

THE 'ALWAYS SPEAKING' APPROACH TO STATUTES (AND THE SIGNIFICANCE OF ITS MISAPPLICATION IN *AUBREY V THE QUEEN*)

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This article clarifies the nature and scope of the 'always speaking' approach to statutes in Anglo-Antipodean law. To do so is important. For whilst it is now considered interpretive orthodoxy to treat statutes as 'always speaking', what that entails in terms of doctrine and application is not always clear. It is, however, recognised that whether or not a statute attracts the operation of the 'always speaking' approach can sometimes be a difficult question to answer. In order to do so judges have at their disposal the interpretive tools (and method) provided by the 'modern approach' to statutory interpretation. Indeed, in these cases maybe close attention to the contextualism which lies at the heart of the 'modern approach' is a more satisfactory way of determining the legal meaning of a statute than to presume that it is 'always speaking'.

I INTRODUCTION

In Australian law it is now said that statutes are 'always speaking'.¹ That is, 'ordinarily or if possible, the words of a statute should be treated as ambulatory, speaking continuously in the present and conveying a contemporary meaning'.² Yet what this interpretive approach entails – in terms of doctrine and application – is not always clear or without controversy. This article aims to identify and clarify the nature of this controversy by explaining what the proper application (and misapplication) of the 'always speaking' approach involves and why. In order to do so, the article will proceed as follows.

Part II traces the origins of the 'always speaking' approach, outlines the orthodox account of it in contemporary Australian law and explains what its

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1 *Aubrey v The Queen* (2017) 260 CLR 305, 326 (Kiefel CJ, Keane, Nettle and Edelman JJ) ('*Aubrey*').

2 *A-G (Tas) v CL* (2018) 28 Tas R 70, 87 [45] (Porter AJ, Blow CJ agreeing at 74 [2], Wood J agreeing at 74 [3]) (emphasis in original).

misapplication entails and why. The focus of Part III is the recent decision in *Aubrey v The Queen* ('Aubrey').³ There, the High Court strongly endorsed the orthodox account of the 'always speaking' approach and sought to apply it to a criminal statute. It is, however, suggested that the Court misapplied it. This resulted in a conviction (and a lengthy jail term) for conduct that would have led to an acquittal on the earlier (long-settled) interpretation of the statute.

Finally, Part IV considers three important issues of method and context which a judge ought to consider before applying the 'always speaking' approach to determine the legal meaning of a statute. These were live issues in *Aubrey*, but are of more general concern as they may arise whenever the application (or otherwise) of the 'always speaking' approach may be interpretively decisive.

II WHAT IS THE 'ALWAYS SPEAKING' APPROACH TO STATUTES?

A Origins

American lawyer Neal Goldfarb has traced the origins of what he termed the 'always speaking' metaphor in an article which critiques it from a linguistics perspective.⁴ It referred to a technique of legislative drafting advocated in the 19th century by English barrister George Coode in his 1845 treatise *On Legislative Expression: Or, the Language of the Written Law*.⁵ Specifically, that drafters ought to use 'the present tense instead of the future'.⁶

Coode recommended the use of the present indicative and supported that recommendation with the statement that 'indicative language describing the case as *now* existing, or as having *now* occurred, is consistent with the supposition of *the law being always speaking*'.⁷

Goldfarb notes that Coode's recommendation was 'highly influential' and 'has been widely adopted in legislative drafting'.⁸ For example, the preference for using the present tense in statutes has been incorporated in drafting manuals in Canada, Scotland and the United States and been statutorily endorsed in Australia, Canada, New Zealand and Northern Ireland.⁹ But Coode's use of the 'always speaking' metaphor – and its adoption in these jurisdictions as a preferred drafting technique – was not invoking an interpretive approach that 'permits the scope of words of a genus as including circumstances which did not previously exist'.¹⁰ Indeed, the contemporary manifestation of the 'always

3 (2017) 260 CLR 305.

4 Neal Goldfarb, "'Always Speaking'? Interpreting the Present Tense in Statutes' (2013) 58(1) *Canadian Journal of Linguistics* 63.

5 Ibid 63–4; George Coode, *On Legislative Expression: Or, the Language of the Written Law* (William Benning, 1845).

6 Goldfarb (n 4) 63.

7 Ibid, quoting Coode (n 5) 23 (emphasis in original).

8 Ibid.

9 Ibid 69–70.

10 Justice James Edelman, 'Uncommon Statutory Interpretation' (Seminar Paper, Constitutional Centre Twilight Seminar, 30 May 2012) 26–7.

speaking' approach in Australian law (as opposed to Coode's drafting metaphor) is said to be of 'relatively recent origin'.¹¹

Relevantly, in Anglo-Australian law, the rule of *contemporanea expositio est optima et fortissima in lege* long governed the construction of statutes.¹² The essence of this historical approach was that 'Acts were to be construed in accordance with their natural meaning as at the date of their enactment'.¹³ Its orthodoxy as one of the fundamental default rules of statutory interpretation was accepted by the leading academic treatises¹⁴ and confirmed in 1979 by the House of Lords in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* ('*Black-Clawson*').¹⁵ What this approach involved (and why) was explained in the following terms by Lord Simon of Glaisdale in *Black-Clawson*:

I confess, my Lords, that when I first read section 8 of the Act of 1933 I was under an immediate and powerful impression that the Court of Appeal must be right. It seemed obvious that subsection (1) was dealing with cause of action estoppel and subsection (3) with issue estoppel ... [b]ut though the foregoing was my first and strong impression, I soon realised that I was looking at section 8 with 1974 eyes and interpreting it in 1974 terms; and that in so doing I was falling into fundamental error. *Contemporanea expositio est fortissima in lege*. The concepts of cause of action and issue estoppel were not developed by 1933 ... and could not possibly be what Parliament and the draftsman then had in mind. My initial response had been scarcely less anachronistic than if I had attempted to interpret Magna Carta by reference to *Rookes v Barnard* [1964] AC 1129.¹⁶

The interpretive duty of a judge under the historical approach is, then, to ascertain the meaning of a statute at the date of its enactment. To that end the rule of *contemporanea expositio est optima et fortissima in lege* stated that 'the Act must be construed as if one were interpreting it the day after it was passed'.¹⁷ And as former High Court judge John Dyson Heydon noted, '[t]he proposition is that once that meaning has been established, it remains constant'.¹⁸ Moreover, the 'always speaking' metaphor as used and advocated by Coode in the context of legislative drafting long coexisted with the rule of *contemporanea expositio est optima et fortissima in lege* in statutory interpretation. That important point was noted by Sir Rupert Cross in the third edition of *Statutory Interpretation*: '[t]he rule that an Act must be construed as if one were interpreting it the day after it was passed is not inconsistent with the somewhat quaint statement that a statute is "always speaking"'.¹⁹

11 Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 157.

12 See *The Longford* (1889) 14 PD 34, 36–7 (Lord Esher).

13 Pearce and Geddes (n 11) 157.

14 See Sir Peter Benson Maxwell, *On the Interpretation of Statutes*, ed Frederick Stroud (Sweet and Maxwell, 5th ed, 1912) 489; Sir Rupert Cross, *Statutory Interpretation* (Butterworths, 3rd ed, 1995) 45.

15 [1975] AC 591, 613–14 (Lord Reid) ('*Black-Clawson*').

16 Ibid 643–4 (emphasis added).

17 *The Longford* (1889) 14 PD 34, 36 (Lord Esher).

18 JD Heydon, 'The "Objective" Approach to Statutory Construction' (Seminar Paper, Current Legal Issues Seminar Series, 8 May 2014) 13.

19 Cross (n 14) 45.

B The Orthodox Account

The nature and scope of the ‘always speaking’ approach in contemporary Australian law was recently outlined by the High Court in *Aubrey*: ‘The approach in this country allows that, if things not known or understood at the time an Act came into force fall, on a fair construction, within its words, those things should be held to be included’.²⁰ So, on the orthodox account of this approach and ‘[s]ince a statute is always speaking, the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change’.²¹ It therefore provides for a statute to be applied to new circumstances and developments without the need for legislative revision or amendment.²²

Yet the fulcrum of this approach is that the core or essential meaning of a statute is fixed at the date of enactment.²³ It is apparent, then, how (and why) the rule of *contemporanea expositio est optima et fortissima in lege* is the historical antecedent of the ‘always speaking’ approach. But whilst ‘[t]he approach of the courts used to be that Acts were to be construed in accordance with their natural meaning as at the date of their enactment’²⁴ now ‘ordinarily or if possible, the words of a statute should be treated as ambulatory, speaking continuously in the present and conveying a contemporary meaning’.²⁵ And that is so unless it is ‘apparent that the legislation was intended to be confined to dealing with entities and activities current at the date on which it is made’.²⁶ This important interpretive development is explained by Pearce and Geddes in the following terms:

The approach of the courts used to be that Acts were to be construed in accordance with their natural meaning as at the date of their enactment. The rule was given the Latin title, *contemporanea exposition est optima et fortissima in lege*. It is clear now, however, that the operation of this rule in its fullest extent has been abandoned except perhaps in the construction of ambiguous language used in very old statutes where the language itself may have had a rather different meaning.²⁷

In Australia, the ‘always speaking’ approach is now statutorily required in two state jurisdictions.²⁸ And as noted above, the High Court recently confirmed in *Aubrey* what the orthodox account of it entails.²⁹ In the course of doing so and

20 (2017) 260 CLR 305, 321 [29] (Kiefel CJ, Keane, Nettle and Edelman JJ).

