

A UNIFORM HERMENEUTIC THESIS: OBJECTIVITY AND THE HIGH COURT OF AUSTRALIA'S APPROACH TO INTERPRETATION ACROSS THE PRIVATE LAW

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At a broad level of generality, the orthodox approach to interpreting contracts, trusts, wills, security documents, company constitutions and so forth is the same: a search for the objective meaning to be attributed to the author or authors of the instrument (the 'uniform hermeneutic thesis'). This article has two primary objectives. The first is to respond to a common criticism of this uniform objective approach. The criticism is that, as each species of legal obligation is different, different rules of interpretation should apply when the given legal context changes. For example, why not ask the settlor of an inter vivos trust what she meant to say when an interpretational dispute arises? The second reason is to demonstrate that the explanations most commonly given in defence of an objective approach to interpretation, namely to promote legal certainty and economic efficiency, fail to capture the essential reason why the objective approach permeates the general law. The thesis put forward in this article is that an objective theory of interpretation is a justifiable aspect of private law because language (being a form of communication) does not operate unilaterally, but rather requires stable and dependable shared conventions. This argument is supported by the further claim that, where the author of a legal instrument utilises these publicly recognised conventions in order to affect her or his legal relations with others, she or he ought to be bound by those conventions. One cannot have the benefit of 'conventions for me but not for thee'.

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I INTRODUCTION

There's glory for you!' [Humpty Dumpty said to Alice]. 'I don't know what you mean by "glory",' Alice said. Humpty Dumpty smiled contemptuously. 'Of course you don't — till I tell you. I meant "there's a nice knock-down argument for you!'" 'But "glory" doesn't mean "a nice knock-down argument",' Alice objected. 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is', said Humpty Dumpty, 'which is to be master — that's all.'

When confronted with Humpty Dumpty's famous question from Lewis Carroll's *Through the Looking Glass*, as applied to the proper interpretation of a legal instrument, most private lawyers have a rote answer: Mr Dumpty's unexpressed subjective beliefs are irrelevant. No court will allow him to suggest that the words used in a private law legal instrument mean only what he subjectively chooses them to mean.² What is legally significant is the meaning that Mr Dumpty's words convey to the reasonable recipient of that communication. The lawyer will then caution that a failure to adopt this approach would detract from the objective approach to legal interpretation that permeates the general law. While lawyers (correctly) hold this principle of objectivity to be sacrosanct, this article argues that many of the most familiar reasons given in defence of the objective approach to legal interpretation fail to capture the essential reason *why* the objective approach permeates the general law. These commonly-cited reasons are likely to be familiar to readers:³ an objective approach to interpretation promotes certainty in attributing meaning to written instruments; there is little utility in departing from an objective approach, as it might be difficult to establish the actual state of mind of a relevant author regarding what the written instrument means; the objective approach is cost effective as it limits the evidence that can be adduced in the course of litigation by eschewing any inquiry into a relevant party's state of mind; and the objective approach protects third parties who may arrange their affairs based on their understanding of the meaning of a written instrument. While at first blush these reasons may appear to serve as attractive justifications for an objective approach to interpretation, however, they are properly understood as consequential and incidental benefits of an objective approach.

¹ Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking Glass* (Penguin Classics, 2009) 186.

² Cf John Locke, *The Works of John Locke in Nine Volumes* (Rivington, 12th ed, 1689) vol 1, 434: '[E]very man has so inviolable a liberty to make words stand for what ideas he pleases, that no one hath the power to make others have the same ideas in their minds that he has, when they use the same words that he does'. See also Glanville Williams, 'Law and Language — IV' (1945) 61(4) *Law Quarterly Review* 384, 384: 'Humpty Dumpty's theory was that supported by Locke, who laid it down that the significance of all words is perfectly arbitrary, and that every man has an inviolable liberty to make words stand for what ideas he pleases.'

³ See below nn 46–88 and accompanying text.

If the need to promote legal certainty or economic efficiency does not justify the objective approach to interpretation, then what is its justification? The thesis put forward in this article is that there is a sound, but generally underappreciated, underlying reason why an objective approach permeates the private law:⁴ simply put, since the very purpose of language is to enable communication between parties, there can be no such thing as an individual or internal subjective language.⁵ By its very nature, therefore, language can only sensibly be understood on the basis of the conventional understanding that is attributed to those words. It is my position that this claim is true in the context of the private law irrespective of whether we accept a formal distinction between the 'speaker meaning'⁶ and the 'sentence or conventional meaning'⁷ of an utterance⁸ (and I accept such a distinction).⁹ That is, the general law provides a strong analytical example of what

⁴ In the interests of brevity, the primary focus of this article is on the law of contract. However, the arguments deployed are nonetheless capable of applying to other private legal instruments (and could apply further still to areas of public law).

⁵ For examples of legal academic commentary that mostly support the thesis presented in this article see: Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 12–3, 87–8; Stephen Smith, *Contract Theory* (Oxford University Press, 2004) 271–9; David Goddard, 'The Myth of Subjectivity' (1987) 7(3) *Legal Studies* 263; Stephen Smith, *Atiyah's Introduction to the Law of Contract* (Oxford University Press, 6th ed, 2005) 149; Robert Stevens, 'The Meaning of Words and the Intentions of Persons' in Simone Degeling, James Edelman and James Goudkamp (eds), *Contract in Commercial Law* (Lawbook Co, 2016) 167; Mindy Chen-Wishart, 'Objectivity and Mistake: the Oxymoron of *Smith v Hughes*' in J Neyers, R Bronough, SGA Pitel (eds), *Exploring Contract Law* (Hart, 2009) 341, 345–7. In the context of public law see Richard Ekins and Jeffery Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39.

⁶ While the speaker meaning and sentence meaning of words will often coincide, they can come apart. For example, I am out for dinner with my wife and order a gammon steak from the waiter (being the only steak on the menu). I am unaware that a gammon steak is a pork dish and I mistakenly believe that I am ordering a beef steak. In this example, I have misused a word; I intended gammon to mean beef and I also intended to be taken by the waiter to have referred to beef (although my usage of the word gammon will not be understood as such by the waiter as my usage was unconventional). In this example, my mistaken reference to gammon can be termed the 'speaker meaning' to be ascribed to the word. On speaker meaning, see Goddard (n 5) 265–6. See also Ekins and Goldsworthy (n 5) 47, who have observed with respect to a non-objectively discernible speaker meaning: '[w]e might say: "That may be the meaning you intended to communicate, but it is not the meaning you did communicate"; or "That may have been what you meant, but it is not what your statement meant."' See also Robin Kar and Margaret Radin, 'Pseudo-Contract and Shared Meaning Analysis' (2019) 132 *Harvard Law Review* 1137, 1145–6.

⁷ That is, the meaning ascribed to an utterance by use of a narrow conventional standard. See John R Searle, 'What is Language: Some Preliminary Remarks' (2009) 11(1) *Ethics & Politics* 173, 193, who notes that it is 'the creation of conventional devices for performing acts of speaker meaning, which gives us something approaching sentence meaning, where sentence meaning is the standing possibility of speaker meaning. Sentence meaning is conventionalized.'

⁸ The term 'utterance' is used in this article to mean any 'communicative act'. For example, writing would constitute an 'utterance'.

⁹ The best explanation for the continuing relevance of the speaker's intentions in conferring meaning on a communicative act is derived from the fact that the conventional meaning of an utterance falls away if the recipient knows that the speaker is being disingenuous. See the example in Paul Grice, 'Meaning' (1957) 66(3) *Philosophical Review* 377, 383: 'If I frown spontaneously, in

is, at the very least partially, an externalist approach to language by asking what the reasonable recipient of the communication would have understood the author to mean. Put another way, an objective theory of interpretation is a justifiable aspect of the general law because language and communication do not operate unilaterally or internally but necessarily depend, at least in part, on the existence of a publicly recognised conventional device (that is, a multilateral, or at least bilateral, understanding of the proper use of the language). Further, where the author of a legal instrument utilises these publicly recognised conventional standards in order to effect legal relations with, or affect the legal position of, others then she ought to be bound by those standards. By using conventional standards to affect the legal position of others the author has 'given her word' to those others, and so cannot now resile from the objective meaning attributed to her utterance without undermining those standards. The author ought not to be able to take advantage of how the other party will typically grasp those conventions.¹⁰

Two important observations flow from the arguments presented in this article. First, the objective hermeneutic thesis set out by the High Court of Australia, which is applied consistently in the attribution of meaning to all instruments used in the private law, is coherent and justifiable. Second, any departure from the objective approach to interpretation would be unprincipled. Appreciating the underlying reasons for the objective approach to interpretation also assists in placing a number of contemporary debates concerning the law of interpretation into their proper context.

The article is divided into three substantive parts. Part II establishes what is meant by legal interpretation in contrast with legal construction. Part III explains why the other commonly cited justifications for the objective approach to interpretation, centring on the need to promote legal certainty and economic efficiency, ultimately provide insufficient reasons for the objective approach. Part IV

the ordinary course of events, someone looking at me may well treat the frown as a natural sign of displeasure. But if I frown deliberately (to convey my displeasure), an onlooker may be expected, provided he recognizes my intention, still to conclude that I am displeased. Ought we not then to say, since it could not be expected to make any difference to the onlooker's reaction whether he regards my frown as spontaneous or as intended to be informative, that my frown (deliberate) does not mean anything? I think this difficulty can be met; for though in general a deliberate frown may have the same effect (as regards inducing belief in my displeasure) as a spontaneous frown, it can be expected to have the same effect only provided the audience takes it as intended to convey displeasure. That is, if we take away the recognition of intention, leaving the other circumstances (including the recognition of the frown as deliberate), the belief-producing tendency of the frown must be regarded as being impaired or destroyed. Perhaps we may sum up what is necessary for A to mean something by X as follows. A must intend to induce by A: a belief in an audience, and he must also intend his utterance to be recognized as so intended.' See also the authorities listed at nn 99 and 118. For another example of a distinction between the content of what we say *using* language and what a speaker *intends* by using the language, see Saul Kripke, 'Speaker's Reference and Semantic Reference' (1977) 2(1) *Midwest Studies in Philosophy* 255, 262–6.

¹⁰ This argument does, however, leave room for an uncommon *bilateral* understanding of language. See the discussion at n 121 and accompanying text.

sets out what is meant by the objective approach to interpretation and provides what could be termed a ‘rights-based justification’ for this approach. Part V concludes.

II THE DISTINCTION BETWEEN INTERPRETATION AND CONSTRUCTION

In order clearly to define the thesis defended in this article, it is important to draw a distinction between legal interpretation and legal construction. This distinction is often overlooked (perhaps justifiably),¹¹ even by experienced lawyers.¹² The reader need not necessarily accept the meanings that I ascribe to the terms ‘interpretation’ and ‘construction’. It must surely be accepted, however, that there are two distinct concepts at play, and that howsoever we choose to label those concepts, there is a need to clearly distinguish between them. It follows that any objection to the account that I offer is likely to be semantic, not substantive.

The process of legal interpretation,¹³ as I use that term in this article, is understood to include two things: (i) discerning the conventional linguistic or semantic meaning of a legal text or document (finding the meaning of the text);¹⁴ and (ii) discerning inferences and implications that are to be ‘read into’, ‘drawn from’ or ‘implied into’ a legal text in order to ensure that the text is efficacious.¹⁵ In contrast, the process of legal construction is broader. The process of legal construction is not limited to discerning the meaning of a legal text, but includes establishing the ultimate legal effect to be given to that text. Thus, the term ‘construction’ is often used when applying what amounts to a substantive legal rule that changes the meaning of a text.¹⁶ As Lindley LJ observed in *Chatenay v The Brazilian Submarine Telegraph Co Ltd*:

¹¹ See below n 20 and accompanying text.

