Statutory Precedents under the "Modern Approach" to Statutory Interpretation

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Abstract

This article considers when Australia's superior appellate courts should overturn or depart from previous judicial interpretations of statute law, especially in light of the modern approach to statutory interpretation. In this age of statutes, it is vital to understand the circumstances in which superior courts should — and equally, should not — do so. Yet, the issue remains largely unexplored in the academic literature. The approach to statutory precedents is said to be informed by special constitutional considerations that do not apply to those of common law, and that require courts to overturn statutory precedents that they consider to be plainly erroneous. More recently, it has been suggested that the sensitivity to context demanded by the modern approach will lead superior courts to more readily conclude that a statutory precedent is wrong. While there is some truth to both claims, there are also compelling reasons why superior courts should exercise caution when dealing with statutory precedents, and in many instances, choose to 'stand by what has been decided'.

I Introduction

This article considers the approach of superior courts in Australia to statutory precedents — and especially that of the High Court of Australia. By 'statutory precedent', we mean a previous decision of the same court, or a court lower in the judicial hierarchy, as to what a statute means. In particular, we examine how the treatment of statutory precedents might be informed by the 'modern approach' to statutory interpretation that has emerged in recent decades.[1]

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[1] *CIC Insurance v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) ('*CIC Insurance*').

In Australia, this approach is now interpretive orthodoxy. Its essence was neatly distilled in the joint judgment of Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection*:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense.[2]

Likewise, the doctrine of precedent is regarded as a well-settled hallmark of the common law. This entails that a lower court must follow the binding precedent of a court higher than it in the same judicial hierarchy.[3] Despite the central importance of *stare decisis* in our legal system, there are questions as to when a *statutory* precedent is binding, and when a court should choose to follow a statutory precedent that is not strictly binding for broader normative reasons.

Our interest in the matter was piqued by the decision of the High Court in *Aubrey v The Queen*.[4] There, the High Court held by majority that transmitting HIV amounted to inflicting grievous bodily harm for the purposes of the *Crimes Act 1900* (NSW). In reaching its decision, the majority declined to follow a statutory precedent that it noted 'had not been distinguished or judicially doubted in New South Wales' for 130 years.[5] The High Court was not, of course, bound to follow that precedent.[6] Nevertheless, to choose not to do so was a significant decision — both for the appellant, who was consequently convicted for conduct which was not understood to be a crime at the time it was committed, and as matter of legal principle.

The legal principles governing the treatment of statutory precedents were laid down by the High Court in *Babaniaris v Lutony Fashions Pty Ltd*.[7] The leading judgment of Mason J stated that the approach of a senior appellate court to a statutory precedent was necessarily informed by special constitutional considerations that do not apply to common law precedents.[8] Since then, there have been suggestions by some judges and academic commentators that the strength of *stare decisis* considerations will, inevitably, be diluted by the modern approach to statutory interpretation.[9] That approach is said to demand a sensitivity to context that will lead a superior court to more readily conclude that a statutory precedent ought to be departed from or overruled.

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2 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (citations omitted) ('*SZTAL*').

3 *Viro v The Queen* (1978) 141 CLR 88, 120 (Gibbs J); 173–4 (Aickin J) ('*Viro*'). For a recent discussion, see *PGA v The Queen* (2012) 245 CLR 355.

4 *Aubrey v The Queen* (2017) 260 CLR 305 (Kiefel CJ, Keane, Nettle and Edelman JJ; Bell J dissenting) ('*Aubrey*').

5 Ibid 324 [35].

6 As the final Australian court of appeal, the High Court is not bound by the decisions of any court, including its own: *Viro* (n 3) 93 (Barwick CJ); 120–2 (Gibbs J); 129–30 (Stephen J); 135 (Mason J); 150–2 (Jacobs J); 166 (Murphy J); 174–5 (Aickin J).

7 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 ('*Babaniaris*').

8 See further Part IIA below.

9 See especially Justice Michael Kirby, 'Precedent Law, Practice and Trends in Australia' (2007) 28(3) *Australian Bar Review* 243 ('Precedent Law'). See further the discussion in Part IIC below.