21 *R v G* [2004] 1 AC 1034, 1054 [29] (Lord Bingham). This is what Francis Bennion calls an ‘ongoing Act’ (compared with a ‘fixed-time Act’) which he regards as ‘a living Act’, the statutory analogy of ‘a living Constitution’ such as the American Constitution: Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th ed, 2013) 797, 800.

22 Pearce and Geddes (n 11) 156.

23 *Aubrey* (2017) 260 CLR 305, 321–2 [29] (Kiefel CJ, Keane, Nettle and Edelman JJ). See further Edelman, ‘Uncommon Statutory Interpretation’ (n 10) 24–5.

24 Pearce and Geddes (n 11) 157. In the United Kingdom see John Bell and George Engle, *Cross: Statutory Interpretation* (Butterworths, 3rd ed, 1995) 50–2; Jones (n 21) 797; Daniel Greenberg, *Craies on Legislation* (Sweet & Maxwell, 11th ed, 2017) 853.

25 *A-G (Tas) v CL* (2018) 28 Tas 70, 87 [45] (Porter AJ, Blow CJ agreeing at 74 [2], Wood J agreeing at 73 [3]) (emphasis in original).

26 Pearce and Geddes (n 11) 157.

27 Ibid.

28 See *Acts Interpretation Act 1915* (SA) s 21; *Interpretation Act 1984* (WA) s 8.

29 (2017) 260 CLR 305, 321–2 [29] (Kiefel CJ, Keane, Nettle and Edelman JJ).

by way of example, the Court cited the interpretive approach of Barwick CJ in *Lake Macquarie Shire Council v Aberdare County Council* ('*Lake Macquarie Shire Council*').³⁰ There it was held that the statutory term 'gas' extended to liquefied petroleum gas when only coal gas was in common use when the relevant statute was enacted – 'the connotation of the word "gas" was fixed, its denotation could change with changing technology'.³¹ In a similar vein was the judgment of McHugh J in *Muin v Refugee Review Tribunal* ('*Muin*').³² There it was held that for purposes of the *Migration Act 1958* (Cth) a "document" includes information that is stored in a computer or a fax machine and which can be printed out by pressing one or more keys or buttons'.³³

No reason appears for thinking that parliament intended to distinguish between information stored on paper and information stored in the electronic impulses of a computer that can be printed on paper by pressing a key or keys on the computer's keyboard. Statutes are always speaking to the present. If we can, we should give the words of a statute – which after all are only the means of conveying ideas and information to the public – a meaning that covers contemporary processes and accords with the object of the enactment.³⁴

Moreover, the fulcrum of the orthodox account – that the core meaning of a statute is fixed but its context or application may change – is perfectly compatible with Parliament drafting a statute which is inherently capable of 'embracing future changes in the subject matter'.³⁵ It can do so by choosing language that is open-ended,³⁶ embodies an inherently flexible standard or incorporates a common law rule or principle.³⁷ This technique was recognised, for example, by the High Court in *Aid/Watch Inc v Commissioner of Taxation* when the meaning of the phrase 'charitable institution' in tax legislation had to be determined:

A law of the Commonwealth may exclude or confirm the operation of the common law of Australia upon a subject or, as in the present case, employ as an integer for its operation a term with a content given by the common law as established from time to time.³⁸

Likewise in *Deputy Commissioner of Taxation v Clark* where the New South Wales Court of Appeal had to ascertain the meaning and scope of a corporate law statutory defence.³⁹ That defence was proved if 'because of illness or for *some*

30 Ibid, citing *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327, 331 ('*Lake Macquarie Shire Council*').

31 Ibid 322 [29]. But see Justice James Edelman, '2018 Winterton Lecture Constitutional Interpretation' (2019) 45(1) *University of Western Australia Law Review* 1, 18–19 (emphasis in original) ('Winterton Lecture') where it was said that '[i]n truth, the meaning of the word "gas" had changed ... [t]he real point made by Barwick CJ and Menzies J seems to be that the *essential* meaning of the word "gas" had not changed'.

32 (2002) 190 ALR 601 ('*Muin*').

33 Ibid 626 [104] (McHugh J).

34 Ibid 626–7 (citations omitted).

35 Pearce and Geddes (n 11) 156.

36 *R v Gee* (2003) 212 CLR 230, 241 [7] (Gleeson CJ).

37 *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, 548–9 [20]–[23] (French CJ, Gummow, Hayne, Crennan and Bell JJ) ('*Aid/Watch*').

38 Ibid 548–9 [20].

39 (2003) 57 NSWLR 113 ('*Clark*').

other good reason, the person did not take part in the management of the company at the payment time'.⁴⁰ Relevantly, Chief Justice Spigelman noted that 'Parliament chose to use words of such generality that subsequent developments in the law of corporations ... could well change the position in relevant respects'.⁴¹

Statutes may be interpreted on the basis that the connotation of the language remains the same whereas its denotation may differ over time ... [w]here, as here, Parliament has chosen a formulation which is of indeterminate scope and of a high level of generality, a court should interpret the provision on the basis that the intention of the original enactment was that the particular application of the provision may vary over time.⁴²

One might, then, suggest that the orthodox account of the 'always speaking' approach in Australian law is a more sophisticated, contemporary manifestation of the old (ancestor) rule of *contemporanea expositio est optima et fortissima in lege*. It is this notion, for example, which animates the more contemporary (orthodox) account provided by Lord Bingham in the 2003 House of Lords decision in *R (Quintavalle) v Secretary of State for Health*:

There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now.⁴³

In any event, the High Court's decision in *Aubrey* emphatically endorsed the orthodox account of the 'always speaking' approach to statutes. It is now a well-established principle of statutory interpretation in Australian law. But on occasion it is, arguably, misapplied. The next section explains what the misapplication of the 'always speaking' approach entails in my view and why.

C What Misapplication Entails (and Why)

On the orthodox account of the 'always speaking' approach, the core meaning of a statute is fixed at the date of enactment but its context or application may change over time. As outlined above in Part II(B), that is the fulcrum of the approach which the High Court cases of *Lake Macquarie Shire Council*, *Muin* and *Aubrey* have established. The 'always speaking' approach is misapplied, then, *when it operates to change the core or essential meaning of a statute*. What this entails was explained by Justice Edelman, in a 2012 speech titled 'Uncommon Statutory Interpretation': 'Matters which are not within the [core] meaning of the statute one year will fall within the statute in the next. This is very different from an approach which permits the scope of words of a genus as including circumstances which did not previously exist'.⁴⁴ The kind of outcome which results from the misapplication of orthodox interpretive principle

40 *Corporations Act 2001* (Cth) s 588FGB(5), quoted in *ibid* 119 [15] (Spigelman CJ) (emphasis added).

41 *Clark* (2003) 57 NSWLR 113, 145 [138] (Spigelman CJ).

42 *Ibid* 145 [139], [142].

43 [2003] 2 AC 687, 695 [9].

44 Edelman, 'Uncommon Statutory Interpretation' (n 10) 26–7.

was neatly outlined (and criticised) by Heydon J in *Pape v Commissioner of Taxation*:

[T]he idea that a statute can change its meaning as time passes, so that it has two contradictory meanings at different times, *each of which is correct at one time but not another*, without any intervention from the legislature which enacted it, is, surely, to be polite, a minority opinion.⁴⁵

Even so, why is it, necessarily, objectionable for the judicial interpretation of a statute to change its core or essential meaning? What is wrong with a court updating the meaning of a statute to better meet the contemporary needs, aspirations and values of the citizenry? Precisely this kind of argument has been made in the American context by T Alexander Aleinikoff.⁴⁶ He advocates that 'the process of interpretation be carried out in a present-minded fashion, as if the statute had been recently enacted'.⁴⁷ On this account, '[u]ltimately the question is, what is the most plausible meaning today *that these words will bear*'.⁴⁸ But in a common law system the legal meaning of a statute does not simply equate to whatever happens to be the contemporary meaning of its terms. That is to fundamentally misunderstand the nature of statute *law* and the interpretive duty of courts in this regard.

The interpretation of a statute 'will give effect to the ordinary meaning of its text in the wider statutory context and with reference to the purpose of the provision'.⁴⁹ Yet these

[c]onsiderations of context and purpose ... recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with statutory purpose, that meaning must be rejected.⁵⁰

To require or permit a judge to update the core meaning of a statute in the manner suggested is, then, anathema to the contextualism which lies at the heart of the 'modern approach' to statutory interpretation in Australia.⁵¹

It is, moreover, constitutionally dubious. Such an updating technique usurps the proper role and function of the legislature. It amounts to impermissible judicial legislation not statutory interpretation as traditionally understood and undertaken by courts in the common law tradition. This is especially pertinent in Australia where there is a strong constitutional separation of judicial power from the legislative and executive arms of government. A principle which mandates that the exercise of judicial power involves only the interpretation and application of legislation (to determine legal controversies) not its effective amendment.