¹² See, eg, Lewison LJ’s interchangeable references to ‘interpretation’ and ‘construction’ in *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata Clo 2 BV* [2014] EWCA Civ 984, [39]. However, in Lewison’s leading text on contractual interpretation these two concepts are captured in various references as independent. See Kim Lewison, *The Interpretation of Contracts* (Sweet and Maxwell, 6th ed, 2015) 28 [2.01]. See also *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580, 1587 (Lord Steyn).

¹³ On the interpretation and construction distinction drawn in this article see also Elisabeth Peden, ‘Cooperation’ in English Contract Law — to Construe or Imply?’ (2000) 16(1) *Journal of Contract Law* 56, 57–8; Catherine Mitchell, *Interpretation of Contracts* (Routledge, 2007) 26–7; Lawrence Solum, ‘The Interpretation–Construction Distinction’ (2010) 27(1) *Constitutional Commentary* 95; James Allsop, ‘Characterisation: Its Place in Contractual Analysis and Related Enquiries’ in Degeling, Edelman and Goudkamp (n 5) 107–8.

¹⁴ These are the branches of linguistics known as semantics and syntax. The former considers the study of the meaning of words and sentences and the latter concerns the formal rules for creating proper sentences. For an accessible introduction to these concepts in the context of the law see Ryan Catterwell, *A Unified Approach to Contract Interpretation* (Hart, 2020) 45–8 [2–39]–[2–44].

¹⁵ This is the branch of linguistics known as pragmatics. That is, what speakers in a community do with language including what a listener can rationally infer from a speaker. On implications and what are termed ‘indirect speech acts’, see below nn 105–111 and accompanying text.

¹⁶ See n 13.

The expression 'construction', as applied to a document, at all events as used by English lawyers, includes two things: first the meaning of the words; and secondly *their legal effect, or the effect which is to be given to them.*¹⁷

Likewise, in *Paciocco v Australia and New Zealand Banking Group Ltd*,¹⁸ the question of whether an impugned contractual clause was a penalty was framed as a question of construction, and construction in that context referred to 'something beyond the attribution of legal meaning'.¹⁹ It encompasses the ultimate legal characterisation of the contractual rights in question.

While it is often the case that the terms interpretation and construction are used interchangeably in Anglo-Australian law,²⁰ this generally has little practical effect. This is because whenever a court tries to give legal effect to a text (be it a contract, trust, statute or otherwise) there is little substantive difference between the two concepts. Indeed, the two concepts become interdependent because an *interpretation* is given to a text *en route* to its ultimate legal effect.²¹ For example, as the law of contract gives effect to the parties' externally communicated intentions to be bound by certain promises (subject to formalities),²² it is no surprise that the meaning of those externally communicated intentions is typically the same as their ultimate legal effect. Therefore, a failure to delineate between the processes of interpretation and construction in the law of contract does not much matter when a court is simply giving effect to the meaning of the parties' agreement (and the same could be said about all manner of legal instruments).

However, the distinction between interpretation and construction becomes important when a court departs from the objective meaning of a contract and gives ultimate legal effect to an agreement through the application of external substantive legal rules (that is, rules *beyond* those pertaining to interpretation). Examples of construction in this sense include the rule against penalties, which limits contracting parties' legal powers to create consent-based remedies, and the doctrines of *Cy-pres* and perpetuities in the context of trusts, which are often

¹⁷ [1891] 1 QB 79, 85 (emphasis added), cited in *Life Insurance Company of Australia Ltd v Phillips* (1925) 36 CLR 60, 78 (Isaacs J). See also John Salmond, *Jurisprudence* (Sweet and Maxwell, 6th ed, 1920) 137.

¹⁸ (2016) 258 CLR 525.

¹⁹ Ibid [31] (Kiefel J, French CJ agreeing); [146] (Gageler J). See also NA Tiverios, 'A Restatement of Relief against Contractual Penalties (I): Underlying Principles in Equity and at Common Law' (2017) 11(1) *Journal of Equity* 1, 5–19.

²⁰ Joshua Getzler, 'Interpretation, Evidence, and the Discovery of Contractual Intention' in Degeling, Edelman and Goudkamp (n 5) 121 n 2; Mitchell (n 13) 26; Allsop (n 13) 107–8.

²¹ *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389, 396–7 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ).

²² Smith, *Contract Theory* (n 5) 57. See also Fried (n 5) 7–17; Charles Fried, 'The Ambitions of Contract as Promise' in Gregory Klass, George Letsas and Prince Saprai, *Philosophical Foundations of Contract Law* (Oxford University Press, 2014) 17; Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge University Press, rev ed, 2017) 17–19 [4:402]–[4:403]. For a critique of the promise theory of contract see Prince Saprai, *Contract Law Without Foundations: Toward a Republican Theory of Contract Law* (Oxford University Press, 2019) 22–39.

framed as questions of ‘construction’.²³ Where there is a difference between the meaning of a legal text applying the rules of interpretation on the one hand, and the ultimate legal effect given to the terms of an instrument applying a rule of construction on the other, a fundamental question is raised: what justification does the court have for failing to give effect to the objective meaning of the externally communicated rights and obligations contained in a legal instrument? It is not the purpose of this article to address the various moral and policy justifications raised by certain questions of legal construction. Rather, a distinction between interpretation and construction is drawn here to make clear that the scope of this article is limited to the former, and to emphasise that legal construction ought not be masked as interpretation. As Arthur Corbin correctly cautioned:

[T]he line separating mere interpretation from judicial construction, although logically quite clear, will always be practically indistinct and difficult of determination, especially because the courts so frequently construct under the guise of mere interpretation.²⁴

III FOUR COMMON BUT INSUFFICIENT JUSTIFICATIONS FOR THE OBJECTIVE APPROACH

A Framing the Issue

It is trite law that an objective theory of interpretation of written instruments permeates²⁵ the general law.²⁶ The expression ‘general law’ here includes both

²³ The doctrine of *Cy-pres* in the context of trusts, is said wholly to ‘belong to construction’: see Francis Lieber, *Legal and Political Hermeneutics* (Charles C Little and James Brown, 1839) 63. The same has been said about the rule relating to perpetuities in the context of trusts: see Solum (n 13), and the law relating to contractual penalties. See also, NA Tiverios, *Contractual Penalties in Australia and the United Kingdom: History, Theory and Practice* (The Federation Press, 2019) 62–63.

²⁴ Arthur Corbin, *Principles of the Law of Contract: With a Chapter on the Law of Agency* (Oxford University Press, 3rd (American) ed, 1919) 406.

²⁵ This proposition is correct insofar as we are concerned with the general interpretation of legal instruments. However, where fraud is involved, for example in the context of a sham trust, the court may engage in a wider inquiry that considers evidence as to parties’ states of mind. For a strong academic defence of how the sham trust doctrine can be reconciled with the objective approach to interpretation, see Simon J Douglas and Ben McFarlane, ‘Sham Trusts’ in H Conway and R Hickey (eds), *Modern Studies in Property Law* (Hart, 2017) 237.

²⁶ *Byrnes v Kendle* (2011) 243 CLR 253, 275 [59] (Gummow and Hayne JJ), 282–92 [93]–[118] (Heydon and Crennan JJ) (‘Byrnes’); *Cusack v London Borough of Harrow* [2013] UKSC 40 [58]–[59] (Lord Neuberger with whom Lord Sumption and Lord Hughes agreed).

equity²⁷ and the common law.²⁸ At a broad level of generality,²⁹ the orthodox approach to interpreting contracts,³⁰ trusts,³¹ deeds,³² wills,³³ bonds,³⁴ and security documents³⁵ is the same: meaning is attributed to a legal relationship by inferring what the author or authors reasonably intended in the light of the text of the instrument when read as a whole against the relevant factual and admissible contextual evidence.³⁶ That is, the general interpretative task for a court is to consider the meaning that will be attributed to a particular manifestation of intention (being in the form of a communicative act or utterance that creates the relevant private law relationship) to the reasonable recipient of that communication.

This explanation highlights an important distinction between: (1) a legal relationship; and (2) an instrument or communicative act that provides evidence for the existence and content of that legal relationship. This truism is all too often

²⁷ *Parkin v Thorold* (1851) 2 Sim NS 1, 6; 61 ER 239, 241 (Lord Cranworth VC); *Tilley v Thomas* (1867) LR 3 Ch App 61, 67 (Lord Cairns); *Solomons v Halloran* (1906) 7 SR (NSW) 32, 42–4 (Street J). Such an approach is wholly consistent with the High Court of Australia's recent emphasis on there being a uniform law of interpretation: *Byrnes* (n 26) 263 [17] (French CJ); 282–92 [93]–[118] (Heydon and Crennan JJ).

²⁸ For example the cases in (n 26).

²⁹ This is not to overlook the fact that, for example, the objective approach to interpreting an informal contract that is operative for a limited duration will raise different contextual considerations than, for example, the interpretation of a federal constitutional compact settled between various states, which is designed to endure over a long period.

³⁰ See below n 39 and accompanying text.

³¹ Where the intention of the settlor is the intention that has been expressed in the communication giving rise to the trust, the trust instrument is to be interpreted objectively by the reasonable person: *Inland Revenue Commissioners v Raphael* [1935] AC 96, 134 (Lord Warrington); *Byrnes* (n 26) 290 [115]; *The Australian Special Opportunity Fund LP v Equity Trustees Wealth Services Ltd* [2015] NSWCA 225 [69] (Bathurst CJ, Macfarlan and Emmett JJA agreeing); *Douglas and McFarlane* (n 25); *Perry Herzfeld, Thomas Prince and Stephen Tully, Interpretation and the Use of Legal Sources* (Lawbook Co, 2009) 607 [25.3.1070]; *Lewin on Trusts* (Sweet & Maxwell, 19th ed, 2015) 244–5 [6–005].

³² *Kneipp v Annunaka Pty Ltd* [2015] QSC 359 [14] (North J); *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, 527 [18] (Kiefel CJ, Gageler, Nettle & Gordon JJ); *NC Seddon, Seddon on Deeds* (Federation Press, 2nd ed, 2015), 173–5 [5.2].

³³ *Walsh v Adrian Cory Sloan as Executor of The Estate of The Late Laurette Dorothy Keddie* [2019] WASCA 107, [24] (Quinlan CJ): 'The starting point is that the object of construing a Will is to ascertain the testator's intention as expressed in the Will itself. As Lord Simon LC said in *Perrin v Morgan* [1943] AC 399, 406: "[T]he fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case — what are the 'expressed intentions' of the testator?'. See too *Lemon v Mead* [2017] WASCA 215, [151] (Buss P).

³⁴ *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85, 111 [78] (Gageler, Nettle and Gordon JJ): 'There was also no dispute about those principles of construction. The proper construction of each [performance bond] is to be determined objectively by reference to its text, context and purpose.' See too *Kawasaki Heavy Industries Ltd v Laing O'Rourke Australia Construction Pty Ltd* (2017) 96 NSWLR 329, 343–5 [60]–[67] (Meagher, Payne and White JJA).

³⁵ *Whiteley v Hodge* [2000] NSWSC 866, [13] (Hamilton J); *Police & Nurses Credit Society Ltd v National Australia Bank Ltd* [2005] WASCA 68, [11] (Murray J).

³⁶ Such uniformity is not a recent development. See JD Heydon, 'Comment on Lord Hoffmann's "Interpretation of Contracts"' in John Sackar and Thomas Prince, *Heydon: Selected Speeches and Papers* (The Federation Press, 2018) 710, 712–14.

overlooked by lawyers. Where A provides B with a standard form contract that B readily signs, the contract between the parties is a legal abstraction evidenced by the physical document (indeed, there would still be a binding contract even if the physical contract happened to be destroyed).³⁷ As observed in Part II, interpretation is the process of inferring the meaning of a legal relationship from the relevant *evidence* in order to reach an ultimate legal effect.