These are fascinating and, we think, controversial propositions, which raise obvious normative concerns. In this 'age of statutes',[10] the rights, obligations, duties and powers of government and the people are primarily determined by statute law. And while it is the text of a statute that must govern, the nature of our constitutional arrangements is such that the courts make legally binding determinations about what that text means. So, when a court overrules a statutory precedent, it changes the law in this sense — and retrospectively so. For these reasons, it is vital to understand the circumstances in which courts should — and equally, should not — overrule a statutory precedent. To this end, this article outlines a set of principles which should inform the courts' approach.

The article proceeds as follows. Part II considers the current law. First, we outline the test articulated in *Babaniaris* — according to which a superior appellate court must overrule a statutory precedent it considers to be 'plainly erroneous'.[11] We then unpack and critique this (elusive) overruling threshold and its application in more recent cases. Second, we provide a brief outline of the core tenets of the modern approach to statutory interpretation, before considering its methodological impact on this overruling threshold. Our analysis reveals some truth to the suggestion that considerations of *stare decisis* will be diluted by the modern approach. There are aspects of that approach that might destabilise, with increasing frequency, the foundations of statutory precedents — especially those of longstanding. That, in our view, is the consequence of judges applying common law reasoning and technique to the task of considering when (and why) statutory precedents ought to be re-evaluated and overruled. Indeed, contrary to the old view that statutory precedents were necessarily treated differently from those of common law, a methodological convergence between the judicial treatment of statutory and common law precedents may be emerging.

Yet, we argue that a more 'activist' approach to overruling statutory precedents is neither necessary nor desirable. Rather, there are still compelling reasons for superior courts to take a more cautious approach. Thus, in Part III, we outline three factors that courts should consider in deciding whether to depart from a statutory precedent. These factors, individually or taken together, may provide powerful reasons for a superior court to 'stand by what has been decided'.

II Statutory Precedents and the Modern Approach to Statutory Interpretation

The doctrine of precedent is said to be 'the hallmark of the common law'.[12] It is underpinned by powerful normative principles, as the Federal Court of Australia explained in *Telstra Corporation v Treloar*:

> The rationale for the doctrine can be grouped into four categories: certainty, equality, efficiency and the appearance of justice. *Stare decisis* promotes

[10] Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982).

[11] *Babaniaris* (n 7) 13 (Mason J).

[12] Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4(2) *Australian Bar Review* 93, 93 ('Use and Abuse of Precedent').

> certainty because the law is then able to furnish a clear guide for the conduct of individuals. Citizens are able to arrange their affairs with confidence knowing that the law that will be applied to them in future will be the same as is currently applied. The doctrine achieves equality by treating like cases alike. *Stare decisis* promotes efficiency. Once a court has determined an issue, subsequent courts need not expend the time and resources to reconsider it. Finally, *stare decisis* promotes the appearance of justice by creating impartial rules of law not dependent upon the personal views or biases of a particular judge. It achieves this result by impersonal and reasoned judgments.[13]

As outlined at the outset, the core tenets of the doctrine of precedent are also clear enough, at least in formal terms:[14] a lower court must follow the binding precedent of a court higher than it in the same judicial hierarchy. The High Court of Australia is not bound by any precedent of another court, nor its own. Yet even when a precedent is not strictly binding, there are strong reasons why a court might follow it nevertheless. The principles of certainty, equality, efficiency and the appearance of justice outlined above may all persuade a court that it should stand by what has been decided.

The vast majority of cases heard by Australian courts now turn, at least to some extent, upon the interpretation of legislation.[15] And it has been said that statutory precedents must be treated differently from precedents of common law. In *Brennan v Comcare*, Gummow J observed that '[t]he judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law.'[16] More specifically, it has been said that statutory precedents 'involve special considerations'[17] relating to the nature of statutory interpretation, and the relationship between Parliament and the courts, which common law precedents do not.[18] This reflects the basic fact that in the case of statutory interpretation, it is the statute that is the source of law and not the courts' exposition of it:

> It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the

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13 *Telstra Corporation v Treloar* (2000) 102 FCR 595, 602 [23] (Branson and Finkelstein JJ) ('*Treloar*').

14 Of course, the more detailed application of that doctrine, and the process of identifying, applying, or distinguishing precedent, is more complex. See, eg, *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Jones v Bartlett* (2000) 205 CLR 166; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 ('*Farah Constructions*').

15 See, eg, Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37(2) *Monash University Law Review* 1, 1 ('Common Law Statutes').

16 *Brennan v Comcare* (1994) 50 FCR 555, 572. See also 573.