45 (2009) 238 CLR 1, 145 [423] ('*Pape*') (emphasis added).

46 T Alexander Aleinikoff, 'Updating Statutory Interpretation' (1988) 87(1) *Michigan Law Review* 20.

47 Ibid 59.

48 Ibid 60 (emphasis in original).

49 *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ).

50 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ) ('*SZTAL*').

51 See Jeffrey Barnes, 'Contextualism: The Modern Approach to Statutory Interpretation' (2018) 41(4) *University of New South Wales Law Journal* 1083.

In any event, it is these methodological and constitutional concerns which characterise – and make problematic – the misapplication of the ‘always speaking’ approach. The decision and interpretive approach of the United Kingdom Supreme Court in *Yemshaw v Hounslow London Borough Council* (*Yemshaw*) has attracted this criticism.⁵² There it was held that the word ‘violence’ in section 177(1) of the *Housing Act 1996* (UK) was not limited to physical contact but included other forms of non-physical violence.⁵³ Section 177(1) provided that ‘[i]t is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence against him’. And subsection (1A) stated: ‘For this purpose “violence” means (a) violence from another person; or (b) threats of violence from another person which are likely to be carried out; and violence is “domestic violence” if it is from a person who is associated with the victim’.

Section 177(1) in its original form was enacted in 1977. The leading judgment in *Yemshaw* given by Lady Hale acknowledged that the underlying purpose and effect of the provision – ‘that a person who is at risk of the violence to which it applies is automatically homeless’⁵⁴ for the beneficial purposes of the Act – was the same as when first enacted.⁵⁵ The appellant was a woman with two young children. She left the matrimonial home and sought accommodation from the local housing authority on the basis she was ‘homeless’ pursuant to section 177(1). The appellant did so due to her husband’s verbally and financially abusive behaviour towards her and also the fear that he would hit her in the event she confronted him about an affair she suspected he was having. But as the husband had never actually hit her or threatened to do so the appellant had to establish that his (non-physical) behaviour constituted ‘violence’ to fall within the scope of section 177(1).

In the 2006 case of *Danesh v Royal Borough of Kensington and Chelsea* [2007] 1 WLR 69 the Court of Appeal unanimously held that for the purposes of the *Housing Act 1996* (UK) ‘violence’ requires physical contact. Relevantly, Lord Justice Neuberger held that ‘when an ordinary English word is used, one is entitled to assume that, in the absence of good reason to the contrary, it should be given its primary natural meaning and to my mind, when one is talking of violence to a person, it involves physical contact’.⁵⁶ In addition, and most relevantly in my view, he observed that if ‘violence’ included words, actions or gestures which caused the appellant to fear physical attack then it would ‘really render paragraph (b) redundant’ as that paragraph covers ‘threats of violence from another person which are likely to be carried out’.⁵⁷ That was an important argument. It was *not* rejecting the linguistic possibility that ‘violence’ may now include non-physical behaviour; or the proposition that the scope of a statute *may* be extended to cover new and unforeseen circumstances; nor was it an

52 [2011] 1 All ER 912 (*Yemshaw*). See below nn 65–76 and accompanying text.

53 *Yemshaw* [2011] 1 All ER 912, 923 [27]–[28] (Lady Hale).

54 *Ibid* 917 [7].

55 *Ibid*.

56 *Danesh v Royal Borough of Kensington and Chelsea* [2007] 1 WLR 69, 75 [15].

57 *Ibid* 75 [14], [16], 71 [4].

application of *contemporanea expositio est optima et fortissima in lege* – the rule that statutes must be ‘construed in accordance with their natural meaning as at the date of their enactment’.⁵⁸ It was rather a tightly-focused ‘text in context’ argument ie, the word ‘violence’ *in the specific context in which it appears* in the *Housing Act 1996* (UK) confirms that its legal meaning corresponds with its natural and ordinary meaning which requires physical contact.

In *Yemshaw*, Lady Hale accepted ‘that this is a natural meaning of the word’ but not ‘that it is *the only* natural meaning of the word’.⁵⁹ ‘It is commonplace to speak of the violence of a person’s language or of a person’s feelings’.⁶⁰ Moreover, she said that by the time section 177(1) was (re)enacted in 1996 it was ‘clear that both international and national government understanding of the term had developed beyond physical contact’.⁶¹ This analysis of the contemporary development and understanding of what violence, and specifically domestic violence, may now entail led to the following conclusion:

[W]hatever may have been the original meaning in 1977 ... by the time of the *Housing Act 1996* the understanding of domestic violence had moved on from a narrow focus upon battered wives and physical contact. But if I am wrong about that, there is no doubt that it has moved on now.⁶²

That being so, Lady Hale said the ‘essential question [was] whether an updated meaning [was] consistent with the statutory purpose’⁶³ detailed above and the relevant statutory language. It was so held.⁶⁴ Richard Ekins has argued that ‘this conclusion betrays a misconception about statutory interpretation’,⁶⁵ and that ‘Lady Hale purports to “update” the statute, which is in truth to amend it by judicial fiat’.⁶⁶

In enacting a statute, Parliament does not simply stipulate a set of words, the *legal* meaning of which changes as word meaning develops over time; nor does Parliament simply adopt some (general) purpose, which the statute may then be forced to realise. Rather, Parliament makes a decision, which it promulgates by uttering the statutory text, intending thereby to convey some particular meaning. The updating doctrine on which Lady Hale relied fails to attend to this reality ...⁶⁷

In a similar (critical) vein Justice Edelman has said ‘[t]he *Yemshaw* updating approach permits a court to say that a statute once meant X but now means Y’.⁶⁸ ‘The effect of this reasoning is that the core meaning of a statute can change’.⁶⁹ And in a more recent speech (made after his appointment to the High Court) his Honour confirmed his constitutional unease with Lady Hale’s reasoning in

58 Pearce and Geddes (n 11) 157.

59 *Yemshaw* [2011] 1 All ER 912, 920 [19] (emphasis in original).

60 Ibid.

61 Ibid 920 [20].

62 Ibid 921 [24].

63 Ibid 923 [27].

64 Ibid.

65 Richard Ekins, ‘Updating the Meaning of Violence’ (2013) 129 *Law Quarterly Review* 17, 19.

66 Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 265.

67 Ekins, ‘Updating the Meaning of Violence’ (n 65) 19 (emphasis in original).

68 Edelman, ‘Uncommon Statutory Interpretation’ (n 10) 28–9.

69 Ibid 26.

Yemshaw which he appeared to characterise as a ‘wholly dynamic approach’.⁷⁰ That is an interpretive approach ‘concerned with the current meaning of the statutory or constitutional words’.⁷¹ Yet, interestingly, he said ‘[w]hat is noteworthy about *Yemshaw* is not the conclusion. That conclusion might have been reached by a characterisation of the essential, original meaning of “violence” at a higher level of generality’.⁷² Justice Edelman explained that interpretive technique in the following way:

[I]n Australian constitutional law, another alternative that avoids the suggestion of the connotation/denotation distinction that meaning cannot change is, the distinction between essential and non-essential meaning ... the non-essential meaning of constitutional and statutory words does change, although the essential meaning does not.⁷³

Yet one might query whether to apply this distinction to *Yemshaw* in the manner Justice Edelman suggested was available is entirely satisfactory. For it is always possible to state the ‘essential, original meaning’ of a statutory word or phrase at a higher level of generality (if so minded) in order to expand the scope of non-essential meaning *which can change*. But to do so renders it more of an interpretive game than a technique to discover (and preserve) the ‘essential, original meaning’ of a statute. Indeed, so applied it may facilitate the same kind of statutory updating as the ‘wholly dynamic approach’ which must be an anathema if ‘essential, original meaning’ in this context is to be more than just an interpretive fig leaf.

In any event, these were not the only critiques of Lady Hale’s interpretive approach and reasoning.⁷⁴ In *Yemshaw* itself, Lord Brown expressed ‘profound doubt as to whether at any stage of their legislative history the “domestic violence” provisions with which we are here concerned ... were intended to extend beyond the limits of physical violence’.⁷⁵ Even so, he did ‘not feel sufficiently strongly as to the proper outcome of the appeal to carry these doubts to the point of dissent’.⁷⁶ There is, then, a decent argument that *Yemshaw* may have involved the misapplication of the ‘always speaking’ approach and that it effected a judicial change to the core meaning of ‘violence’ for the purposes of the *Housing Act 1996* (UK).

It is, moreover, interesting and relevant for present purposes to note the following additional observations made by Justice Edelman regarding the interpretive approach in *Yemshaw*, what it would mean in a criminal context and why it was unlikely to be followed in Australia:

70 Edelman, ‘Winterton Lecture’ (n 31) 25–7.

71 Ibid 27.

72 Ibid 26.

73 Ibid 18. See also *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 37 (Edelman J).

74 But for an interesting argument on the possible use of legislative history to justify Lady Hale’s interpretive approach, see Donald L Drakeman, ‘Constitutional Counterpoint: Legislative Debates, Statutory Interpretation and the Separation of Powers’ (2017) 38(1) *Statute Law Review* 116, 119–23.