So applied to the law of contract, on the objective approach, the impugned contractual rights, obligations and stipulations should be interpreted in accordance with how a reasonable recipient of the communication in the parties' position would have understood the relevant contract, read as a whole, in the circumstances and context in which that contract was entered into (that context including the purpose and object of the transaction, shared background information,³⁸ and the recipient's general powers of rationality).³⁹ Accordingly, what is actually meant when reference is made to the 'parties' intentions' when interpreting a contract is not the parties' subjective intentions (by applying facts particular to, and known only by, one party) or, at the other end of the spectrum, the literal meaning of a particular contractual provision read in artificial isolation (by applying meaning to a specific part of a text with the most limited potential application of context). Rather, the term 'intention' is used to describe the parties' intentions when applying the objective theory of contract law to the impugned bargain.⁴⁰ This approach was succinctly captured by the unanimous decision of the High Court of Australia in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,⁴¹ and has been reaffirmed many times since:

This Court ... has recently reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References

³⁷ *Wave v Harrop* (1861) 6 H & N 768, 774–5 158 ER 317, 320 (Bramwell B): 'a written contract ... is not the contract itself but only evidence — the record of the contract'.

³⁸ The extent to which non-notorious background evidence can be used to discern the objective intentions of the parties absent ambiguity in a contractual text in Australia remains open for debate. A useful summary of this controversy and the relevant authorities is provided in *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd* [2019] 1 QR 392, [118]–[121] (Jackson J). For commentary see Thomas Prince, 'Defending Orthodoxy: *Codelfa* and Ambiguity' (2015) 89(7) *Australian Law Journal* 491; John Eldridge 'Surrounding Circumstances in Contractual Interpretation: Where are we Now?' (2018) 32(3) *Commercial Law Quarterly* 3.

³⁹ *Byrnes* (n 26) 284 [98] (Heydon and Crennan JJ); *Maggbury Pty Ltd v Hafele Aust Pty Ltd* (2001) 210 CLR 181, 188 [11] (Gleeson CJ, Gummow & Hayne JJ); *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–7 [35] (French CJ, Hayne, Crennan and Kiefel JJ); *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* (2015) 256 CLR 104, 116 [46]–[47] (French CJ, Nettle and Gordon JJ); *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544, 551 [16] (Kiefel, Bell and Gordon JJ), 571 [73] (Nettle J).

⁴⁰ See, eg, George Leggatt, 'Making Sense of Contracts: the Rational Choice Theory' (2015) 131 (July) *Law Quarterly Review* 454, 456, 467.

⁴¹ (2004) 219 CLR 165.

to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.⁴²

Notwithstanding the centrality of the unified objective theory of interpretation in judicial pronouncements, that approach to interpretation still raises two important and interrelated questions. First, is the objective theory of interpretation inconsistent with the idea that a contract contains voluntarily assumed obligations that arise from mutual promises?⁴³ What, one may ask, is ‘voluntarily assumed’ about an obligation, the existence and content of which is not determined by reference to a person’s internal mental state, but by a court-constructed, reasonable-person-based interpretation of a series of displays of outward human behaviour? Or, as Richard Calnan has succinctly and thought provokingly observed: ‘If the law of contract is concerned with the voluntary assumption of liability, why not carry it to its logical conclusion and say that what matters is what the parties actually intended’.⁴⁴ No doubt a similar question could be asked of trusts (giving effect to the settlor’s actual intentions), wills (giving effect to the testator’s actual intentions), security documents (giving effect to the parties’ actual intentions) and so on. Second, despite constant curial reaffirmations of the objective theory of interpretation, the question of *why* a legal instrument is to be interpreted objectively is insufficiently engaged with in the case law. This lack of engagement may ultimately reflect a cautious approach, which enables judges to agree on abstract and ambiguous concepts without agreeing on the particular meaning of those abstractions.⁴⁵

The object of this Part is to illustrate why four commonly-cited justifications proffered in support of the objective approach to interpretation ultimately provide insufficient support for it (notwithstanding that such justifications

⁴² See the cases cited above at n 39. See also *Toll (FGCT) Pty Ltd* (n 41) 179 [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). For a thought-provoking contrast see art 4.1 of the International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts 2010* (UNIDROIT, 2010), [1] of which envisages the possibility of there being a common subjective intention between the parties, and [2] of which makes the ‘objective approach’ the default the ‘fall back’ position.

⁴³ See n 22 and accompanying text.

⁴⁴ Richard Calnan, *Principles of Contractual Interpretation* (Oxford University Press, 2013) 14. This critique was most prominently set out in the writings of PS Atiyah who noted (it is submitted incorrectly) that the use of the objective reasonableness standard in contractual interpretation suggests that the law of contract is not chiefly concerned with voluntary obligations. See *Essays on Contract* (Clarendon, 1986) 21–2. See also the discussions in Smith, *Contract Theory* (n 5) 60–2; and Catterwell (n 14) 91 [4–18].

⁴⁵ See generally, Cass Sunstein ‘Beyond Judicial Minimalism’ (2008) 43(4) *Tulsa Law Review* 825, 828.

identify significant consequential benefits of the objective approach).⁴⁶ The first two justifications (centring on the need to promote efficiency and certainty) are dealt with together as they raise some broadly common issues, notwithstanding that they are conceptually distinct. The third and fourth justifications (centring on the need to protect reasonable reliance and to protect third parties) are dealt with in turn.

B Certainty and Efficiency

The first commonly-cited justification for an objective approach to interpretation is the difficulty, high evidentiary burden, and potential impossibility of establishing the subjective state of mind of the relevant draftsperson of a legal instrument or a subjective common intention between contractual counterparties (particularly, although not exclusively, where a relevant entity is a corporate or non-natural person).⁴⁷ The objective approach to interpretation is said to be both a practical and economically efficient workaround for this problem.⁴⁸

A second, and related, commonly-cited justification for an objective approach is that it promotes certainty, is cost effective and removes the potential for the parties to engage in *ex post facto* attempts to embellish the content of a legal instrument once a dispute arises.⁴⁹ Lord Wilberforce commented on the issue of self-serving evidence in *Prenn v Simmonds*,⁵⁰ noting that it would be dangerous for a court to consider one party's reasons for entering into a contract when that objective might be self-serving in the light of the final compromise reached between the parties as expressed in the text of the agreement. Likewise,

⁴⁶ These justifications can be identified from works such as Calnan (n 44) 14–7; Lewin (n 31) 244–5 [6–005]; Mitchell (n 13) 78–9; Stevens (n 5); Smith, *Contract Theory* (n 5) 271–7; Ewan McKendrick, *Contract Law: Text, Cases and Materials* (Oxford University Press, 7th ed, 2016) 378, 382; Hugh Collins, *The Law of Contract* (Cambridge University Press, 4th ed, 2003) 228–31; and Atiyah (n 44) 21, 86–7.

⁴⁷ On judicial scepticism of collective intentions in deliberative bodies, see *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–9 (Gummow J); Robert French, 'The Courts and the Parliament' (2013) 87(12) *Australian Law Journal* 820, 825; Murray Gleeson, 'The Objectivity of Contractual Interpretation' in Hugh Dillon (ed) *Advocacy and Judging: Selected Papers of Murray Gleeson* (Federation Press, 2017) 276, 282–3. In response, Ekins and Goldsworthy (n 5) 47, have observed: 'an alternative theory of legislative intent ... is that the legislature is a complex purposive group — an institution — that forms and acts on intentions, which arise from but are not reducible to the intentions of the members of the group (the individual legislators). ... It follows that group intention does not involve spooky group mental states. Intentions are plans that persons adopt as a means to ends they seek. The intention of a group is the plan of action that its members adopt, and hold in common, to structure how they are to act in order to achieve some end that they want to reach together.' For another good defence of collective intentionality see Catterwell (n 14) 92 [4–20].

⁴⁸ Calnan (n 44) 15–6.

⁴⁹ See particularly, Calnan (n 44) 16; Lewin (n 31) 244–5 [6–005]. Regarding the importance of certainty see *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348, 357 (Latham CJ).

⁵⁰ *Prenn v Simmonds* [1971] 1 WLR 1381, 1385.

on the issues of certainty and efficiency, one leading English text has noted that, without an objective approach, ‘no lawyer would be safe advising on the construction of a written instrument, nor any party taking under it’.⁵¹ Or, as one commentator has crisply put the argument, the written contract facilitates the ability for the parties’ respective legal positions to be ‘determined from their writing with as a high degree of certainty and efficiency as possible’.⁵²

To the extent that the justifications raised above allude to the impossibility of subjective or private rule-following and the morality of holding parties to their objectively discernible intentions, I will not quibble with them. The important point for present purposes is that neither economic efficiency nor certainty alone are persuasive justifications for an objective approach to interpretation. It is true that the objective approach is both generally efficient and promotes certainty. But such benefits are not, in and of themselves, sufficient reasons for having the rule. This is because legal arguments focusing on certainty and efficiency do not seek to justify their claim exclusively to control the law.⁵³ Put simply, arguments centring exclusively on efficiency and certainty do not count for much where the consequence of considering such criteria is the creation of a legal rule that is otherwise morally indefensible.⁵⁴ Efficiency and certainty are insufficient justifications for a rule because it is easy to come up with examples (real or fictitious) of legal rules that are efficient or certain (or both), but which are nevertheless morally difficult to justify.

For example, the old common law practice of wager of law or compurgation was a certain way of resolving simple debt cases.⁵⁵ However, no serious lawyer or legal scholar would suggest today that the oaths of 11 ‘witnesses’⁵⁶ — often with

⁵¹ Lewin (n 31) 244 [6–005], a statement which mirrors that in *Shore v Wilson* (1842) 9 Cl & F 355; 8 ER 450, 532 (Tindal CJ).

⁵² Prince (n 38) 503. See too Jonathan Morgan, *Contract Law Minimalism* (Cambridge University Press, 2013) 233: ‘Rules in commercial matters should be as clear as possible to enable decisions to be made swiftly and confidently.’ In making this point, however, Morgan is cognisant of the insights from philosophy of language and the mind contained in this article.

⁵³ See Jon Hanson, Kathleen Hanson and Melissa Hart, ‘Law and Economics’ in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 2nd ed, 2010) 300: ‘the vast majority of law and economics scholarship assumes without hesitation that the goal of the law should be efficiency’. See also 322–4. Further, the theory of efficient breach has drawn some criticism from the High Court of Australia. See *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 285–90 [13]–[20] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ).

⁵⁴ Stevens (n 5) 170.

⁵⁵ The use of the defence of wager of law in debt cases helped facilitate the development of assumpsit to enforce contracts: John Baker, ‘A New Light on Slade’s Case’ (1971) 29(1) *Cambridge Law Journal* 213, 219. Although note that in an action for debt on a bond a defendant was not entitled to defend the action by way of wager of law: Anon, ‘A Lecture of Wager of Law (15th Century)’, in JH Baker, *Baker and Milsom Sources of English Legal History* (Oxford University Press, 2nd ed, 2010) 283.

⁵⁶ Often paid witnesses based in London. See JH Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 81: ‘The *nisi prius* system was never extended to enable compurgators to appear at the assizes, and it was unrealistic to expect eleven men to be brought

no local nexus to, or knowledge of, the dispute attesting to B's credibility that he has paid A a debt — is a sound way of resolving the substantive merits of a debt claim.⁵⁷ Consider, also, the contentious common law rule that allowed double recovery under a bond during the early modern period.⁵⁸ The traditional common law procedure enabled an obligee holding a simple bond to enforce the bond multiple times. Indeed, at common law, A could successfully sue on a bond stolen back from B, even where B had paid the sum due under the bond.⁵⁹ The rationale for allowing double recovery was that the common law procedure favoured the universal benefits of simplicity, efficiency and certainty in making the mere production of the bond to the common law court non-traversable proof of an obligation to pay a debt as stipulated in the bond.⁶⁰ This meant that a careless party who failed to destroy the bond or take an acquittance on his performance of the bond ran the risk of the double enforcement of the bond,⁶¹ although relief

from far afield in routine cases. At Westminster, therefore, the difficulties came to be eased by the toleration of a charade. A defendant could hire professional compurgators to help out, and by the end of the sixteenth century it was part of the official duty of the court's door-keepers to provide them, for a fixed fee.'