17 Sir Anthony Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' (2003) 24(1) *Adelaide Law Review* 15, 25 ('Legislative and Judicial Law-Making').

18 See also *Carter v Bradbeer* [1975] 3 All ER 158, 161 (Diplock J): 'A question of statutory construction is one in which the strict doctrine of precedent can only be of narrow application'.

> law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.[19]

And this, Pearce and Geddes conclude, 'reflects an activist approach to the court's relationship with the legislature'.[20]

This section explores and examines that approach. We begin with the decision of the High Court in *Babaniaris*, which outlined the threshold for overruling a statutory precedent. Then, we detail the modern approach to statutory interpretation which has emerged in recent decades. This grounds the critical analysis of the treatment of statutory precedents that we undertake in Part III.

A Babaniaris*: The Overruling Threshold for a Statutory Precedent*

In the 1987 decision of *Babaniaris*, the High Court outlined the threshold for when a superior court should overrule a (non-binding) statutory precedent. In the leading judgment, Mason J observed:

> If an appellate court … is convinced that a previous interpretation is *plainly erroneous* then it cannot allow previous error to stand in the way of declaring the true intent of the statute. It is no part of a court's function to perpetuate error and to insist on an interpretation which, it is convinced, does not give effect to the legislative intention. … The injustice or inconvenience which will result from displacement of a long-standing decision is certainly a very important factor to be considered, but there is no support in principle or authority for the proposition that the court should persist with a manifestly incorrect interpretation on the ground that it will cause injustice or inconvenience.[21]

The *Babaniaris* litigation considered a statutory precedent laid down decades earlier in *Little v Levin Cuttings Pty Ltd*.[22] This was a decision of Judge Stretton of the Workers Compensation Board of Victoria regarding the definition of 'outworker' in s 3 of the *Worker Compensation Act 1958* (Vic). A person to whom that definition applied was not entitled to compensation under s 5 of the Act. Judge Stretton held that independent contractors were not 'outworkers', but rather 'workers', and so were entitled to statutory compensation.[23]

The decision in the first instance in *Babaniaris* was, again, made by the Victorian Workers Compensation Board.[24] The applicant was an independent contractor. On the basis of the statutory precedent from *Little*, the Board held that she was not an 'outworker' and so entitled to workers compensation.[25] The company for whom she performed work then appealed, successfully, to the Full Court of the Supreme Court of Victoria in *Lutony Fashions Pty Ltd v Babaniaris*.[26]

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19 *Ogden Industries Pty Ltd v Lucas* [1970] AC 113 (PC), 127 ('*Ogden Industries*'). See further DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) 9.

20 Pearce and Geddes (n 19) 15.

21 *Babaniaris* (n 7) 13 (emphasis added; citations omitted). See also Mason, 'Use and Abuse of Precedent' (n 12) 93; Mason, 'Legislative and Judicial Law-Making' (n 17) 25.

22 *Little v Levin Cuttings Pty Ltd* (1953) 3 WCBD (Vict) 71 ('*Little*').

23 Ibid.

24 *Babaniaris v Lutony Fashions Pty Ltd* (1987) WCC(Vic) 70-396.

25 As explained in *Lutony Fashions Pty Ltd v Babaniaris* [1986] VR 469, 470–1 (Brooking J) ('*Lutony*').

26 Ibid.

In a 2:1 decision, the Court held that the applicant was an 'outworker' for the purposes of the Act.[27] The matter was then appealed to the High Court, which upheld (also by majority) the decision of the Full Court majority. Relevantly, Wilson and Dawson JJ stated that the

> [High] Court is reluctant to depart from long-standing decisions of State courts upon the construction of State statutes if the meaning is doubtful, particularly where those decisions have been acted on in such a way as to affect rights and obligations.[28]

However, the majority held that the *Little* precedent was 'plainly erroneous'[29] and that *stare decisis* 'has no application where the meaning of a statute is plain and free from ambiguity'.[30] Without descending into the minutiae of the Full Court's interpretive reasoning, the High Court concluded that the view of the majority in that case was preferable in light of the statutory text, the wider context of the Act and its practical outcome. The upshot of the *Little* precedent was that 'an independent contractor who is an outworker would be a "worker" and entitled to compensation, whereas the employee who is an outworker would not be a "worker" and would not be entitled to compensation'.[31] As Mason J later observed, '[t]his is not a rational and sensible outcome'.[32] It would also mean that independent contractors were entitled to compensation, but not subject to the same pecuniary cap on compensation as others, which Mason J described as a 'strange result'.[33] Finally, the interpretation in *Little* was said to give too much emphasis to this one provision (s 3(6)) of the Act.[34]