75 *Yemshaw* [2011] 1 All ER 912, 928 [48].

76 Ibid 931 [60].

[T]he approach in *Yemshaw* admits of the possibility that a circumstance which would properly have been expressly rejected in one case might properly be accepted in a later case ... There was no suggestion in *Yemshaw* that this technique would be confined to the civil law. It might be possible for a person to be acquitted of a crime based upon a construction of a criminal statute in 1977 but, in 2012 a court might hold that although that construction was correct in 1977, at some stage the words acquired a new meaning and a person could now be convicted of the offence in exactly the same circumstances.⁷⁷

Based on prior statements of interpretive principle made by the High Court, Justice Edelman said it was 'possible to query whether such a result would be reached in Australia',⁷⁸ and that '[t]here may also be questions concerning the constitutionality of such an updating approach'.⁷⁹ For in Australia, as noted, the *Australian Constitution* establishes a strong separation of judicial power which authorises the courts to undertake statutory interpretation not judicial legislation.⁸⁰ Yet in 2017 the High Court in *Aubrey* appeared to do precisely what Justice Edelman foreshadowed in a criminal law context. Of even greater surprise was that Justice Edelman, having been appointed to the High Court in January of 2017, formed part of the joint judgment. Part III considers *Aubrey* and suggests how (and why) the joint judgment may have misapplied the 'always speaking' approach.

III AUBREY V THE QUEEN

A Facts

The appellant had engaged in unprotected sexual intercourse with his partner (the complainant) over several months when he knew that he was HIV positive. He was charged with one count under section 36 of the *Crimes Act 1900* (NSW) and, in the alternative, one count under section 35(1)(b). It was an offence under section 36 to maliciously cause by any means another person to contract a grievous bodily disease with the intent of causing the other person to contract a grievous bodily disease. Section 35(1)(b) made it an offence to maliciously, by any means, inflict grievous bodily harm upon a person. Following a jury trial in the District Court of New South Wales the appellant was acquitted of the section 36 charge but convicted under section 35(1)(b). The section 35(1)(b) conviction was unsuccessfully appealed in the Court of Criminal Appeal. In the High Court the relevant issue for present purposes was whether 'having sexual intercourse with another person and thereby causing the other person to contract a grievous

77 Edelman, 'Uncommon Statutory Interpretation' (n 10) 27.

78 Ibid.

79 Ibid.

80 *Momcilovic v The Queen* (2011) 245 CLR 1, 45 (French CJ), 158–62 (Heydon J), 217 (Crennan and Kiefel JJ) ('*Momcilovic*').

bodily disease [was] capable of amounting to the *infliction of grievous bodily harm* within the meaning of [section] 35(1)(b) ... ?⁸¹

The joint judgment of Kiefel CJ, Keane, Nettle and Edelman JJ noted that ‘until this case, *Clarence* had not been distinguished or judicially doubted in New South Wales’.⁸² *R v Clarence* (‘*Clarence*’) was an 1888 decision of the UK Court for Crown Cases Reserved.⁸³ It stood for the proposition ‘that the “uncertain and delayed operation of the act by which infection is communicated” does not constitute the infliction of grievous bodily harm’.⁸⁴ That was the long settled statutory meaning of the relevant phrase within the meaning of section 35(1)(b) to which the joint judgment referred. However, it was argued that ‘the decision in *Clarence* has long been regarded as doubtful’.⁸⁵ And to that end, the joint judgment offered nine carefully argued reasons as to why (and how) the precedential status of *Clarence* was fatally undermined with the consequence that it should no longer be followed.⁸⁶ The accuracy of this precedent analysis was disputed by Bell J in dissent.⁸⁷ Yet the joint judgment said that ‘*even if* the Parliament that enacted [section] 36 contemplated that [section] 35 would be construed in accordance with *Clarence*, the meaning of [section] 35 is not thereby affected’.⁸⁸

Moreover, the joint judgment said that given the generality of the language at issue – inflicts grievous bodily harm – section 35(1)(b) ‘attracts the operation of the ‘always speaking’ approach’.⁸⁹ They noted that ‘[t]he appellant did not develop his argument on the always speaking approach to statutory construction’,⁹⁰ but said ‘[t]he approach in this country allows that, if things not known or understood at the time an Act came into force fall, on a fair construction, within its words, those things should be included’.⁹¹

B How (and Why) It Was Misapplied

There is a strong argument that a serious sexual disease constituted ‘grievous bodily harm’ by the time the actions which gave rise to *Aubrey* was committed. Although, the New South Wales Parliament itself had expressed doubt in this regard.⁹² But the interpretive issue in *Aubrey* was whether *in the context of section 35* a person who transmits a serious sexual disease to another ‘inflicts

81 *Aubrey* (2017) 260 CLR 305, 312 [6] (Kiefel CJ, Keane, Nettle and Edelman JJ) (emphasis added). See generally James Morgan, ‘Offences Against the Person and Sexually Transmitted Diseases: *Aubrey v The Queen* (2017) 260 CLR 305’ (2018) 39(1) *Adelaide Law Review* 207.

82 *Aubrey* (2017) 260 CLR 305, 324 [35].

83 (1888) 22 QBD 23.

84 *Aubrey* (2017) 260 CLR 305, 332 [55] (Bell J), citing *R v Clarence* (1888) 22 QBD 23, 41–2 (Stephen J, Huddleston B, Mathew, AL Smith and Grantham JJ agreeing).

85 *Ibid* 324 [36] (Kiefel CJ, Keane, Nettle and Edelman JJ).

86 *Ibid* 319–25.

87 *Ibid* 335–38.

88 *Ibid* 325 [38] (emphasis added).

89 *Ibid* 326 [40].

90 *Ibid* 322 [30].

91 *Ibid* 321 [29] (citations omitted).

92 See below n 140 and accompanying text.

grievous bodily harm' upon them. The critical word that fell to be construed was 'inflicts'. As noted, the joint judgment said that 'until this case, *Clarence* had not been distinguished or judicially doubted in New South Wales'.⁹³ But as the generality of the statutory language attracted the operation of the 'always speaking' approach they reasoned as follows:

[E]ven if the reckless transmission of sexual diseases were not within the ordinary acceptation of 'inflicting grievous bodily harm' in 1888 ... subsequent developments in knowledge of the aetiology and symptomology of infection have been such that it now accords with ordinary understanding to conceive of the reckless transmission of sexual disease by sexual intercourse without disclosure of the risk of infection as the infliction of grievous bodily injury.⁹⁴

The joint judgment said that this accorded with the approach of Lord Steyn in *R v Ireland* – which it expressly endorsed⁹⁵ – where it was held that in 'light of contemporary knowledge' the meaning of 'bodily harm' in an 1861 Act now included a recognisable psychiatric illness.⁹⁶ But as Jacinta Dharmananda has pointed out, 'much of the majority's reasoning for this principle focuse[d] on the verb "inflicts"'.⁹⁷

It is less apparent how this word, used in isolation, may be an ambulatory term establishing a genus encompassing new things that have evolved from 'developments in knowledge of the aetiology and symptomology of infection'. The majority's use of the principle for this word appears more consistent with merely adopting a contemporary or 'updated' meaning of the word.⁹⁸

So, on this (orthodox) account the application of the 'always speaking' approach to 'inflicts' by the joint judgment was, arguably, problematic. Yet it was required to overcome the long settled legal meaning of '*inflicts* grievous bodily harm' in the context of section 35. Relevantly and to that end, they rejected the appellant's submission that 'the ordinary acceptation of the word "inflicts" does not, even now, extend to the communication of disease or infection'.⁹⁹

It is commonplace to speak of the infliction of suffering and thus, as counsel seemed to accept, it is now commonplace to speak of the infliction of psychiatric injury. Semasiologically, it is just as commonplace and just as appropriate to speak of the infliction of physical disease.¹⁰⁰

That is certainly true. But what may, semasiologically, constitute the meaning of 'infliction' does not, necessarily, equate to the legal meaning of '*inflicts* grievous bodily harm' in the context of section 35. That was the essence of the appellant's submission in this regard. The joint judgment on the other hand considered the contemporary linguistic meaning of 'inflicts' without giving sufficient consideration to the specific statutory context in which it appears in my

93 *Aubrey* (2017) 260 CLR 305, 324 [36] (Kiefel CJ, Keane, Nettle and Edelman JJ).

94 *Ibid* 320 [24].

95 *Ibid* 321–2 [29].

96 *R v Ireland* [1998] AC 147, 158–9.

97 Jacinta Dharmananda, 'The "Always Speaking" Principle: Not Always Needed?' (2017) 28(3) *Public Law Review* 199, 202.

98 *Ibid*.

99 *Aubrey* (2017) 260 CLR 305, 321 [28] (Kiefel CJ, Keane, Nettle and Edelman JJ).