⁵⁷ The procedure whereby, in response to A's debt claim, B would swear on oath that he did not owe A the impugned debt. The court would accept B's oath as a full answer to A's claim if B obtained the oaths of typically 11 'witnesses' testifying to B's character and not the facts of the case (ie, the witnesses did not attest to the debt being paid): JH Baker (n 56) 81; TFT Plucknett, *A Concise History of the Common Law*, (Little & Brown Co, 5th ed, 2010) 115–6. The process was fully abolished in 1833 by statute. See *Civil Procedure Act 1833*, 3 & 4 Will IV, c. 42, s 13.

⁵⁸ See *Donne v Cornwall* (1486) YB Pass 1 Henry VII, fo 14v, pl 2 (CP), extracted in Baker, *Sources of Legal History* (n 55) 283.

⁵⁹ Indeed, in *Donne v Cornwall* (n 58), A successfully sued in the Common Pleas and then on appeal to the non-statutory Exchequer Chamber on a simple bond that he stole back from B's wife, after B had already paid to A the sum of £10 owing under the bond. For completeness, it ought to be noted that Bryan CJCP did observe that B would be able to sue A for trespass for stealing back the bond and thus 'recover back the same amount in damages' as was payable on the stolen bond.

⁶⁰ Indeed, this is part of a wider historical trend. As the enforcement of bonds and conditional bonds was in general, and more broadly, almost irresistible (ie, there were only very limited ways in which a defendant at common law could escape the obligation to pay the sum on the face of the bond). See also Tiverios (n 23) 10–31; Edith Henderson, 'Relief from Bonds in the English Chancery: Mid-Sixteenth Century' (1974) 18(4) *American Journal of Legal History* 298, 300.

⁶¹ *Waberley v Cockerel* (1541) Dyer 51, extracted in Baker, *Sources of Legal History* (n 55) 285, where Serjeants Staunford and Bromley captured the utilitarian justification for double recovery: '[I]t is nevertheless better to suffer mischief to one man than inconvenience to many, which would subvert the law. For if matter in writing could be so easily defeated and avoided by such a surmise, by naked breath, a matter in writing would be of no greater authority than a matter of fact.' See also TFT Plucknett and JL Barton (eds), *St German's Doctor and Student* (Selden Society, 1974) 77–8. The label 'utilitarian' could be used to justify this approach, notwithstanding that term was not in use in the fifteenth century. Utilitarianism would only become an identifiable moral and political philosophy after 1780 with the publication of Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (T Payne & Son, 1790). However, the nomenclature of 'utility' was borrowed by Bentham from the earlier works of David Hume and had been used by Bentham in *A Fragment on Government* (T Payne, E Elmsly and E Brooke, 1776).

eventually became available in equity.⁶² Again, making a bond non-traversable proof of a debt in a common law case is very certain and efficient. Indeed, the common law approach was expressly justified on the basis that it was efficient for the great many who were trying to enforce bonds at the expense of a few careless individuals.⁶³ But where there is clear and accessible evidence that B has discharged his obligation to A under the bond, there appears little merit in allowing A to double recover under the bond by virtue of his mere possession and production of the document.

This does not mean that economic efficiency and legal certainty are irrelevant to the creation and form of a legal rule. Starting with economic efficiency, while this ought not be the exclusive goal of the law, it ought nevertheless to be seen as a desirable goal for any legal system. Accordingly, when selecting between multiple morally defensible approaches to a particular legal issue, economic efficiency can serve as a useful supplementary (or second order) criterion for deciding on one approach over another. Put simply, economic efficiency considerations serve a tiebreaker function. It can be a useful analytical tool deployed to break a tie between two fairly evenly poised and otherwise justifiable approaches to an area of law (ie, choosing between (i) two different underlying non-consequentialist moral approaches to an area of law; or (ii) two different methods or forms of a legal rule when translating high-level moral principles into positive law).⁶⁴

Similarly, with respect to the importance of legal certainty, it is true that the general law and associated coercive power of the state should ultimately 'be used only in cases defined in advance by the law and in such a way that it can be foreseen how it will be used'.⁶⁵ A lack of certainty in the law can be a friend of tyranny.⁶⁶ It is antithetical to the rule of law for a legal instrument to mean

⁶² Relief became available in equity during the reign of Edward IV (1442–83): AWB Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 (July) *Law Quarterly Review* 392, 416–18; DEC Yale (ed), *Lord Nottingham's Chancery Cases (Vol 2)* (B Quaritch, 1957–61) 9; DEC Yale (ed) *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (Cambridge University Press, 1965) 213; WT Barbour, *The History of Contract in Early English Equity* (Oxford University Press, 1914) 85–9.

⁶³ *Waberley v Cockerel* (n 61).

⁶⁴ See Hanson, Hanson and Hart (n 53) 324: 'recognizing some weaknesses in law and economics does not justify ignoring it. Whatever its costs, law and economics also has some benefits. After all, while the claim that efficiency should serve as *the* goal of the law might not find much support, many people — and perhaps most people — still believe that efficiency should be *a* goal of the legal system. And, where the model's relevant assumptions are plausible, law and economics can contribute in important ways to our understanding of laws' effects, of how those laws might be altered to better serve the goal of efficiency, or, alternatively, of what the efficiency costs of pursuing different policy goals ... might be'.

⁶⁵ FA Hayek, *The Road to Serfdom* (Routledge & Kegan Paul Ltd, 1944) 62. See also JD Heydon, 'The "Objective" Approach to Statutory Construction' in John Sackar and Thomas Prince, *Heydon: Selected Speeches and Papers* (Federation Press, 2018) 332, 335–6; J Dinwiddy, 'Bentham' in W Twining, *Bentham: Selected Writings of John Dinwiddy* (Stanford University Press, 2003) 54.

⁶⁶ Lieber (n 23) 88.

whatever an apparatchik thinks is an expedient way to resolve a given dispute. Accordingly, I do not wish to be taken as suggesting that certainty is not important to the general law. Rather, I am making the modest claim that certainty in and of itself does not exclusively provide a positive justification for a particular legal rule. Arguments based on legal certainty need to be deployed carefully and in a manner that does not prove too much. A legal rule that you become my indentured servant under set conditions can be enacted by parliament in a sufficiently certain manner, but few would think this a moral rule. It is for this reason that there is much wisdom in Glanville Williams' observation that 'it is to the interest of legal certainty that, other things being equal, the rules of law should be as clear of application as possible'.⁶⁷ For present purposes, the ultimate question is whether 'other things' are indeed equal. Thus, we must appeal to some further factor beyond legal certainty to explain the objective approach to interpretation. The rights-based thesis in the Part IV of this article achieves this aim, while nonetheless providing sufficient efficiency and certainty.

C Protecting Reasonable Reliance

The third commonly-cited justification for an objective approach to interpretation is that it is justifiable to depart from the actual intentions of a draftsman in order to protect a relevant party's reasonable reliance on the legal instrument.⁶⁸ This argument has particular force in the context of the law of contract, where it is said by some commentators that an objective approach to interpretation is required where contractual obligations are conceptualised as 'obligations to ensure that others whom we induce to rely upon us are not made worse off as a consequence of that reliance'.⁶⁹ If this underlying approach to the law of contract were to be adopted then, as Collins has observed,

the objective test implies that a court should in principle not be concerned with an inquiry into intention at all. The issue is rather what a *reasonable* promisee would have understood by the promises being made in the contract, not what the promisor intended nor what the promisee had hoped for at the outset.⁷⁰

There are several problems with the reliance-based justification for the objective approach to legal interpretation. First and foremost, very few modern legal commentators would suggest that the law of contract is concerned with protecting reasonable reliance. The promissory model remains the orthodox

⁶⁷ Glanville Williams, 'Law and Language — II' (1945) 61 (January) *Law Quarterly Review* 179, 185.

⁶⁸ A position identified in Collins (n 46) 228–31; Atiyah (n 44) 21, 86–7; and Mitchell (n 13) 13.

⁶⁹ Smith, *Contract Theory* (n 5) 78. For commentators that favour this approach see Collins (n 46) 228–31; Atiyah (n 44) 21, 86–7.

⁷⁰ Collins (n 46) 228–9.

explanation of the law of contract.⁷¹ Second, the reasonable reliance justification cannot explain why an objective approach permeates the general law, as an objective approach is used to interpret written instruments even where detrimental reliance on the instrument is impossible or improbable (for example, a sealed will, secret and half-secret trusts, the draft contract that never left the desk of the law graduate, or the private member's Bill which is destined to languish in parliament and never come to a substantive vote).⁷²

Third, a reliance-based model does not fit analytically with areas of the law in which the objective approach to interpretation persists. This is for the simple reason that, in the law of obligations, the parties' bilateral rights and obligations precede any reliance by the counterparty (putting estoppels to one side).⁷³ Take, for instance, a trustee's primary obligation to comply with the terms of her trust and the related strict remedies arising from the accounting procedure where she fails to do so.⁷⁴ The imposition of such legal duties and the related legal remedies cannot be explained by virtue of protecting a trustee's or a beneficiary's reasonable reliance on the terms of the trust instrument. This is because, for example, the remedy has the potential greatly to exceed a beneficiary's reliance on the written instrument.

The reliance-based argument for an objective approach to interpretation in its most defensible context is problematic even if it is confined to the law of contract. This is because a reliance-based conceptualisation of contractual obligations cannot account for many key analytical features of the law, including that:⁷⁵ (i) a contract is binding from the moment of creation and not the moment

⁷¹ See, eg, Smith, *Contract Theory* (n 5) 43–4.

⁷² One potential rejoinder to this point might be to say that such instruments are being interpreted as if they were to be relied upon later.

⁷³ PS Atiyah viewed equitable estoppel and contract as operating in the same substantive space. On this view, both doctrines enforce a contract, albeit with detrimental reliance standing in for the consideration requirement whenever estoppel is invoked. In response, Ben McFarlane correctly observes that salient analytical differences between the jural relations involved in contract and estoppel mean that this cannot be the case: the law of contract imposes an immediate right – duty relationship at the point of formation, which obliges the promisor to perform the promise, whereas estoppel only imposes a primary *liability* on the promisor at some later point in time and only if there is a prospect of the promisee suffering a detriment as a result of his or her reasonable reliance on the promise. Cf PS Atiyah, 'When is an Enforceable Agreement Not a Contract? Answer: When it is an Equity' (1976) 92 (April) *Law Quarterly Review* 174, with B McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press, 2nd ed, 2020); B McFarlane, 'Equitable Estoppel as a Cause of Action: Neither One Thing nor One Other' in Degeling, Edelman and Goudkamp (n 5) 359, 370.

⁷⁴ See *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, where the High Court of Australia emphasised that a trustee's duty to comply with the terms of the trust is fundamental. See generally on this point Charles Mitchell, 'Stewardship of Property and Liability to Account' [2014] (3) *Conveyancer and Property Lawyer* 215; James Edelman and Steven Elliott, 'Money Remedies Against Trustees' (2004) 18(3) *Tolley's Trust Law International* 116; NA Tiverios and Clare McKay, 'Orthodoxy Lost: The (Ir)Relevance of Question in Quantifying Breach of Trust Claims' (2016) 90(4) *Australian Law Journal* 231.

⁷⁵ Smith, *Contract Theory* (n 5) 90–6.

of reliance.⁷⁶ Accordingly, a promise or agreement between A and B is the prerequisite for the general law's imposition of contractual obligations, not A and B's reasonable reliance of the content of the contract; (ii) contractual obligations are read, and given effect to, as primary obligations to perform what was promised and *not* as secondary obligations to provide a remedy to B for the adverse consequences of her reasonable reliance on A's promise; (iii) the default measure of compensation for breach of contract does not seek to remedy B's reliance, but rather seeks to put B in as good a position as she would have been in had the contract been performed.⁷⁷ Indeed, it is only in the exceptional circumstance that B cannot prove the position she would have been in had the contract been performed that she might be able to recover as damages such expenditure as was reasonably incurred in reliance on the broken promise.⁷⁸ In sum, the promissory model explains why many features of contract law turn out to be consistent with the reliance model, without having to erect a conceptually independent defence of the reliance approach. This is for the simple reason that, in protecting promising, the law of contract also necessarily protects reliance as a *derivative* matter.