As noted, the decisions of both the Full Supreme Court and the High Court were split. Even in dissent, Nicholson J of the Full Court acknowledged that '[o]n the face of the definition, it would appear on first reading that [the applicant] does'[35] constitute an 'outworker' for purposes of the Act. 'However, when regard is had to the legislative history of the provision,' his Honour continued, 'I think the matter is by no means as clear.'[36] That history demonstrated that successive amendments to the Act operated to expand its protection by limiting those persons excluded by s 3.[37] And while Nicholson J acknowledged that there was 'some attraction' to the argument that *Little* produced 'illogical' outcomes (as outlined above),[38] it did have an alternative explanation:

> I think the answer to it lies in the historical fact that the Act was never meant to apply to independent contractors at all. Parliament, having extended its ambit to cover certain independent contractors, it would in my view be illogical to similarly extend the ambit of what is on any view an

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27 Ibid 477 (Brooking J); 477 (Murray J); Nicholson J dissenting.
28 *Babaniaris* (n 7) 22–3 (citations omitted).
29 Ibid 13 (Mason J).
30 Ibid 23 (Wilson and Dawson JJ).
31 Ibid 9 (Mason J).
32 Ibid.
33 Ibid 10 (Mason J).
34 Ibid 9 (Mason J).
35 *Lutony* (n 25) 481.
36 Ibid.
37 Ibid 481–2.
38 Ibid 482.

> anachronistic exclusion to disentitle some of these independent contractors from obtaining compensation, and I cannot believe that Parliament ever intended such a result.[39]

Nicholson J thought it relevant that Judge Stretton was 'a judge with extensive experience in the workers compensation jurisdiction',[40] and that the precedent his Honour set 'ha[d] since stood unchallenged and has been frequently followed by the Board from 1953 until the present time [1985]'.[41] While these facts, of course, did not necessarily mean that the precedent was correct, they were important considerations that should incline a court to stand by what had been decided.[42]

Brennan and Deane JJ, the dissenters in the High Court in *Babaniaris*, also preferred the construction of s 3 reached by the majority of the Full Court of the Victorian Supreme Court:

> If this were the first occasion when the underlying issue had arisen for judicial determination, we would be disposed to agree with the answers given … Though we are not disposed to agree with Judge Stretton's construction, we are quite unable to 'say positively that it was wrong and productive of inconvenience'.[43]

That finding was important. *Little* was, as a consequence, 'a determination to which *stare decisis* might properly apply. Having been accepted for a long time as stating the law, that determination ought not now to be departed from.'[44]

The 'plainly erroneous' test for overruling a statutory precedent has subsequently been endorsed.[45] It is similar to the test subsequently endorsed in a more specific, legislative context: namely the interpretation by courts of different jurisdictions of either national uniform, or federal, legislation. In *Australian Securities Commission v Marlborough Gold Mines Ltd,* the High Court stated that

> uniformity of decision in the interpretation of uniform national legislation such as the [Corporations] Law is a sufficiently important consideration to require that an intermediate appellate court — and all the more so a single judge — should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.[46]

While we do not attempt any detailed comparison of the way in which the tests from *Babaniaris* and *Marlborough Gold Mines* have been applied, they are patently similar. As we explain in Part III, both are informed by a particular

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39 Ibid.
40 Ibid 481.
41 Ibid.
42 Ibid.
43 *Babaniaris* (n 7) 28.
44 Ibid 32.
45 See, eg, *McNamara (McGrath) v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646, 661 (McHugh, Gummow and Heydon JJ); *Jones v Daniel* (2004) 141 FCR 148, 155 (Moore J; Hill J agreeing at 149, Allsop J agreeing at 156); *Treloar* (n 13) 602 [26] (Branson and Finkelstein JJ).
46 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 ('*Marlborough Gold Mines*'). See also *Farah Constructions* (n 14) 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

understanding of the judicial role and the nature of statute law. And both require the court to distinguish between interpretations of a statute that are 'right' and those that are 'wrong'. Yet, this is plainly a difficult interpretive matter. As Mason J noted extra-curially '[t]he perennial problem is, of course, to arrive at the conviction that the old decision is wrong.'[47] Where is the dividing line, between a construction that does not appear to be the best to an appellate court, and one that is 'plainly erroneous'? It is evidently one that courts have struggled to draw, including in cases such as *Babaniaris*.