100 *Ibid*.

view. That interpretive approach is problematic for reasons that will be outlined and explained more fully below.¹⁰¹

In any event, the above analysis suggests that the joint judgment in *Aubrey* may have updated the meaning of the word ‘inflicts’ which changed the core meaning of ‘inflicts grievous bodily harm’ in the context of section 35(1)(b) as a consequence. This was not a case of a statutory word as genus being applied to circumstances which did not exist at the time of enactment but fell within the essential, original meaning of that term.¹⁰² It is of course possible (maybe probable) that as a linguistic matter the reckless transmission of a sexual disease may now constitute the infliction of grievous bodily harm. But as noted the legal meaning of a statute does not (necessarily) correspond with its linguistic meaning.¹⁰³ To update the meaning of a statute in this manner involves, then, giving its words and phrases ‘whatever meaning they happen to have at the time in the future when they are read and interpreted’.¹⁰⁴ The upshot was a statute (section 35) with ‘two contradictory meanings at different times, each of which is correct at one time but not another, without any intervention from the legislature which enacted it’.¹⁰⁵ That is, arguably, judicial legislation not statutory interpretation. In a criminal context like *Aubrey* the result was that a person was convicted of an offence and sentenced to five years imprisonment regarding conduct for which they would have been acquitted on the earlier (indeed for the 116 years prior) interpretation of the statute.¹⁰⁶ That amounts to the retrospective widening of a criminal statute, the significance of which will be explored in Part IV(C) below.

On this account *Aubrey* involved a misapplication of the ‘always speaking’ approach in my view. Yet the reasoning of the joint judgment has not attracted the separation of powers-based criticism that by ‘updating’ the core meaning of section 35 it usurped the legislative function. That might simply reflect the likelihood that few in government or the citizenry more generally lamented (or maybe even noticed) the nature of the judicial ‘interpretation’ which secured the criminal conviction of the appellant in *Aubrey* for his appalling conduct.¹⁰⁷ Or maybe with ‘an ever-expanding statute book and the growth in the size and complexity of modern government the political arms of government are *prima facie* willing to accept this species of judicial updating’.¹⁰⁸ Tolerance of this

101 See below Part IV(A).

102 But see Edelman, ‘Winterton Lecture’ (n 31) 19.

103 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) (*‘Project Blue Sky’*).

104 Jack Tsen-Ta Lee, ‘The Text through Time’ (2010) 31(3) *Statute Law Review* 217, 219.

105 *Pape* (2009) 238 CLR 1, 145 [423] (Heydon J).

106 Jeremy Gans, ‘High Court Overrules 130 Year-Old Criminal Law Precedent’, Opinions on High (Blog Post, 11 May 2017) <<http://blogs.unimelb.edu.au/opinionsonhigh/2017/05/11/news-high-court-overrules-130-year-old-criminal-law-precedent/#more-6940>>.

107 It was not in dispute that the appellant in *Aubrey* engaged in unprotected sexual intercourse with the complainant over several months when he knew that he was HIV positive.

108 Dan Meagher, ‘The Principle of Legality and *Contemporanea Exposition est Optima et Fortissima in Lege*’ (2017) 38(1) *Statute Law Review* 98, 104–5 (emphasis added) (*‘The Principle of Legality’*). But for more radical and contested explanation of and justification for this kind of statutory interpretation see Sir Stephen Sedley, ‘Human Rights: A Twenty-First Century Agenda’ [1995] *Public Law* 386, 388 where it

constitutionally dubious form of “interpretation” may hold ‘so long as the statutory language is [linguistically] capable of bearing the legal meaning’, does not frustrate clear government policy and, ‘most importantly, the updating does not effect a controversial change in social or economic policy upon which the political arms of government and/or wider public would resist or take exception’.¹⁰⁹

In any event, as noted above and explored in more detail below, the orthodox account of the ‘always speaking’ approach is doctrinally and normatively sound and consistent with the interpretive duty of courts in the common law tradition.¹¹⁰ Nevertheless, Part IV will outline important issues of method and context that a judge should consider before it is applied to determine the legal meaning of a statute. The criminal law context – and maybe the exceptional facts – of *Aubrey* shone a particularly bright light on these issues. Yet they are issues of more general concern which may arise in cases where the decision to apply (or not) the ‘always speaking’ approach may be interpretively decisive.

IV ISSUES WITH THE ‘ALWAYS SPEAKING’ APPROACH TO STATUTES

A The ‘Modern Approach’ to Statutory Interpretation

In Australia, the High Court has stated that it is the ‘modern approach’ to interpretation which judges must use to determine the legal meaning of a statute.¹¹¹ In *CIC Insurance Ltd v Bankstown Football Club Ltd* the judgment of Brennan CJ, Dawson, Toohey and Gummow J outlined what that involved:

[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [reference to reports of law reform bodies], one may discern the statute was intended to remedy.¹¹²

The ‘modern approach’ to interpretation has, then, ‘context at its heart’.¹¹³ Specifically, that to ascertain the meaning of a statute its context must ‘be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise’ and ‘in its widest sense’.¹¹⁴ In its more recent jurisprudence the High Court has sought to emphasise if not reassert the

was argued that ‘modern public law has carried forward a culture of judicial assertiveness to compensate for, and in places repair, dysfunctions in the democratic process’.

109 Meagher, ‘The Principle of Legality’ (n 108) 105.

110 See below Part IV(A).

111 The essence of that approach was first explained in 1985 in a dissenting judgment of Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch* (1985) 157 CLR 309, 315.

112 (1997) 187 CLR 384, 408 (citations omitted) (*‘CIC Insurance’*).

113 Barnes (n 51) 1084.

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

centrality of the statutory text to the ‘modern approach’.¹¹⁵ This ‘reminds us ... that context is critical and useful for its capacity to assist in working out the meaning of a statutory text. In a process the aim of which is to attribute meaning to a statutory text, context, necessarily, plays an instrumental role’.¹¹⁶ Yet the Court in doing so has underlined (not undermined) the core principles of the ‘modern approach’. This was made clear in its 2017 decision in *SZTAL*.¹¹⁷ Relevantly, as Gageler J explained: ‘The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility “if, and in so far as, it assists in fixing the meaning of the statutory text”’.¹¹⁸

In any event, the application of the orthodox account of the ‘always speaking’ approach is perfectly compatible with the ‘modern approach’ to statutory interpretation. If close consideration of a statutory text in its wider context and by reference to its purpose establishes that Parliament has deliberately chosen words to provide for its application to new circumstances and developments then the application of the ‘always speaking’ approach is judicially required. As detailed in Part II(B) above, Parliament can do so by choosing to use words or phrases that are ‘of indeterminate scope and of a high level of generality’,¹¹⁹ embodying an inherently flexible standard or incorporate a common law rule or principle. Yet this kind of statutory language is necessary but not sufficient to justify its application. The specific context of the provision – including its parliamentary history, underlying purpose, role within the wider statutory scheme and the existing legal context into which was enacted – must be such as to convince a court that this is what Parliament meant and intended by choosing the words and form of statute which it did.

That, for example, was the basis for McHugh J finding that a ‘document’ for the purposes of the *Migration Act 1958* (Cth) included information that was stored on a computer. There was ‘[n]o reason ... for thinking that Parliament intended to distinguish’ between hard and electronic copies and that extended meaning ‘accords with the object of the enactment’.¹²⁰ Whereas it was suggested above that in *Yemshaw* Lady Hale was mistaken to hold that ‘violence’ in the specific context of the *Housing Act 1996* (UK) was chosen by Parliament to accommodate – and so apply to – new manifestations of violence beyond the physical.¹²¹ So, the applicability or otherwise of the ‘always speaking’ approach to a statutory text is determined by its specific context and the purpose for which it was enacted by Parliament. That is the essence of the ‘modern approach’ and neatly illustrates the extra-curial observation of the Hon Murray Gleeson that

115 See *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

116 Dan Meagher, ‘The “Modern Approach” to Statutory Interpretation and the Principle of Legality: An Issue of Coherence?’ (2018) 46 *Federal Law Review* 397, 404.

117 (2017) 262 CLR 362, 368–9 (Kiefel CJ, Nettle and Gordon JJ), 373–5 (Gageler J).

118 Ibid 374 [37] (citations omitted).

119 *Clark* (2003) 57 NSWLR 113, 145 [142] (Spigelman CJ).

120 *Muin* (2002) 190 ALR 601, 626–7 [104].