D Protecting Third Parties

The final commonly-cited justification for an objective approach to interpretation is said to be the protection of third parties.⁷⁹ The argument is that, given that juridical relationships created within the law of obligations can form the subject matter of further equitable interests (such as equitable assignments,⁸⁰

⁷⁶ Reliance alone is insufficient because a valid contract requires: (i) offer; (ii) acceptance; (iii) consideration; (iv) an intention to create legal relations; and (v) semantic certainty of the agreement. See Andrew Burrows (ed) *A Restatement of the English Law of Contract* (Oxford University Press, 2016) 52–79; and NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (9th ed, LexisNexis 2008) 10 [1.16].

⁷⁷ *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80 (Mason CJ and Dawson J).

⁷⁸ Indeed, reliance damages for breach of contract are only recoverable to the extent which B would have recovered them if A had properly performed the impugned contract (ie, as a matter of law expectation damages *cap* reliance damages showing it is the expectation measure performing the important remedial work in this context): *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, 414 (Dixon and Fullagar JJ); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 85–6 (Mason CJ and Dawson J), 126–7 (Deane J); *Clark v Macourt* (2013) 253 CLR 1, 11 [27] (Crennan and Bell JJ).

⁷⁹ Calnan (n 44) 16; Lewison (n 12) 14 [1.04]; Prince (n 38) 504; Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 44; Murray Gleeson, 'Legal Interpretation — The Bounds of Legitimacy' in Hugh Dillon (ed) *Advocacy and Judging: Selected Papers of Murray Gleeson* (Federation Press, 2017) 242, 245; Gleeson (n 47) 279.

⁸⁰ See, eg, *Brice v Bannister* (1877–78) LR 3 QBD 569.

charges,⁸¹ charge backs,⁸² trusts⁸³ and sub-trusts⁸⁴), an objective approach to interpretation protects vulnerable third parties by giving evidential primacy to the content on the face of the impugned instrument (as opposed to giving evidential primacy to evidence that is only within the knowledge of the parties or relevant draftsman). Again, this justification does not, in and of itself, provide a wholly convincing reason for adopting an objective approach to interpretation across the general law.

While third parties do indeed benefit from the objective approach to interpretation, there are two main problems with this justification. First, equitable interests derived from a contract (such as a trust, assignment or charge) cannot be greater than the source of rights contained in the contract itself.⁸⁵ Accordingly, if the contract does not allow for such equitable interests to be created in favour of third parties (by the insertion of a non-assignment clause, for example) then there is no reason to be worried about the prejudice suffered by interested third parties when interpreting such instruments. Nonetheless, instruments incapable of creating third party rights are still interpreted objectively. Second, it is less clear why, in interpreting a bilateral legal instrument, courts should apply a default rule of interpretation that is primarily concerned with protecting potentially interested third parties. Ultimately, whatever approach to interpretation courts adopt, third parties (or, perhaps more accurately, the lawyers representing third parties) will take the necessary steps to protect themselves before taking an interest in a contract (or other bilateral legal instrument) between unrelated parties.

However, it ought to be noted that third party interests may nonetheless be relevant to the interpretative questions of: (i) who is the relevant recipient of the communication contained within a legal instrument. For example, some legal instruments, such as a charge, are expressly intended by the author to give third parties notice of an equitable interest and thus are intended to be read as such; and (ii) the related question of how much bilateral contextual extrinsic evidence ought to be admitted in the process of interpretation where a third party is an intended recipient of the communication. For example, where the document between A and B is intended to be publicly registered,⁸⁶ and thereby to affect directly the legal interests of C (a third party), an uncommon bilateral

⁸¹ See, eg, *Holroyd v Marshall* (1861–62) 10 HLC 191; *Tailby v Official Receiver* (1888) 13 App Cas 532, 543 (Lord Macnaghten).

⁸² See, eg, *Re Bank of Credit and Commerce International SA (In Liquidation) (No 8)* [1998] AC 214.

⁸³ See, eg, *Don King Productions Inc v Warren* (No1) [2000] Ch 291 (CA); *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 1 CLC 434.

⁸⁴ See, eg, *Re Lehman Brothers International (Europe)* [2010] EWHC 2914 (Ch), [226] (Briggs J).

⁸⁵ *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *Pacific Brands Sport and Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, 404 [32] (Finn and Sundberg JJ); *Walker Group Constructions Pty Ltd v Tzaneros Investments Pty Ltd* (2017) 94 NSWLR 108, 137 [112] (Bathurst CJ).

⁸⁶ Such as a registered mortgage or charge.

understanding of the language between A and B ought not to affect C.⁸⁷ As Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ observed in *Westfield Management Limited v Perpetual Trustee Company Limited*:

[T]he third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.⁸⁸

IV FOUNDATIONS OF THE OBJECTIVE APPROACH

A Conventions

The argument made in this Part is that the principal reason why an objective approach to interpretation permeates the general law is that language and communication are interpersonal by nature.⁸⁹ There is no such thing as an individual having his own internal or subjective language: ‘words are used for communication and communication requires shared or public meanings’.⁹⁰ Put another way, language does not operate unilaterally but multilaterally (or at the very least bilaterally). Before this argument is outlined in more detail, it ought to

⁸⁷ Gleeson (n 47) 279–80, 288. See also the detailed discussion on this point in Paul S Davies, ‘The Meaning of Commercial Contracts’ in Paul S Davies and Justine Pila (eds) *The Jurisprudence of Lord Hoffmann* (Hart, 2017) 215, 226–30.

⁸⁸ (2007) 233 CLR 528, 539 [39]. See also *Re Sigma Finance Corp (In Administration)* [2010] 1 All ER 571, 589 [37].

⁸⁹ The original basis for this ‘use’ philosophy of language is set out in Ludwig Wittgenstein, *Philosophical Investigations* (Wiley–Blackwell, 4th ed, 2009) 86–111 [198]–[315]. For a good modern defence of Wittgenstein’s thesis see Saul A Kripke, *Wittgenstein on Rules and Private Language* (Blackwell Publishing, 1983) 56–113. See also Hilary Putnam, ‘The Meaning of “Meaning”’ (1975) 7 *Minnesota Studies in the Philosophy of Science* 131, 144, where he concludes that you can ‘cut the pie any way you like, “meanings” just ain’t in the head!’; and Hilary Putnam, *Meaning and the Moral Sciences* (Routledge, 1978) 97–9. Such ‘use’ theories of language have been built upon in the modern context by John R Searle, ‘How to Derive ‘Ought’ From ‘Is’ (1964) 73(1) *The Philosophical Review* 43, 52–8; JL Austin, ‘Performative Utterances’ in JL Austin, *Philosophical Papers* (Oxford University Press, 2nd ed, 1970) 233, 237–45; John R Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge University Press, 1979); Searle (n 7) 199–200. The question whether a language is being followed (ie, whether its use is correct) and the rejection of the idea of a subjective language is distinct from the question of how languages come into existence and are learnt. For a scholarly and accessible discussion of the latter see Steven Pinker, *The Language Instinct: How the Mind Creates Language* (Penguin Science 1994) 25–54 where Pinker defends the thesis that the capacity for *homo sapiens* to learn language is an inherent biological instinct (akin to a spider’s instinctual ability to spin a web), and where he gives examples of language being reformed (eg, isolated hearing-impaired individuals who have developed unique sign languages once they form a community).

⁹⁰ Smith, *Contract Theory* (n 5) 273, citing Wittgenstein (n 89). Further, since thoughts, intentions and beliefs are linguistic objects, there are no such things as private thoughts, intentions, and beliefs, in the sense that their *semantic* contents are not determined by their holders: Gottlob Frege, ‘The Thought: A Logical Inquiry’ (1956) 65(259) *Mind* 289.

be emphasised that the idea that a legal doctrine or area of law that depends on external communication necessarily depends on conventional meanings to give content to that communication is not a novel one. It is consistent with the uniform hermeneutic thesis across the private law as set out by Heydon and Crennan JJ in *Byrnes v Kendle*.⁹¹ In defending a uniform hermeneutic thesis, their Honours made the important point that, in the context of contractual interpretation, legal relationships are ultimately contingent on a court giving meaning to external communications or signals that are intended by the author to have legally significant effects:

These conclusions flow from the objective theory of contractual obligation. Contractual obligation does not depend on actual mental agreement. Mr Justice Holmes said:

‘[P]arties may be bound by contract to things which neither of them intended, and when one does not know the other’s assent ...

‘[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, — not on the parties’ having *meant* the same thing but on their having *said* the same thing.’⁹²

Similarly, in *Mannai Investment Co Ltd v Eagle Star Life Assurance*,⁹³ Lord Hoffmann emphasised that, in interpreting a contract, one must start by examining the words by their shared or public understanding — a process which his Lordship termed as reading such words as if they were ‘utterances in everyday life’.⁹⁴ Likewise, in a speech that was otherwise critical of Lord Hoffmann’s approach towards contractual interpretation,⁹⁵ Lord Sumption opined that ‘[l]anguage is a mode of communication. Its efficacy depends on the acceptance of a number of conventions that enable people to understand each other.’⁹⁶

⁹¹ *Byrnes* (n 26).

⁹² *Ibid* 285 [100], citing Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10(8) *Harvard Law Review* 457, 463–4. See generally James Edelman, ‘Uncommon Statutory Interpretation’ (Seminar Paper, Western Australia Constitutional Centre, 30 May 2012); Heydon (n 36) 711.

⁹³ [1997] AC 749.

⁹⁴ *Ibid* 774. See also Leggatt (n 40) 468.

⁹⁵ Lord Sumption’s view is that surrounding circumstances help to understand the meaning of words in context. However, Lord Sumption argues that the use of background circumstances is only permissible in the interpretative context as a means to understanding language. Accordingly, Lord Sumption cautions that Lord Hoffmann’s broad interpretative approach of considering the background matrix of factors that lead to the creation of written obligations may enable a court to reach impossible interpretations on the grounds of reasonableness or fairness. See Jonathan Sumption, ‘A Question of Taste: The Supreme Court and the Interpretation of Contracts’ (2017) 17(2) *Oxford University Commonwealth Law Journal* 301, 309. For the response see, Leonard Hoffmann, ‘Language and Lawyers’ (2018) 134 (October) *Law Quarterly Review* 553. For a discussion of the disagreement between Lord Sumption and Lord Hoffmann see Ewan McKendrick, ‘Interpretation’ in William Day and Sarah Worthington (eds) *Challenging Private Law: Lord Sumption on the Supreme Court* (Hart, 2020) 3.

⁹⁶ Sumption, above n 107, 309.

The position taken here is that an objective approach to interpretation is justifiable across private law transactions notwithstanding the fact that such transactions are ultimately consent-based. Four premises underpin this argument. The first premise is that language involves, as an essential component, a series of conventional rules. The rules of language are rules that are applied to determine the meaning of an expression. The meaning of an expression is determined by the 'use' that a community conventionally attributes to that expression.⁹⁷ That is, the proper use of a word depends on the ability of a potential rule-follower (A) to follow the conventional rules that govern a language. Put another way, the existence of a public convention determines the use to be attributed to an expression and therefore the rules of a language.⁹⁸

To make this claim is not wholly to overlook the fact that language is ultimately used by a speaker who intends to convey a certain meaning to a recipient.⁹⁹ Language can have a genesis in individuals wishing to represent a certain state of affairs to the world (or simply another person), but for this process to be effective it must, at some point, become conventionalised. In order to convey meaning, a speaker will require a repeatable and dependable standard that recipients can deploy for this purpose. The necessary connection between 'speaker meaning' and conventional meaning was made by John Searle in the following terms:

We have to assume that [*homo sapiens* or some equivalent hypothetical species] are capable of evolving procedures for representing [internal] states of affairs; where the representations have speaker meaning ... They can represent states of affairs that they

⁹⁷ See also Searle (n 7): 'The introduction of conventional devices for representing states of affairs already presupposes the notion of speaker meaning. Any agent who is capable of using those devices must be able to use them meaningfully.'

