justify making the relevant change to the rules of construction via the common law or ordinary legislation. That view is based on the following points. Firstly and foremost, as explained earlier the relevant rule of construction would likely be incompatible with ch III of the *Constitution* and the constitutionally prescribed system of representative and responsible government. Secondly, regardless of any acceptance of the change by the three arms of government, they do not have any valid authority, either individually or jointly, to circumvent a constitutional requirement or to effect an alteration of the *Constitution* without a referendum under s 128. Thirdly, given that legislative power belongs to the Parliament of the day, no Parliament would be able to bind its successors to accept this radical change to the constitutional relationship between Parliament and the judiciary.

126 Stephen Gageler, ‘Beyond the Text: A Vision of the Structure and Function of the *Constitution*’ (2009) 32 *Australian Bar Review* 138, 152. It is unknown whether Justice Gageler would consider that his theory on the role of judicial power justifies changing the rules of construction.

127 *Ibid.*

Finally, although it is theoretically possible (depending on the balance of power in the house or houses)¹²⁸ for Parliament to override judicial interpretations of legislation, that possibility would not validate any breach of the constitutionally mandated separation of powers.¹²⁹

The constitutional requirements referred to above limit the extent to which the international trend towards ‘judicialization of public policy’¹³⁰ can be followed in Australia. The ongoing debate generated by that trend is a contemporary manifestation of the centuries-old debate over whether the people can be trusted to govern themselves. On one side of the current debate is the view that unelected judges should have the power to construe legislation according to their assessments of the appropriate balance to be struck between conflicting rights and interests. This view is based primarily on the claim that unelected judges are best placed to perform such a balancing role impartially and fairly, as they are independent of the political branches of government and are not answerable to the electors. Regardless of the merits or otherwise of this argument, the question of whether Australian courts can validly assume or be given the relevant public policy role must be answered by reference to the applicable constitutional law as it is, not as one would like it to be. In Australia’s constitutional context and subject to limited exceptions arising from constitutional requirements,¹³¹ the validity of such a role is questionable if it involves courts determining the meanings of valid legislation according to *their* assessments (rather than the manifested legislative intentions) as to the appropriate balance to be struck between conflicting rights and interests. If the performance of a particular role by the courts is contrary to a constitutional requirement, it would be no answer to that impediment to say that Parliament intends the courts to perform the role, or that the courts are well suited for the role.

VIII CONCLUSION

The title of this article asks whether legislative intentions are real. According to the analysis undertaken, the answer to that question is both ‘yes’ and ‘no’. It is argued that some of the legislative intentions recognised by the law are real and

128 The fact that Parliament has not legislatively overridden a particular judicial interpretation does not necessarily mean that Parliament accepts the interpretation. If only one house of a bicameral legislature accepts the interpretation, it would be incorrect to say that Parliament accepts it.

129 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 16–17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

130 C Neal Tate and Torbjörn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press, 1995); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004); James Allan, *Democracy in Decline: Steps in the Wrong Direction* (Connor Court Publishing, 2014).

131 For example, the courts are sometimes required to balance conflicting rights and interests in cases where the validity of a law (for example, a law that burdens the freedom of communication on political or governmental matters) depends on whether that law satisfies a constitutional requirement for proportionality.

that others are fictional creations of the courts. The key propositions raised in support of that view are as follows:

1. A decision by a person or group of persons cannot be made without an intention or intentions being formed or adopted.
2. When one or more members of a group individually form or adopt an intention and the group acts on that intention via a decision, that decision manifests the prevailing intention of the members of the group.
3. The prevailing intention is not fictional or metaphorical; it is an actual intention individually formed or adopted by one or more real persons and acted on via a decision of the group.
4. A legislative intention formed or adopted by a legislator during the lawmaking process qualifies as a legislative intention recognised by the law if it prevails in the lawmaking process. This occurs when Parliament acts on the intention by enacting legislation that gives effect to the intention according to the rules of construction. It is therefore possible for a legislative intention recognised by the law to be an actual, prevailing intention formed or adopted by one or more of the individuals who participated in the lawmaking process.
5. A decision by Parliament to enact a law manifests a prevailing legislative intention that the relevant law take effect according to its terms and the intentions manifested by those terms.
6. The whole package of the proposed law is adopted.
7. Because legislative intentions are not always knowable or provable and do not cover the meaning and application of legislation in every situation, the courts are sometimes compelled by necessity to construct potentially fictional legislative intentions in order to interpret laws that are ambiguous, obscure, absurd, uncertain, inconsistent or partially invalid. In addition, the rules of construction sometimes require the courts to disregard evident intentions or construct potentially fictional ones.
8. The concept of legislative intention applied by the courts is therefore a metaphorical construct, but this does not mean that there can be no true intention behind an Act of Parliament.
9. In many cases, the statutory text and context provide clear and conclusive evidence of a specific legislative intention.
10. Attributed legislative intentions prevail over real ones for interpretative purposes, but that is no reason to suppose that there can be no true intention behind an Act of Parliament.

In summary, it is contended that although some of the legislative intentions recognised by the law are fictional creations of the courts, they usually do have a basis in reality.

It is also contended that acceptance of the proposition that legislative intentions can be real would not affect the way Australian courts interpret legislation under the existing rules of construction, but that it would limit the extent to which those rules can validly be modified. That view is based on implications arising from the separation of powers and system of representative and responsible government prescribed by the *Constitution*.

As stated earlier, it is not suggested that the High Court's basic approach to statutory construction is flawed. Nor is it suggested that there is any suspect motive behind the High Court's adoption of the view that the concept of legislative intention is a metaphor.¹³² Numerous obiter observations made by members of the High Court in the *Momcilovic*¹³³ case indicate that the Court is attentive to the need to confine itself to its constitutionally assigned role. Nevertheless, the idea that there is no true intention behind an Act of Parliament should be challenged as it has serious implications for the functioning of democracy and the rule of law. If, as claimed here, that idea is a fiction, then it is a dangerous one. If that fiction were to gain judicial acceptance, it could eventually provide the theoretical foundation for the development of rules of construction enabling or requiring judges to substitute their own preferences for those of the elected representatives in Parliament. The scope and temptation for judges to mould the law to their liking would be significant if it were deemed that they alone have the power to construct legislative intentions.

This supposedly exclusive power of judges arguably could be defended on the basis that it is simply an aspect of the rule of law. After all, the law is what the courts say it is. However, if the law were to become what judges in particular cases would like it to be, it would be reasonable to ask whether the rule of judges has been substituted for the rule of law.

132 *Pape* (2009) 238 CLR 1, 132 [389] (Hayne and Kiefel JJ); *Cross* (2012) 248 CLR 378, 389 [25] (French CJ and Hayne J), 405 [70] (Crennan and Bell JJ).

133 (2011) 245 CLR 1.