121 See above nn 52–76 and accompanying text.

'[t]he meaning of a text is always influenced, and sometimes controlled, by context'.¹²²

The reasoning of the Full Court of the Tasmanian Supreme Court in *Attorney-General (Tas) v CL* provides an important recent example of this interaction.¹²³ Like *Yemshaw*, the Court had to determine whether the meaning of 'violence' in the context of the *Victims of Crime Assistance Act 1976* (Tas) covered only physical violence or the threat of it. The judge in the first instance applied the 'always speaking' approach to hold that the meaning of 'violence' had evolved and 'is capable of accommodating acts which are intended to cause harm other than through the application of force to the person of another'.¹²⁴ However, the Full Court rejected that approach *in this statutory context*:

[O]rdinarily or if possible, the words of a statute should be treated as ambulatory, speaking continuously in the present and conveying a contemporary meaning. Whether or not that applies in the particular case depends on text, context and purpose.¹²⁵

And that statutory context – in particular, specific sections in the definition of 'offence' – made it clear to the Court that 'the words "offence involving violence by one person against another" in the context in which they appear, have the more common meaning of physical force or the threat of it, and not the far more expanded notions as contended for the respondent'.¹²⁶ That conclusion was supported by extrinsic parliamentary materials in the Court's view.¹²⁷ Relevantly, the Minister's second reading speech revealed that a core aim of the relevant statutory provisions was 'to restrict the range of criminal conduct for which claims could be made' and '[t]hat included limiting claims to ones where there had been a crime of person to person violence'.¹²⁸

The interpretive tools (and method) available to Australian courts under the 'modern approach' raises, then, an interesting and important issue regarding the 'always speaking' approach to statutes. Relevantly, is it really necessary or of interpretive value for our courts to presume that a statute is 'always speaking'? This is, I think, the point which the joint judgment of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ sought to make in the 2007 High Court case of *Forsyth v Deputy Commissioner of Taxation*:

[T]he appellant submitted that there was a principle of statutory construction at common law favouring the ambulatory approach for which he contended. The correctness of this proposition in its generality was denied by the Deputy Commissioner. The Deputy Commissioner did, however, acknowledge that a rebuttable 'presumption' that a statute is 'always speaking' had found some degree of academic and judicial support in the United Kingdom. The terminology of rebuttable presumption is apt to mislead. What it bespeaks is an exercise in statutory interpretation which seeks to discern what is called the intention of the

122 Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 29.

123 [2018] TASFC 6. My thanks to one of the referees for drawing this important case to my attention.

124 Ibid 81 [27] (Porter AJ).

125 Ibid 87 [45] (emphasis in original).

126 Ibid 98 [84].

127 Ibid.

128 Ibid 97 [81].

legislature in enacting the specific provision, having regard to its context, scope and purpose.¹²⁹

So, whether or not Parliament has chosen statutory language to provide for its application to new circumstances and developments should be determined upon the application of the ‘modern approach’ to interpretation.¹³⁰ That process ‘begins with a consideration of the ordinary and grammatical meaning of the words of the provision having regard to their context and legislative purpose’,¹³¹ *not a presumption that a statute is ‘always speaking’*. Upon the completion of that interpretive inquiry a court may then conclude that the statute is to be applied to new circumstances and developments if interpretively possible. That interpretive conclusion might reasonably be made, for example, when a statute ‘employ[s] as an integer for its operation a term with a content given by the common law as established from time to time’.¹³² Indeed, Pearce and Geddes make the following observation:

Legislation is usually deliberately drafted with the intention that the text is to be regarded as ambulatory, thereby embracing future changes in the subject matter ... The knowledge extant at the date of enacting the legislation may enable the parliament to identify the problem with which the legislation is intended to deal but it may choose not to define ‘its metes and bounds’ ...¹³³

Even so, to hold that a statute has such an operation upon the application of the ‘modern approach’ is *the conclusion as to its legal meaning* not the interpretive method or principle itself. That is important. To *begin* the interpretive process with the ‘always speaking’ approach is, arguably, to put the cart before the horse. And if so, then in Australia it might be ‘worth considering whether the “always speaking” principle has, like the golden rule, been rendered otiose by the contemporary interpretive approach’.¹³⁴

The significance of this point is illustrated by *Aubrey*. Arguably, the decision of the joint judgment that section 35 ‘attract[ed] the operation of the always speaking approach’¹³⁵ was made without paying proper regard and according sufficient weight to important aspects of the relevant statutory context.¹³⁶ To recall, in *Aubrey* it was held that the sexual transmission of a serious disease ‘inflicts grievous bodily harm’.¹³⁷ Yet the wider context included another offence in the same statute that made it a (more) serious crime to maliciously cause a

129 (2007) 231 CLR 531, 548 [39] (citations omitted).

130 Ibid, citing *CIC Insurance* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) as the relevant authority for what ‘an exercise in statutory interpretation ... seeks to discern’.

131 *Australian Education Union v Department of Education and Children’s Services* (2012) 248 CLR 1, 13 [26] (French CJ, Hayne, Kiefel and Bell JJ).

132 *Aid/Watch* (2010) 241 CLR 539, 548–9 [20] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

133 Pearce and Geddes (n 11) 156 (citations omitted).

134 Dharmananda (n 97) 204.

135 *Aubrey* (2017) 260 CLR 305, 326 [40] (Kiefel CJ, Keane, Nettle and Edelman JJ).

136 Richard Ekins has made a similar criticism of the interpretive reasoning of Lady Hale in *Yemshaw* though it was framed in terms of her Honour not directly considering ‘which meaning Parliament likely intended’: see Ekins, ‘Updating the Meaning of Violence’ (n 65) 18.

137 *Crimes Act 1900* (NSW) s 35(1)(b); *Aubrey* (2017) 260 CLR 305, 326 [40] (Kiefel CJ, Keane, Nettle and Edelman JJ).

person to contract a grievous bodily disease with the intent of doing so.¹³⁸ In doing so the New South Wales Parliament added the grievous bodily disease crime to an existing criminal statute and did so in a specific form which included the *mens rea* of intent as an essential element. If it wished to do so Parliament could have created the lesser included offence or expanded the scope of section 35 to make clear that such conduct fell within it. It did not. Indeed, when the New South Wales Parliament amended the definition of 'grievous bodily harm' to include 'any grievous bodily disease'¹³⁹ the second reading speech read as follows:

[I]n 1990 the New South Wales Parliament enacted section 36 of the *Crimes Act* – causing a grievous bodily disease – and, in doing so, it is arguable that Parliament conceded that serious diseases did not amount to grievous bodily harm.¹⁴⁰

It is of course a fundamental proposition of the constitutional separation of powers that '[t]he words of a Minister must not be substituted for the text of the law'.¹⁴¹ That constitutional proposition, as I understand it, assumes the text of the law yields a legal meaning which one seeks to displace through an external source. But the scope of the criminal offence in *Aubrey* was contested and its legal meaning was unclear. Under the 'modern approach', then, the relevant context – which provided useful internal (specific grievous bodily disease offence with the *mens rea* of intent in the next section of the same statute) and external (second reading speech, legislative history) sources of statutory meaning – must 'be considered in the first instance' and 'in its widest sense' to assist in fixing the meaning of the ambiguous statutory text.¹⁴² And that (internal and wider) context contained clear signals that the legal meaning of 'inflicts grievous bodily harm' did not include the sexual transmission of a serious disease.

The Court did, however, allude to the (internal and wider) context detailed above when it said that 'even if the Parliament that enacted [section] 36 [grievous bodily disease offence with *mens rea* of intent] contemplated that [section] 35 [the relevant offence] would be construed in accordance with *Clarence*, the meaning of [section] 35 is not thereby affected'.¹⁴³ *Clarence*, to recall, was the (then) 116-year English precedent which controlled the legal meaning of section 35: 'that the "uncertain and delayed operation of the act by which infection is communicated" does not constitute the infliction of grievous bodily harm'.¹⁴⁴ Yet the Court stated that as the 'always speaking' approach was attracted the relevant interpretive question was:

138 *Crimes Act 1900* (NSW) s 36, repealed by *Crimes Amendment Act 2007* (NSW) sch 1 item 9.

139 The *Crimes Amendment Act 2007* (NSW) sch 1 item 1 inserted the following at the end of the definition of 'grievous bodily harm': 'and (c) any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease)'. The facts which gave rise to *Aubrey* occurred in early 2004.

140 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 September 2007, 2258 (Barry Collier).

141 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ).

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

143 *Aubrey* (2017) 260 CLR 305, 325 [38] (Kiefel CJ, Keane, Nettle and Edelman JJ).

144 *Ibid* 332 [55] (Bell J).

[W]hether, if the Parliament that enacted [section] 35 in 1900 were appraised of subsequent advances in the understanding of the aetiology and symptomology of infectious diseases, they would have intended that [section] 35 extend to the reckless transmission of HIV by consensual sexual intercourse with a complainant who is ignorant of the accused's infection.¹⁴⁵

This is an odd and distracting way to frame the interpretive issue in Australia. That is so as the contemporary High Court has rejected authentic notions of (subjective *or* objective) legislative intention as a 'fiction which serves no useful purpose'.¹⁴⁶ Rather, the Court now considers 'legislative intention' to be the product not the goal or lodestar of statutory interpretation as the judgment of French CJ, Crennan, Kiefel and Bell JJ explained in *Zheng v Cai*:

[J]udicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws ... the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.¹⁴⁷

This controversial¹⁴⁸ aspect of the Court's interpretive method forms part of the 'modern approach'. That being so it is difficult to understand why (and how) the relevant interpretive question was the counterfactual proposed. What the 1900 Parliament would have intended (subjectively or objectively) regarding the coverage of the offence if it knew of the later medical and scientific advances is not the relevant inquiry under the 'modern approach'.¹⁴⁹ The nature of the interpretive task under this approach was outlined by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* ('*Project Blue Sky*') in a statement routinely endorsed and applied by senior appellate courts in Australia:

The duty of a court is to give words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.¹⁵⁰

And the following explanation given by the High Court in *Lacey v Attorney-General (Qld)* as to the meaning of 'legislative intention' in the above statement makes it clear why the counterfactual posed in *Aubrey* was not the relevant interpretive question to ask under the 'modern approach':

The legislative intention there referred to is not an objective collective mental state. Such a state is a fiction which serves no useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of

145 Ibid 325 [38] (Kiefel CJ, Keane, Nettle and Edelman JJ).

146 *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ) ('*Lacey*'). But see the more sympathetic (extra-curial) views of Justice Gageler and Justice Edelman regarding legislative intention as an objective construct: Justice Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1; Edelman, 'Winteron Lecture' (n 31) 12–15. (2009) 239 CLR 446, 455–6 [28] (citations omitted).