⁹⁸ I am not referring here to a private code that could be deciphered into English but the possibility of a truly private or subjective language.

⁹⁹ The seminal work in this area is Grice (n 9) 383: 'Perhaps we may sum up what is necessary for A to mean something by X as follows. A must intend to induce by X: a belief in an audience, and he must also intend his utterance to be recognized as so intended.' See also Paul Grice, *Studies in the Way of Words* (Harvard University Press, 1989). Grice answers the question 'what is it to communicate meaningfully?' with three points: (i) to get people to recognise speaker's intentions (ie, the speaker's intention is to produce an effect in the listener); (ii) the speaker means something if the utterance produces an effect on the hearer to recognise an intention to produce that effect; (iii) a communication is successful if the hearer understands the speaker's actual intention (ie, understanding is the hearer's recognition of speaker meaning). For an overview see John R Searle, *Mind, Language and Society: Philosophy in the Real World* (Basic Books, 1998) 139–45: 'Grice saw correctly that when we communicate to people, we succeed in producing understanding in them by getting them to recognize our intention to produce that understanding. Communication is peculiar among human actions in that we succeed in producing an intended effect on the hearer by getting the hearer to recognize the intention to produce that very effect. ... I am trying to tell someone that it is raining, I succeed in telling them as soon as they recognize that I am trying to tell them'. For an overview of the philosophy of language in the legal context see Leggatt (n 40) 457–9; Ekins & Goldsworthy (n 5); Chris Staughton, 'How Courts Interpret Commercial Contracts?' (1999) 58(2) *Cambridge Law Journal* 303, 304.

believe exist, states of affairs they desire to exist, states of affairs they intend to bring about, etc.

These procedures, or at least some of them, become conventionalized. What does that mean exactly? It means that given collective intentionality, if anyone intentionally engages in one of these procedures, then other members of the group have a right to expect that the procedures are being followed correctly. This, I take it, is the essential thing about conventions. Conventions are arbitrary, but once they are settled they give the participants a right to expectations.¹⁰⁰

On this understanding, it is still correct to care about a speaker's intentions.¹⁰¹ Indeed, a speaker's objective intentions are necessarily contingent on her subjective intentions. What is acknowledged, however, is that those subjective intentions must be funnelled through dependable and stable conventional rules, which, in turn, give recipients an expectation that those conventions are being followed (ie, conventions are the accepted common stock clues by which a speaker's meaning is conveyed). Thus, the objective intention of the speaker is that which the reasonable recipient of the communication would infer, given the totality of the accessible evidence, was the speaker's subjective intention.

The second premise concerns the existence of rules and how they are followed. Compliance with rules is objective. It is not conceptually possible for there to be a 'closed' or 'private' system of rule following. Whether or not A is complying with a convention cannot be assessed on the basis of the facts particular to, and known only by, A (or perceived due to A's state of mind) alone.¹⁰² If it were possible to determine rule following on account only of A's state of mind, then A merely thinking that he was following a rule would constitute compliance with that rule. Accordingly, rule following is not an internal process particular to, or known only by, A. Rather, whether or not a rule (or convention) is being followed is to be judged by an external (normative) standard. I do not wish to be taken as saying that individuals ought not choose to act virtuously,¹⁰³ or to seek

¹⁰⁰ Searle (n 7) 199–201. See also at 189: 'But which really comes first, speaker meaning or convention? In the order of logical dependence the speaker intentionality must be logically prior, because these conventions for unstructured propositions encode preexisting speaker meanings. However, without language and its conventions you can only have very simple speaker meanings.' See also John Searle, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge University Press, 1983) 176–9. For a similar point, see Kripke (n 9) 271.

¹⁰¹ In the legal context see Ekins & Goldsworthy (n 5) 46.

¹⁰² See also Stevens (n 5) 168.

¹⁰³ For example, Aristotle's project in *Nicomachean Ethics* argued that to achieve *eudemonia* (or happiness), an individual ought to live their life in a manner that cultivates a set of virtues of character and intellect (including the character of 'justice'). Thus the morally right course of action in a given set of circumstances becomes the course of action that fosters virtuous characteristics and therefore self-development. Unlike a rights-based theory (which has primary explanatory force in the private law), Aristotle argued that a person should not be a stickler for his legal rights where to do so would not be virtuous, therefore stultifying the chances of personal development towards happiness. This idea was given a spiritual underpinning by St Thomas Aquinas, who

meaning or self-improvement on a day-to-day basis. I am simply making the point that personal vows, internal goal-setting and subjective thoughts (for example, your private New Year's resolutions) are not the domain of the externally binding rights and obligations with which the private law is concerned.

The third premise is that a purely private or subjective approach, being a potential alternative to an objective approach, is not possible as there would be no 'rules of the game'. That is, there would be no conventions against which to assess the future use of language and therefore no ability to ascertain compliance with the rules of the language. Wittgenstein put this point in the following terms:

To follow a rule, to make a report, to give an order, to play a game of chess, are *customs* (usages, institutions). To understand a sentence means to understand a language. To understand a language means to have mastered a technique. ... '[F]ollowing a rule' is a practice. And to think one is following a rule is not to follow a rule. And that's why it's not possible to follow a rule 'privately'; otherwise thinking one was following a rule would be the same thing as following it. ... Shared human behaviour is the system of reference by means of which we interpret an unknown language.¹⁰⁴

The fourth premise is that, while the narrow conventional meanings of words are used to understand the meaning of an utterance, they are not the whole picture. This is because a speaker of the English language relies on additional general principles when communicating, such as: (i) the assumed existence of shared background information;¹⁰⁵ (ii) a recipient's general powers of reasoning and

observed that acting virtuously facilitates an individual attaining eternal life. It then follows that once such virtues have been cultivated temporally, they will continue to exist spiritually and thus in perpetuity. See Roger Crips (ed), *Nicomachean Ethics* (Cambridge University Press, rev ed, 2014) 16–24, 30–6, 76–9, 98. Aristotle's observation is picked up by Thomas Aquinas, *Summa Theologica*, Part 1–2 (*Pars Prima Secundae*) q 96 art 6. For an overview of the influence of Aristotle's work on that of Aquinas see James Doig, 'Aquinas and Aristotle' in Brian Davies and Eleonore Stump (ed), *The Oxford Handbook of Aquinas* (Oxford University Press, 2012) 33.

¹⁰⁴ See Wittgenstein (n 89) 86–8 [198]–[206]; Michael Beany 'Wittgenstein on Language: From Simples to Samples' in Ernest Lepore and Barry C Smith (eds), *The Oxford Handbook of Philosophy of Language* (Oxford University Press, 2006) 40, 55 where it is noted that Wittgenstein's 'private language argument ... can be seen as developing [his] rule-following considerations'. See also Herman Cappelen and Josh Dever, *Puzzles of Reference* (Oxford University Press, 2018) 89. However, this is not to say there are no meaningful differences between compliance with a language and compliance with other social rules. One clear difference is that *other* social rules require a language on which they can build, whereas language evolves from a complex mix of speaker meaning and convention.

¹⁰⁵ For example, where I straightforwardly offer 'to sell you 100 bushels of corn for \$1000 AUD', understanding this utterance requires us to accept a large number of contextual assumptions, including: (i) an understanding of what an exchange or sale is; (ii) an understanding of what a contract is; (iii) an understanding of a particular unit of fiat currency; (iv) an understanding of what corn is; (v) an understanding of imperial weights and measurements; (vi) a basic understanding of numeracy (we could go on). As Grice (n 9) 387 notes: 'In cases where there is doubt, say, about which of two or more things an utterer intends to convey, we tend to refer to the context (linguistic or otherwise) of the utterance and ask which of the alternatives would be relevant to other things he is saying or doing, or which intention in a particular situation would fit

rationality; and (iii) the assumption that parties to a conversation intend to communicate meaningfully.¹⁰⁶ Such principles explain the ability of linguists to account for phenomena such as irony, metaphor, hints, implications and other like cases.¹⁰⁷ I do not consider that such principles do harm to the general thesis put forward in this article. On the contrary, they form part of the public rules against which a speaker makes an utterance.

Consider an example where Holmes asks Diplock to go to the ‘Bentham’s Head Pub tonight for a couple of milkshakes’. Diplock responds: ‘I have to look after my baby son and my wife is away.’ Diplock’s response is generally understood to mean that he is rejecting Holmes’ proposal, but this cannot be explained by virtue of the narrow linguistic meaning of the text or utterance alone. The reasoning deployed to take Diplock’s utterance as a rejection of Holmes’ proposal appears to be that, first, we assume as a general rule that Diplock is not speaking nonsense but is attempting to communicate meaningfully with Holmes and cooperate in the conversation (that is, unless there is evidence to the contrary). Second, from Holmes’ perspective it appears that Diplock must have meant something more than the literal meaning of what he said, as the literal meaning of the words neither expressly reject nor accept Holmes’ proposal to go to the pub. Third, Holmes (and the average person for that matter) understands certain notorious background information — such as that looking after a baby is labour intensive, that a baby cannot be left alone, that a pub at night is not a good place for a baby and that childcare arrangements may take some time to organise and are difficult to finalise at late notice. Fourth, given the content of the third point the ‘rational person’¹⁰⁸ in Holmes’ position will realise that it is

in with some purpose he obviously has (eg, a man who calls for a “pump” at a fire would not want a bicycle pump). Nonlinguistic parallels are obvious: context is a criterion in settling the question of why a man who has just put a cigarette in his mouth has put his hand in his pocket; relevance to an obvious end is a criterion in settling why a man is running away from a bull.’ See also *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633, 653 [73] (Leeming JA); JW Carter, ‘Context and Literalism in Construction’ (2014) 31(2) *Journal of Contract Law* 100, 118.

¹⁰⁶ Searle (n 89) 31–6; Grice (n 99) 26–31, 109. This idea has been expanded on by relevance theory, which argues that the meaning of express linguistic expressions are generally underdetermined such that there is a significant gap between the intentions of the speaker and a narrow, literal meaning of an utterance. See, eg, Deirdre Wilson, ‘Relevance Theory’ in Yan Huang (ed) *The Oxford Handbook of Pragmatics* (Oxford University Press, 2017) 85–9 [4.3]: ‘The goal [of relevance theory] is to find an overall interpretation that confirms the presumption of optimal relevance. For this, the addressee must enrich the decoded sentence meaning at the explicit level, and complement it at the implicit level, so as to yield enough cognitive effects to satisfy his expectations of relevance. ... What makes it reasonable for the addressee to follow a path of least effort is that the speaker is expected (within the limits of her abilities and preferences) to have made the utterance as easy as possible for him to understand.’ See also Robyn Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication* (Blackwell Publishing, 2002) 83.

¹⁰⁷ Searle (n 89) 30.

¹⁰⁸ Michael Dummett, *The Seas of Language* (Clarendon University Press, 1993) 104: ‘Any adequate philosophical account of language must describe it as a rational activity on the part of creatures to

unlikely that Diplock can both attend the pub and look after his baby son. Finally, given that to accept a proposal one must be able to perform one's side of whatever the proposal is, as a matter of basic inductive reasoning it appears to be most probable that Diplock is rejecting (politely) Holmes' proposal, as Diplock does not have capacity to attend the pub and his communication, which was made in direct response to a proposal, likely means something. Such contextual reasoning is standard in Anglo-Australian contractual interpretation jurisprudence.¹⁰⁹ However, it ought not to be overlooked that the context between the parties might nonetheless suggest that a court should give interpretative primacy to textual clues over other contextual and purposive clues. For example, think of the common rule that a formal and professionally drafted instrument is to be interpreted more precisely than a communicative act of a lay person.¹¹⁰ This rule, which favours text over certain aspects of context, is itself a contextual assumption — an assumption that certain persons *generally* wish to be taken more literally.¹¹¹ Thus, sometimes the context may itself point to the parties' intending a text to have a narrow meaning.

In this connection I wish to emphasise that, just because the interpretive task at general law is a search for objective meaning, it does not stand to reason that there are no difficult interpretive questions at general law.¹¹² This follows from the fact that day-to-day interpretation requires inductive and not deductive reasoning. The aim of interpretation is to infer the author's most probable intention from the communicative act. As such, intentionality provides a guide in this process. The court arrives at the correct answer by inductively balancing competing principles through which intentionality has been funnelled, namely the public meaning of the specific words the author has deployed and a range of permissible contextual factors.¹¹³ Context can, at its broadest, include: notorious background facts; prior negotiations and preparatory works; the purpose and

whom can be ascribed *intention and purpose*' (emphasis added). Thus Lord Hoffmann was correct to observe in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 ('*Investors Compensation Scheme*'): 'Many people, including politicians, celebrities and Mrs Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean. If anyone is doing violence to natural meanings, it is they rather than their listener.'

¹⁰⁹ There are plenty of examples, but four good illustrative examples are *Investors Compensation Scheme* (n 108); *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2004) 240 CLR 45, 62 [36] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ); *Thorney Park Golf v Myers Catering Ltd* [2015] EWCA Civ 19, [26] (McCombe LJ) ('*Thorney Park Golf*'); *Ecosse Property Holdings* (n 39) 551 [16], 555 [27] (Kiefel, Bell and Gordon JJ).

¹¹⁰ For a simple example of this principle in action see *Thorney Park Golf* (n 109) [24] (McCombe LJ).

¹¹¹ A point made in *Morgan* (n 52) 233.

¹¹² David McLauchlan, 'Contractual Interpretation: What Is It About?' (2009) 31(1) *Sydney Law Review* 5, 6; Ryan Catterwell 'Striking a Balance in Contract Interpretation: The Primacy of the Text' (2019) 23(1) *Edinburgh Law Review* 52.

¹¹³ For good lists of contextual factors and related rules of interpretation see Smith, *Contract Theory* (n 5) 274; Leggatt (n 40) 468–70; Catterwell (n 112). Leggatt notes that language users will nonetheless have subtle preferences regarding the application of such contextual factors.

internal logic of a written instrument; common industry and institutional practice; the parties' powers of rationality; and even shared normative understandings¹¹⁴ (although there is a legitimate debate to be had concerning when context should yield to secondary considerations of legal certainty and efficiency).¹¹⁵ Finally, in the very rare case in which the court cannot arrive at the most probable meaning of a text when contrasting multiple meanings, the contract will be void for uncertainty (unless the impugned term can be severed).¹¹⁶

B Morality and Conventions

The final aim of this Part is to identify why the legal system is justified in accepting the objective meaning attributed to the text by a recipient of a legal instrument over a subjective speaker meaning.¹¹⁷ That is to say, the account so far provided is somewhat incomplete as it does not fully explain *why* the drafter of a legal instrument must be bound by public standards (as discussed in the previous section) for determining meaning, as opposed to a 'mistaken' subjective speaker meaning (in the sense that the meaning fails to coincide with the public meaning attributed to the speaker's intentions as understood by the reasonable recipient.)¹¹⁸ It is all well and good to identify conventional standards, but why do those standards apply to me when I never agreed to them? Why trample upon my expressive individuality? In cases where an undisclosed speaker meaning and the conventional meaning come apart, why does the law choose to favour the reasonable listener rather than the speaker? The fundamental point made in this

¹¹⁴ See, eg, Ronald Dworkin, *Law's Empire* (Hart, 1998) 19–20, using the example that one ought not profit from his own wrong, as applied in *Riggs v Palmer* 115 NY 506, 22 NE 188 (1889). See also 65–6 and 76–83.

¹¹⁵ In this connection, arguing in favour of a more textualist (ie, *Codelfa* style) approach to contractual interpretation, which limits the use of extrinsic material in the United States of America on the basis of utility or efficiency *albeit at the expense of interpretive accuracy*, see Alan Schwartz and Robert E Scott, *Contract Interpretation Redux* (2010) 119(5) *Yale Law Journal* 926, 930. See also Morgan (n 52) 228–37.

¹¹⁶ See the novel case of *Raffles v Wichelhaus* (1864) 2 Hurl & C 906; 159 ER 375, where a contract was void for uncertainty in circumstances where the court could not identify the subject matter of the central obligation contained within the instrument. In this case the subject matter of the contract was a cargo of cotton on the ship *The Peerless* sailing from Bombay, India, in circumstances where there where two ships called *The Peerless* sailing from Bombay within several months of each other and it was not possible to discern which ship the contract identified.

¹¹⁷ Although this argument would not strictly be limited to the law. See Searle (n 7) 199–201.

¹¹⁸ By allowing for the possibility of a 'mistaken' speaker meaning, I believe that the position taken in this article is typically wider than that taken by 'use' theorists such as Wittgenstein (n 89) 86–8 [198]–[206]. This is because I acknowledge that a speaker may not use a term correctly and thus the speaker meaning and the sentence meaning of a sentence can come apart. This will particularly be the case in circumstances where a speaker is ignorant of his incorrect use of a word. See the example concerning gammon steak above at (n 6). See also Leggatt (n 40) 459 noting that 'the possibility of concluding that the parties to a contract have used the "wrong" words presupposes the existence of an intention to convey a meaning which is distinct from the conventional meaning of the words used. That seems to import the psychological theory of interpretation.'

article is that if the author of a legal instrument utilises socially recognised conventional standards in order to affect her private law legal relations with others, she should be bound by those standards. That is, by using conventional or public standards, the author has implicitly ‘given her word’ to the recipient or recipients, and so cannot resile from the expectations immediately created by the objective meaning attributed to her utterance by application of those standards. The creation of such expectations is why the defence of the objective approach in this article could be termed ‘rights-based’; individuals become obliged to follow such conventions once they are deployed, because they create in the other party a ‘right’ to expect that those conventions will be followed.

It is worth introducing the point with a simple example derived from the law of contract. You attend my house one evening to play a series of boardgames. During the evening I draft a brief contract to which you assent. The central promises in the contract are that I am obliged to sell you ‘the chessboard on my bookshelf for the sum of \$100’. Assume, however, that I honestly believe that the reference to ‘chessboard’ as specified in our agreement actually refers to the boardgame ‘snakes and ladders’, which is sitting next to my chessboard on the same bookshelf. You have paid me \$100 and now the time has arrived for me to perform and deliver up the chattel to you. In this example, which meaning is to govern our contractual relations? Is it: (i) the conventional meaning that my use of ‘chessboard’ would have conveyed to you; or (ii) my honestly held subjective belief that I have sold you my copy of ‘snakes and ladders’? The answer is, of course, (i). You are entitled to the chessboard and not my copy of snakes and ladders.¹¹⁹ As the promisee, you must be entitled to insist on performance of a promise in terms of the expectations created by the meaning conveyed to you by my communication.¹²⁰ The corollary of this point is that, for present purposes, we can put to one side my undisclosed subjective intentions in making the promise.¹²¹ However, if I had outlined in my offer to create a contract that ‘chessboard’ actually means ‘snakes and ladders’, then a contextual interpretation of my offer would now match my inner will. It is for this reason that it is unobjectionable for us to define the shared understanding of terms within an agreement (think of the

¹¹⁹ See, eg, *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461–2 [22] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ): ‘[This] case provides a good example of the reason why the meaning of commercial documents is determined objectively: it was only the documents that spoke to [the promisee].’ See too *Toll (FGCT) Pty Ltd* (n 41) 177–8 [35].

¹²⁰ A classic enunciation of this principle is *Smith v Hughes* (1871) LR 6 QB 597, 607 (Blackburn J): ‘If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.’

¹²¹ In making this claim I am not ruling out the potential for vitiating factors to allow me to set aside the contract or have the contract declared *void ab initio* in circumstances where, for example, I did not understand the transaction. The salient point is that the contract is binding and legal effect is given to its objective meaning *unless* there is some good reason for the court to allow me to escape the bargain. See further, Heydon (n 36) 711; Gleeson (n 47) 284.

common glossary of definitions that is contained in most contracts, trusts or deeds etc). As Stephen Smith has explained:

[I]f John and Ann agree that whenever John says 'dog' he means 'cat', then the next time John says 'dog' to Ann, the meaning is what John says will be the thing ordinarily called 'cat'. Although language must be shared, it is possible for there to be only two sharers.¹²²

Putting to one side cases where the parties have expressly defined the terms of an agreement (which still depend on a shared convention), the question remains why courts should adopt the objective conventional and public meaning in the original snakes and ladders example above. Let us examine the different elements of this simple example. First, I have utilised a series of conventional standards — a series of words in English — in order to communicate to you my intention to be bound by the promise. Second, I can attempt (ultimately unsuccessfully) to resile from this promise by arguing that while it is true that, applying public conventions, I have promised to sell you the 'chessboard on my bookshelf', I nonetheless never subjectively intended to make such a promise and thus I should not be bound by the conventional meaning of my promise. Third, on the other hand, in applying the conventional standards of the English language, you quite rightly understood my promise to mean that I intended to sell you my chessboard for the sum of \$100. Fourth, only one of our two potential approaches is capable of being applied universally across time without contradicting itself.

Let us imagine for a moment what would happen under a legal system in which I am allowed to resile from the conventional understanding of my promise to you. More importantly, extrapolate this out to all contracting parties in our position. If the law allowed me, and others in my position, to resile from selling you 'the chessboard on my bookshelf' on account of my undisclosed subjective intentions, then the conventional standards, and the related promissory conventions and other legal institutions that they reinforce, would be undermined. That is, unless the common linguistic conventions are followed there would cease to be a stable objective linguistic convention on which the private law could properly develop rights, duties, powers, liabilities, privileges and immunities.¹²³ Indeed, the intended effect of the act of promising is the

¹²² Smith, *Contract Theory* (n 5) 274. See also McLauchlan (n 112) 5, 15–23.

¹²³ See Searle (n 100) 178; JL Austin, *How to do Things with Words* (Oxford University Press, 1962) 101. It is important to appreciate that, for example, promises are not internal mental events. Rather, promises are a type of outward communicative act. Such acts were termed 'performatives' by JL Austin. Performatives are linguistic acts that *do not* consist of using language to describe or report something that exists in the world. Rather than being descriptive 'performatives' actually change the nature of the world. Thus a performative act (such as a promise) is not merely a communicative act to convey information or describe the world. The act of uttering the performative makes it

creation of stable expectations concerning people's future actions. It cannot be the case that the promisor can only have 'stability for me but not for thee'. This is, however, not intended to provide an indefeasible argument for a promisor to *always* do what was promised. As made clear in the earlier discussion on legal interpretation in contradistinction to legal construction, there are other events of greater normative pull that can, in limited circumstances, justify releasing a promisor from the objective meaning attributed to her promise.¹²⁴ The point here is to defend the baseline objective approach to interpretation and to observe that this approach is nonetheless consistent with promissory theories of contract.

By using conventional standards to effect a promise with a counterparty, the promisor cannot now resile from the objective meaning attributed to her utterance by application of those standards without damaging the shared legal institutions that those standards create. In short, there exist public conventions as to how one can express intentions.¹²⁵ The use of such conventions creates expectations in others. If one is to take the benefits of such conventions in order to enhance one's own autonomy then one must also take on the burden that, as a matter of parity, others are entitled to those same benefits. The conventions will break if employed disingenuously or erroneously, and so it is wholly justifiable to hold a promisor to the objective meaning attributed to her utterance.