147 (2009) 239 CLR 446, 455–6 [28] (citations omitted).

148 See Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39.

149 See Dharmananda (n 97) 203.

150 (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.¹⁵¹

The conclusion in *Aubrey* that section 35 attracted the operation of the 'always speaking' approach may, then, have distracted the Court from the proper discharge of its core interpretive duty under the 'modern approach'. And as Dharmananda has noted, 'it is debatable how much the question assists us'¹⁵² in any event. For even with this imputed knowledge there must be serious doubt as to whether the New South Wales Parliament in 1900 would have applied this offence to the sexual transmission of a serious disease.

There is one final point regarding the 'modern approach' in this context worth considering. One might speculate as to whether the High Court's rejection of authentic notions of legislative intent in the construction of statutes may have played an unwitting role in the misapplication of the 'always speaking' approach in *Aubrey*. As noted, there is no reason in principle why the application of the 'modern approach' – where legislative intention is the product not the aim of statutory interpretation – cannot yield a legal meaning that a statute is to be applied to new circumstances and developments if interpretively possible. But without the constitutional discipline which the discovery of (objective) legislative intent, arguably, provides the interpretive process, maybe the Court in *Aubrey* placed undue emphasis on the contemporary linguistic meaning of the offence.¹⁵³ As Gageler J recently observed, critically, of this aspect of the 'modern approach':

[The] legislated text is the product of deliberative choice on the part of democratically elected representatives to pursue collectively chosen ends by collectively chosen means. To reduce legislative intention to a label for the outcome of a constructional choice made by the court itself, is to miss the point of the traditional terminology. It is to ignore that the responsibility of the court, in making a constructional choice, is to adopt an authoritative construction of legislated text which accords with the imputed intention of the enacting legislature. Worse, it is to use a constructional methodology which fails to give full expression to 'the constitutional relationship between courts and the legislature'.¹⁵⁴

Is it possible that *as a practical matter* updating statutory meaning in a constitutionally dubious manner which, arguably, occurred in *Aubrey* is more likely if one considers legislative intention a 'fiction which serves no useful purpose'¹⁵⁵ in the interpretive process?

151 (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayden, Crennan, Kiefel and Bell JJ) (citations omitted).

152 Dharmananda (n 97) 203.

153 See Justice Susan Kenny, 'Constitutional Role of the Judge: Statutory Interpretation' (2014) 1 *Judicial College of Victoria Online Journal* 4, 7–8.

154 *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 363 ALR 188, 206–7 [77] (citations omitted).

155 *Lacey* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ).

B Practical Inconvenience, Constitutional Considerations and ‘Constructional Choice’

The interpretive reasoning in *Aubrey* raised two further issues regarding the ‘always speaking’ approach that are worth considering. The first was the view taken by the joint judgment that ‘[i]n light of contemporary ideas and understanding, any other result would be productive of considerable inconvenience’.¹⁵⁶ The same concern was expressed by Windeyer J in *Lake Macquarie Shire Council*. He had serious doubt that ‘gas’ could be applied to petroleum gas as the rest of the High Court had found,¹⁵⁷ but chose not to dissent on this point due to the inconvenience which his preferred view would occasion: ‘So, sacrificing what seems to me to be the true interpretation of the word “gas” to considerations of expediency in the more general aspects of the case, I prefer not to press my view’.¹⁵⁸ It will be recalled that Lord Brown took a similar, pragmatic approach in *Yemshaw* notwithstanding his ‘profound doubt’ as to the availability of the ‘always speaking’ approach in that statutory context.¹⁵⁹

In terms of interpretive principle, one might suggest that whether or not a statutory provision attracts the operation of the ‘always speaking’ approach is not a matter of judicial choice. That the approach necessarily follows – and must be employed – if the interpretive process determines that Parliament has chosen statutory language to provide for its application to new circumstances and developments; and vice versa. When the interpretive situation *is* clear (either way) this interpretive proposition holds true. But maybe what the above pragmatic statements suggest is that in some contexts whether or not a statute attracts the operation of the ‘always speaking’ approach is a very difficult question to answer.¹⁶⁰ And that is especially so if the issue is relevant to how an ultimate appellate court such as the High Court will determine a case. At this level of the judicial hierarchy the case – and interpretive question it generates – is, necessarily, a hard one.

It is for good reason, then, that the High Court has recognised the element of ‘constructional choice’ which is often available to a judge when interpreting a statute.¹⁶¹ As French CJ observed in *Momcilovic v The Queen*, ‘[i]t reflects the plasticity and shades of meaning and nuance that are the natural attributes of language and the legal indeterminacy that is avoided only with difficulty in statutory drafting’.¹⁶² That judicial choice is not, of course, at large. It is bounded by the range of meanings that the text will reasonably bear and is informed ‘on evaluation of the relative coherence of the alternatives with identified statutory objects or policies’.¹⁶³

¹⁵⁶ *Aubrey* (2017) 260 CLR 305, 326 [40] (Kiefel CJ, Keane, Nettle and Edelman JJ).

¹⁵⁷ *Lake Macquarie Shire Council* (1970) 123 CLR 327, 332.

¹⁵⁸ *Ibid* 333.

¹⁵⁹ *Yemshaw* [2011] 1 All ER 912, 928 [48].

¹⁶⁰ See Ross Carter, *Burrows and Carter: Statute Law in New Zealand* (LexisNexis, 5th ed, 2015) 400–5.

¹⁶¹ See Justice John Basten, ‘Statutory Interpretation’ (2018) 92 *Australian Law Journal* 81.

¹⁶² (2011) 245 CLR 1, 50 [50].

¹⁶³ *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531, 557 [66] (Gageler and Keane JJ).

Yet in hard (statutory interpretation) cases whilst the identification of statutory purpose(s) is '[i]ntegral to making such a choice'¹⁶⁴ it may not be sufficient or decisive. Other contextual factors may also be interpretively relevant and useful. So, for example, where one meaning of a statute is destructive of fundamental rights courts in our common law and constitutional tradition will, if interpretively open, 'tend to choose another which avoids or mitigates that destruction or impairment'.¹⁶⁵ And in a case where the 'always speaking' approach might be interpretively available, the significant practical inconvenience which would attend its non-application should also inform the 'constructional choice' to be made.¹⁶⁶ It is an important, additional contextual reason for a judge to *decide* that a particular statute in a specific context is to be applied to new circumstances and developments. This explains – in terms of contemporary interpretive principle – why the approach of Windeyer J in *Lake Macquarie Shire Council* was sensible and justified.

However, there are hard cases where other contextual factors might outweigh the practical inconvenience of not applying the 'always speaking' approach. This might be when a court is faced with an old statute the settled meaning of which is considered anachronistic or antithetical to contemporary values. As noted, in *Aubrey*, the joint judgment said that '[i]n light of contemporary ideas and understanding, any other result would be productive of considerable inconvenience'.¹⁶⁷ Yet in this context the respective roles of Parliament and the courts in keeping the statute book up to date and in good working order is an important (constitutional) consideration. As Bell J noted in dissent, 'it is a large step to depart from a decision which has been understood to settle the construction of a provision'.¹⁶⁸ It was not the role of the Court, in her view, to apply the 'always speaking' approach to extend the coverage of section 35 to new developments in medical science: 'If that settled understanding is ill-suited to the needs of modern society, the solution lies in the legislature addressing the deficiency'.¹⁶⁹ Which is precisely what later occurred when the New South Wales extended the definition of 'grievous bodily harm' to include 'grievous bodily disease' as noted above.¹⁷⁰

This constitutional consideration might also inform the 'constructional choice' to be made in a case where the statute concerns a contested issue of social or economic policy. If the application of the 'always speaking' approach would, in effect, amount to the judicial determination of the relevant issue then a court might reasonably refrain from doing so. That would reflect the sound view

164 *STZAL* (2017) 262 CLR 362, 375 [39] (Gageler J).

165 Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40(1) *Statute Law Review* 40, 40.

166 For example, the High Court in *Project Blue Sky* (1998) CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) said that the consequences of a literal or grammatical interpretation of a statute 'may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning'. My thanks to one of the referees for bringing this point to my attention.

167 *Aubrey* (2017) 260 CLR 305, 326 [40] (Kiefel CJ, Keane, Nettle and Edelman JJ).