Objectivity in interpretation protects the underlying linguistic standards on which the private law builds shared institutions. The objective approach to legal interpretation enables the creation of a sophisticated social reality in that it provides the underlying building blocks for the creation of the shared legal institutions of the private law, being the underlying rights, duties, powers, liabilities, privileges and immunities between two jural parties that the state can enforce. This argument mirrors Immanuel Kant's famous hypothesis that, in a society where the truth of an expression can no longer be taken at face value, the conventional standard of promising would be swiftly abolished:

I ask myself: would I actually be content that my maxim (to extricate myself from a predicament by means of an untruthful promise) should hold as a universal law (for

reality. Some examples generally favoured by Austin and Searle are as follows: (i) an official naming a ship ('[w]hen I say "I name this ship the *Queen Elizabeth*" I do not describe the christening ceremony, I actually perform the christening' (Austin (n 89) 235)); (ii) marriage – where A says 'I do' to B in the right circumstances, he marries B and thus the nature of the world is changed by the communicative act (Austin (n 89) 235)); (iii) promising – where A says to B that 'I promise to wash your windows on date Y' in the right circumstances, a *new* promise to wash B's windows has been created by this act (Austin (n 89) 242)).

¹²⁴ See n 23. There are plenty of examples including relief against penalties, relief against forfeiture, restraint of trade, and vitiating factors. One clear example is a contract being voidable in equity for a unilateral mistake. A unilateral mistake when entering the contract will render it voidable if, one party (ie, A) is mistaken and B knows, or ought reasonably to know, of the mistake, provided that: (i) the mistake is to the terms or subject matter of the contract; (ii) the mistaken party (ie, A) is the party who is alleging that the contract is voidable; and (iii) there is a degree of 'unconscionability' on the part of B in taking advantage of the mistake: *Taylor v Johnson* (1983) 151 CLR 422.

¹²⁵ See, Goddard (n 5) 268–71.

myself as well as others), and would I be able to say to myself: everyone may make an untruthful promise when he finds himself in a predicament from which he can extricate himself in no other way? Then I soon become aware that I could indeed will the lie, but by no means a universal law to lie; for according to such a law there would actually be no promise at all, since it would be futile to pretend my will to others with regard my future actions, who would not believe this pretense; or, if they rashly did so, would pay me back in like coin, and hence my maxim, as soon as it were made a universal law, would have to destroy itself.¹²⁶

C The Bilateral Nature of Private Law

The reasoning set out above, which binds a person to the objective meaning attributable to their intentions, is not limited to the law of contract but applies *mutatis mutandis* more broadly to other areas of the private law. A more fundamental observation can also be made with respect to the various other species of private law legal instruments to which the objective theory applies (such as trusts, wills, bonds and security documents). All of these examples involve vesting in an individual or institution the legal power to change the legal relations of others concerning a certain activity.¹²⁷ In the context of private law, such legal powers are normatively bilateral.¹²⁸ That is, the exercise of such powers affects both the power holder and the liability holder, and for this reason such powers must be exercised through communication of the power holder's intention to bring about the relevant change. Only communication of that intention enables the change to be effected in a way that publicly implicates both juridical parties.¹²⁹

¹²⁶ Kant (n 22) 17–19 [4:402]–[4:403]. Note that other normative theories come to a not dissimilar conclusion as that adopted in this article. See, eg, Joseph Raz, 'Review: Promises, Morals, and Law' (1982) 95(4) *Harvard Law Review* 916, 936–8 (justifying objectivity based on utilitarianism on the grounds that it protects the institution of promising from harm); John Finnis, *Natural Law & Natural Rights* (Oxford University Press, 2nd ed, 2011) 303 (justifying objectivity based on the stability and cooperation required to build the 'common good' from the perspective of natural law). For a view of natural law like Finnis see Nicholas J McBride, *The Humanity of Private Law Part I: Explanation* (Hart Publishing, 2018) 165: 'Contract law would fail in its mission to facilitate the orderly workings of the marketplace were it *not* to give effect to the objective principle'.

¹²⁷ I will refer to an individual who is liable to have their legal position changed by a power holder as being under a 'legal liability' or a 'liability holder'. See WN Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16, 44. Under Hohfeld's schema a legal power is defined as the ability (or factum) of the power holder (A) to directly change the nature of the legal relationship between A and another individual (B) regarding a certain activity (thus with respect to that activity B is said to be under a liability vis-à-vis A). See also Chris Essert, 'Legal Powers in Private Law' [2015] 21(3–4) *Legal Theory* 136, 145.

¹²⁸ Essert (n 127) 136, 145–52. See also John Finnis, 'Some Professorial Fallacies About Rights' (1972) 4(2) *Adelaide Law Review* 377, 379.

¹²⁹ EJ Weinrib, *The Idea of Private Law* (Oxford University Press, 2012) 103: 'On stepping into a world of interaction, the freely willing actor establishes a presence there though acts that have an externally recognizable nature. Purely mental imaginings and reservations, however real they are to the actor or however serious the consequences to which they might in due course leave, have no status in this world of interaction.'

The following implications flow from this argument. First, facts particular to, or known only by, the power holder about her intentions are insufficient to serve this purpose because they do not implicate the liability holder. Secondly, given that the power holder must engage in an act of communication to affect the liability holder, she must, at some point, deploy a conventional public standard in order to do so. Thirdly, given the power holder's utilisation of conventional public standards, she can be taken by the liability holder to have utilised those standards honestly and correctly, lest those standards and the legal and social institutions they support be undermined. Fourthly, and finally, it follows that a power holder might conceivably exercise the power unintentionally — that is, the power holder might bring about a change in her jural relations with others by communicating an objective intention to do so, but without possessing the relevant subjective intention to do so. As Chris Essert observes, in the context of the law of contract and the law of property:

[A legal] power is exercised through a single juridical event that cannot be conceived of by reference to some facts about A alone, or some facts about B alone, or indeed some facts about A alone and some facts about B alone. Rather, the power is exercised through an event — A's communication of intention to B — that must be understood in terms of A and B and the relationship between them. Thus the exercise of power in this paradigmatic case invokes the correlatively structured normativity that is characteristic of private law. ...

The orthodox view says that the common law of contract allows that one can contract unintentionally if one communicates or manifests the intention to contract. ... [There] are dissenters, ... [but] on the understanding of powers that I offer here, the orthodox view must be correct: the formation of the contract affects both parties and so must be constituted entirely by facts that are public as between them and not by facts that are entirely about one of them (such as their internal psychological states). ... [Similarly] subjective intention is not required to exercise the power of consent [for example, with respect to land]; by communicating an intention to render some touching (or some entry onto land) non-wrongful, of some act that otherwise would infringe upon a right of mine — affects not just me but also (say) you, and so it must be explained by some fact that is not merely about me (or merely about you) but about both of us, and the communication of my intention is just such a fact.¹³⁰

This point regarding an overt communicative act to create a property right is clearly illustrated by cases that establish the rule that a property owner cannot transfer or create a proprietary or possessory interest in that property without some outward form of expression. As Megarry J observed in *Re Vandervell's Trusts (No 2)*:

¹³⁰ Essert (n 127) 147, 153–4. See also *Smith v Hughes* (1871) LR 6 QB 597, 607 (Blackburn J).

[T]he mere existence of some unexpressed intention in the breast of the owner of property does nothing: there must at least be some expression of that intention before it can effect any result. To yearn is not to transfer.¹³¹

Likewise, a declaration of trust (even a self-declaration of trust or the declaration of a secret trust) must involve some form of external objective manifestation against which to assess rule compliance. As Briggs LJ said in *Juliet Bellis & Co v Challinor*, a ‘person creates a trust by his words or conduct, not by his innermost thoughts’.¹³² In a synthesis of the points made above concerning various types of legal instruments, Gleeson CJ observed:

With statutes, as with wills and contracts, the courts will need to respect the primacy of the text, understood in light of context and purpose. That — the text — is what is being interpreted. The legitimate object of the exercise is to give legal effect to the expressed intention of the person, or persons, or institution which has the legal capacity to create the rights in question.¹³³

A similar approach extends beyond the attribution of meaning to legal instruments and applies more generally to other areas of the private law. Imagine if, after giving a lecture, I take a stroll down Tottenham Court Road in London. I reach Leicester Square and come up with the bright idea of publishing a billboard. Accordingly, I purchase advertising space on a billboard and publish on it a message that states, without foundation, that my friend Julius engages in the practice of ‘match fixing’.¹³⁴ Julius is readily identifiable from my statement because I include his personal details with the communication and he is a well-known local footballer playing for Tottenham Hotspur.

My communication is defamatory because the words have a clear conventional meaning attributable by the reasonable recipient of the communication.¹³⁵ They suggest to the ordinary reader that Julius engages in a negative type of cheating; rather than perform at his best, Julius attempts to influence the outcome of sporting contests to further his own self-interest. This is the conventional meaning attributed to the communication. It is simply not to the point for me to attempt to deny that this should be the meaning attributed to the words on the basis that my subjective intention is different. Suppose that I actually intended to express that Julius is a fine footballer — indeed, so good that his presence on the pitch ensures a fixed outcome. My subjective view of what the

¹³¹ [1973] 3 WLR 744, 767. On the nature of an overt act to acquire a right of possession see also Ben McFarlane, *The Structure of Property Law* (Hart, 2008) 154–6.

¹³² [2015] EWCA Civ 59, [59] (Briggs LJ).

¹³³ Gleeson (n 79) 253–4 (emphasis added). See also *Wilson v Anderson* (2002) 213 CLR 401, 418 [8] (Gleeson CJ).

¹³⁴ On idiomatic expressions, irony, metaphors etc, see the discussion above from n 106 and accompanying text.

¹³⁵ *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 542 (Gaudron and Gummow JJ); 573 (Kirby J); *Trkulja v Google LLC* (2018) 263 CLR 149, 159–160 [31]–[32] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

communication means simply does not matter; I must take the conventional rules of the English language as I find them.¹³⁶ If I were responsible for the creation of the defamatory billboard then I have committed a tort by infringing Julius's right to personal reputation. Importantly, a right to personal reputation would not be worth much unless it was underpinned by a stable conventional standard on which it could be based.

The salient point is that the drafter of a legal instrument is employing a conventional device in a particular social setting for the purpose of affecting the jural relations of (at least) one other person. That is, the speaker is attempting to create, change, regulate or abolish rights, duties, powers, privileges or immunities. Given that this can only be achieved in a manner that publicly implicates both juridical parties, the speaker should be *prima facie* bound to the commitments, directives and orders contained in her communicative act. A failure to adhere to these objective standards would erode or debase the conventional building blocks on which shared legal institutions are created. These are sound reasons for holding a speaker to the immediate expectations created by her or his communicative act. As John Searle puts it,

[I]t is implicit that the speaker employing the conventional device in a social setting for the purpose, for example, of conveying some truth about the world to the hearer, is thereby committed to that truth. That is, we will not understand an essential feature of language if we do not see that it necessarily involves social commitments, and that the necessity of these social commitments derives from the social character of the communication situation, the conventional character of the devices used, and the intentionality of speaker meaning. It is this feature that enables language to form the foundation of human society in general. If a speaker intentionally conveys information to a hearer using socially accepted conventions for the purpose of producing a belief in the hearer about a state of affairs in the world, *then the speaker is committed to the truth of his utterance.*¹³⁷

V CONCLUSION

There are three important points to take away from this article. First, there remains a meaningful distinction between legal interpretation and legal construction. The former is concerned with the attribution of meaning to a legal text, whereas the latter is concerned with the ultimate legal effect of that text. Secondly, the most cited justifications proffered in support of the objective approach to interpretation provide insufficient support for it. Finally, the unified hermeneutic thesis as enunciated by the High Court of Australia in respect of the interpretation of instruments across the private law is a justifiable consequence

¹³⁶ This point is detailed in Stevens (n 5) 171. See also Leggatt (n 40) 475.

¹³⁷ Searle (n 7) 194–201 (emphasis added).

of: (i) the multilateral nature of language as involving shared conventions; (ii) there being no such thing as private rule-following and therefore private compliance with language; and (iii) the moral and policy-based conclusion that, when the author of a legal instrument utilises socially recognised conventional standards in order to affect her legal relations with others, she should be bound by those standards, lest they be undermined.