168 *Ibid* 332 [55] (Bell J).

169 *Ibid*.

170 *Crimes Amendment Act 2007* (NSW) sch 1 item 1.

that it is the role of Parliament – not the courts in an exercise of statutory interpretation – to resolve contested issues of social and economic policy. It might, for example, explain some of the interpretive controversy which attended the decision of the House of Lords in *Ghaidan v Godin-Mendoza* ('*Ghaidan*').¹⁷¹ There it was held that a same-sex partner was a statutory tenant's surviving 'spouse' for the purposes of the *Rent Act 1977* (UK).¹⁷² That interpretation was at odds with its own earlier decision in this regard in *Fitzpatrick v Sterling Housing Association* ('*Fitzpatrick*').¹⁷³ But a majority of the House of Lords thought it was nevertheless compelled by the post-*Fitzpatrick* enactment of the *Human Rights Act 1998* (UK) and its section 3 obligation that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.¹⁷⁴ In any event, the respective roles of Parliament and the courts regarding legislation is an important constitutional consideration in these contexts. It is part of the interpretive matrix which, in a hard case, informs the judicial decision whether or not a statute *ought* to attract the operation of the 'always speaking' approach.

C The Criminal Context

The final issue concerns the application of the 'always speaking' approach to a criminal statute. The reasoning of the joint judgment in *Aubrey* and the outcome it occasioned brings this important issue into sharp relief. The application of the 'always speaking' approach in this context *extended criminal liability to new circumstances and developments*. So, in *Aubrey* it resulted, *necessarily*, in the retrospective operation of section 35(1)(b) of the *Crimes Act 1900* (NSW). And whilst 'there is no little difficulty presented by the use of the words "retrospective" and "retroactive" in relation to legislation'¹⁷⁵ the interpretation of the joint judgment occasioned a *strong* form of retrospectivity. That is, the law 'change[d] the legal status of previous acts on a backward-looking as well as forward-looking basis'.¹⁷⁶ That is no small matter in a common law system presumptively hostile to retrospective lawmaking for its capacity to undermine the core rule of law values of certainty, accessibility and prospectivity.¹⁷⁷

One might reasonably query, then, why the joint judgment did not consider this a context in which the common law presumption against retrospectivity ought to have been applied. The 'modern approach' as articulated in *Project Blue*

171 [2004] 2 AC 557 ('*Ghaidan*'). See Justice Pamela Tate, 'Statutory Interpretive Techniques Under the Charter: Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43, 62–3.

172 *Ghaidan* [2004] 2 AC 557 (Lord Nicholls, Lord Steyn, Lord Rodger, Baroness Hale; Lord Millett dissenting).

173 [2001] 1 AC 27 ('*Fitzpatrick*').

174 *Ghaidan* [2004] 2 AC 557, 572 (Lord Nicholls), 577 (Lord Steyn), 604 (Lord Rodger), 609 (Baroness Hale).

175 *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117, 156 [94] (Gummow, Hayne and Bell JJ) ('*Australian Education Union*').

176 Stephen R Munzer, 'Retroactive Law' (1977) 6(2) *Journal of Legal Studies* 373, 383.

177 See Charles Sampford, *Retrospectivity and the Rule of Law* (Oxford University Press, 2006).

Sky (and detailed above) makes clear that 'the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning'.¹⁷⁸ And those canons include the principle of legality¹⁷⁹ – a strong clear statement rule for fundamental rights in Australia¹⁸⁰ – of which the common law retrospectivity presumption is now considered an aspect.¹⁸¹ As Andrew Palmer and Charles Sampford have noted regarding the common law abolition of the marital immunity for rape, '[w]hy does it seem to be acceptable for judges to change the criminal law retrospectively, if it is generally seen as totally unacceptable for a legislature to do so?'¹⁸² Indeed, those marital immunity cases and *Aubrey* were examples of strong retrospective lawmaking by the courts. Relevantly, they resulted in persons being convicted of serious criminal offences regarding conduct that was lawful at the time it was undertaken.

On the other hand, is it likely or reasonable that the HIV positive accused in *Aubrey* consciously decided to have unprotected sex with his partner in reliance upon the long settled meaning of the criminal statute? If the core vice of retrospective lawmaking is to 'defeat the expectations of citizens formed in reliance on the existing state of law'¹⁸³ then in the specific context of *Aubrey* the reliance argument was weak. If the accused was unaware of the statute's meaning – which in the circumstances of the case seems almost certain¹⁸⁴ – then the reliance argument loses much of its force. But even if we assume that he did, 'then his reliance on the existing rule seems to make his actions more, rather than less, morally reprehensible'.¹⁸⁵ Either way, it is unlikely that the application of the 'always speaking' approach in *Aubrey* and the strong retrospectivity which it occasioned was a source of unfairness or injustice to the accused *specifically* or any other person similarly placed.

Yet the public interest in seeing justice done in an individual case, which may well have been the outcome in *Aubrey*, must be weighed up against the wider, long-term public interest in the judicial maintenance of the rule of law and its core values. It is no small matter as noted above to give a criminal statute a strong retrospective operation. It occasions a form of institutional or collective

178 *Project Blue Sky* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

179 *Ibid* n 56, where the joint judgment cited the seminal authority *Coco v The Queen* (1994) 179 CLR 427, 437 for the principle of legality.

180 See Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413.

181 *Australian Education Union* (2012) 246 CLR 117, 134–5 [30] (French CJ, Crennan and Kiefel JJ).

182 Andrew Palmer and Charles Sampford, 'Judicial Retrospectivity in Australia' (1995) 4(2) *Griffith Law Review* 170, 183. The authors suggest 'that judges are likely to ... make more limited decisions, and have neither the power nor the inclination to make more far-reaching decisions': at 184.

183 Andrew Palmer and Charles Sampford, 'Retrospective Legislation in Australia: Looking Back at the 1980s' (1994) 22(2) *Federal Law Review* 217, 229.

184 The appellant was acquitted of maliciously causing the complainant to contract a grievous bodily disease with the intent of causing the complainant to contract the disease under the *Crimes Act 1900* (NSW) s 36. Yet it is fanciful to think that in light of this offence (and his own conduct) that the appellant knew in advance that his actions did not amount to the infliction of grievous bodily harm under the *Crimes Act 1900* (NSW) s 35(1)(b) based on a 130 year-old English precedent.

185 Palmer and Sampford, 'Judicial Retrospectivity in Australia' (n 182) 180.

injustice. As a consequence, then, a court may resist the application of the ‘always speaking’ approach to a statute if to do so would amount to the retrospective extension of criminal (or civil) harm. The common law’s presumptive hostility to (strong) retrospective lawmaking and the duty of the legislature to extend the criminal (or civil) liability of *its* statutes ought to be given serious consideration in this context. That presumptive hostility should direct consideration of whether an alternative construction of the statute – without a strong retrospective operation – might be available and preferable in the relevant factual and statutory context.

The dissenting judgment of Bell J in *Aubrey* suggested that there was a constructional choice to be made regarding the proper scope of section 35. Moreover, her interpretive reasoning explained why (and how) the application of the ‘always speaking’ approach in this context was problematic. It was, she said, ‘a large step to depart from a decision which has been understood to settle the construction of a provision, *particularly where the effect of that departure is to extend the scope of criminal liability*’.¹⁸⁶ And there were other important legal values at stake which justified not departing from that settled understanding:

Certainty is an important value in the criminal law. That importance is not lessened by asking whether it is likely that persons would have acted differently had they known that the law was not as it had been previously expounded.¹⁸⁷

In doing so, Bell J recognised the weakness of the accused’s reliance argument on the long settled meaning of the criminal offence. But her Honour did not consider that sufficient to justify giving the statute a retrospective operation which the application of the ‘always speaking’ approach to the statute occasioned in *Aubrey*. The value of certainty in the criminal law and the constitutional duty of the legislature (not the courts) to amend a deficient and antiquated statute – the point considered in Part IV(B) above – were, in her view compelling in this context.¹⁸⁸

V CONCLUSION

This article has sought to clarify the nature and scope of the ‘always speaking’ approach to statutes in Australian law. To do so is important. For whilst it is now considered interpretive orthodoxy to treat statutes as ‘always speaking’, what that entails in terms of doctrine and application is not always clear. The analysis undertaken in this regard outlined the orthodox account of this approach which, in turn, helped us to understand when it is judicially misapplied and why that is so.

It was, however, recognised that whether or not a statute attracts the operation of the ‘always speaking’ approach can sometimes be a difficult question to answer. In these hard cases courts have a ‘constructional choice’ to

186 *Aubrey* (2017) 260 CLR 305, 332 [55] (Bell J) (emphasis added).

187 *Ibid* 338 [73] (Bell J).

188 But for a sophisticated version of the alternative argument, see Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982).

make. In order to do so judges have at their disposal the interpretive tools (and method) provided by the 'modern approach' to statutory interpretation. Indeed, in these cases maybe close attention to the contextualism which lies at the heart of the 'modern approach'¹⁸⁹ is a more satisfactory way of determining the legal meaning of a statute than to presume that it is 'always speaking'.

189 See Barnes (n 51) 1084.