We now turn to explore this critical question by outlining the different bases on which a court might conclude that this threshold has been met, and whether the modern approach to statutory interpretation that emerged after *Babaniaris* might have lowered this threshold, or increased the likelihood of a court concluding that it has been met. Before doing so, we begin with a brief overview of what the modern approach entails.

B *The Modern Approach to Statutory Interpretation: A Brief Outline*

This section provides a brief outline of recent developments in the field of statutory interpretation to identify the core tenets of the interpretive approach currently favoured by Australian courts. Three broad principles or features of the modern approach can be identified, which are relevant to the treatment of statutory precedents.

The first is what we consider the leitmotif of the modern approach: its emphasis on reading text in context. The second may be viewed as a more radical strand or offshoot of this approach, which appeared on the verge of forming a new orthodoxy under the High Court led by French CJ, but the place of which is now uncertain: that is, the view that statutory interpretation is not assisted by recourse to ideas of parliamentary intent. The third and more fundamental principle is the constitutional notion that in our system of government, it is an exclusively judicial function to make binding determinations as to what a statute means.

In *CIC Insurance v Bankstown Football Club Ltd*, Brennan CJ, Dawson, Toohey and Gummow JJ stated:

> [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 [reports of law reform bodies], one may discern the statute was intended to remedy …[48]

As Dharmananda has observed, 'neither ambiguity of the statutory text or the satisfaction of any other condition is required before [context] may be considered pursuant to the *CIC Insurance* principle.'[49] In addition

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47 Mason, 'Use and Abuse of Precedent' (n 12) 111.

48 *CIC Insurance* (n 1) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (citations omitted).

49 Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42(2) *Federal Law Review* 333, 341. See also Pearce and Geddes (n 19) 93;

> though *CIC Insurance* itself was about reports of law reform bodies, the concept of context 'in its widest sense' has been construed to include parliamentary materials generally as well as the state of the law when the statute was enacted, its defects, the history of the relevant law, parliamentary history of the statute, and historical context.[50]

Moreover, the *internal* context of a statute is always critical to the meaning attributed to a statute under the modern approach. That is so as '[t]he primary object of statutory interpretation is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.'[51]

Some judges insist that 'context' must be understood more broadly still. For example, Stephen Gageler, writing extra-curially when Commonwealth Solicitor-General, argued that the context relevantly includes 'the way the statutory text is applied in the courts *after* the text is enacted'.[52] He continued:

> The meaning of a statutory text is reinformed by the accumulated experience of courts in the application of the law to the facts in a succession of cases. The meaning of a statutory text is also informed, and reinformed, by the need for the courts to apply the text each time, not in isolation, but as part of the totality of the common law and statute law as it then exists.[53]

The emergence of this modern — contextual — approach to interpretation in Australia was clearly hastened by statute.[54] Yet the articulation, endorsement and development of the modern approach is nevertheless a distinctly common law phenomenon. Just a year after *CIC Insurance*, the essence of the modern approach (at common law) was confirmed in the now seminal statement of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*:

> 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.[55]

Their Honours then endorsed the view of Bennion in *Statutory Interpretation*, which highlighted the distinction between legal and literal or grammatical meaning. In order to ascertain the former, 'there needs to be brought to the

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Matthew T Stubbs, 'From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation' (2006) 34(1) *Federal Law Review* 103, 115–17.

50 Dharmananda (n 49) 341 (citations omitted).

51 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

52 Gageler, 'Common Law Statutes' (n 15) 1 (emphasis in original).

53 Ibid 1–2.

54 See especially ss 15AA–AB *Acts Interpretation Act 1901* (Cth) and their state and territory equivalents.

55 *Project Blue Sky* (n 51) 384 [78] (citations omitted).

grammatical meaning of an enactment due consideration of the relevant matters drawn from the context (using that term in its widest sense)'.[56]

The core interpretive principles outlined in *CIC Insurance* and *Project Blue Sky* have since been routinely endorsed by Australia's senior appellate courts.[57] In a series of cases decided between 2009 and 2012, the High Court emphasised the centrality of the statutory text to the interpretive enterprise.[58] These cases remind us, and properly so, 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.[59] But this refocusing on the statutory text has sharpened, rather than undermined, the core interpretive principles of the modern approach.[60] As Gageler J observed in *SZTAL*:

> 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' ...[61]

It is that contextual approach that the Court considers best equips a judge to discharge their interpretive duty to 'determine what Parliament meant by the words it used'.[62]

While this much now seems orthodox, and fairly uncontroversial, recent case law on statutory interpretation does contain other more radical strands. Some judges have insisted that parliamentary intention — long understood to be the lodestar of the interpretive process — is an unhelpful 'fiction'.[63] This scepticism was fuelled by work in the realm of political theory and philosophy, which argued that it was impossible for a large and heterogeneous group of people (such as a Parliament) to form any meaningful intention. On this account, a statute should be treated as a kind of artefact quite independent of the legislature that enacted it and

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56 Ibid, quoting Francis Bennion, *Statutory Interpretation* (LexisNexis, 3rd ed, 1997) 343–4.

57 '[T]oo often to be doubted', as the Federal Court put it *Federal Commissioner of Taxation v Jayasinghe* (2016) 247 FCR 40, 43 [5].

58 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 (Hayne, Heydon, Crennan and Kiefel JJ); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [43]–[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Lacey*'); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) ('*Consolidated Media*'); *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ) ('*Thiess*').

59 *Thiess* (n 58) 671–2 [22]–[23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ), quoting *Consolidated Media* (n 58) 519 [39].

60 See Chief Justice James Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84(12) *Australian Law Journal* 822, 831.

61 *SZTAL* (n 2) 374 [37] (citations omitted).

62 Spigelman (n 60) 828.

63 *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339 (Gaudron J); 345–6 (McHugh J); *R v Hughes* (2000) 202 CLR 535, 563 [60] (Kirby J); *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 411–12 (French J) ('*NAAV*'); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 389 [25] (French CJ and Hayne J) ('*Cross*'); *Momcilovic v The Queen* (2011) 245 CLR 1, 44–5 [38] (French CJ), 85 [146] (Gummow J) ('*Momcilovic*'); *Lacey* (n 58) 592 [43]–[44].

the motivations and objectives its members might have had[64] — and this focused attention even more closely on the specificities of a statutory text, and its internal logic and structure. Those who take the view that parliamentary intention is a judicial construct may be more likely to conclude that a statutory precedent ought to be overruled, for reasons that we will explain.

These shifts seemed to coincide, albeit in indistinct ways, with another more longstanding principle of Australian public law. It is emphatically said to be the role of the courts and not any other branch of government to declare and enforce the law.[65] While this is not a uniquely Australian view,[66] it has arguably been applied more rigidly here than in other jurisdictions. This is reflected, for example, in the fact that Australian courts do not defer to the Executive's interpretation of the law, or countenance the prospect that Parliament might legitimately delegate final say about how ambiguous provisions should be understood to the executive branch.[67] As a general proposition, then, the judicial role of conclusively interpreting statute law has been pointed to as one of fundamental constitutional importance, which must be performed with the strictest independence and in accordance with established legal rules.

C *The Impact of the Modern Approach on the Overruling Threshold*

Writing extra-curially in 2007, Justice Kirby said that 'the most significant change in the law that has occurred in recent times, relevant to the operation of the precedent in Australia, has been the shift towards statute law'.[68] In the specific context of statutory precedent, his Honour made the following observations:

> The new emphasis by the High Court of Australia upon the importance of purpose and context in ascertaining legislative meaning means that the construction of a particular word or phrase, used in a new context, will need to be reconsidered when presented in a later case. It follows that the law of precedent, as it applies to legislative texts, is bound to have less significance than in the statement of the broad principles of the common law … In giving meaning to a legislative text the necessary starting point, in every case, is the text itself — not what judges may have said on other texts or on the principles of the common law that preceded the adoption of the text.[69]

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64 This position is explored further in Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39; Patrick Emerton and Lisa Burton Crawford, 'Statutory Meaning Without Parliamentary Intention: Defending the High Court's "Alternative Approach" to Statutory Interpretation' in Lisa Burton Crawford, Patrick Emerton and Dale Smith, *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 39.

65 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153–4 [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J).

66 It is, after all, rooted in the United States ('US') Supreme Court decision in *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

67 Unlike in the US. See further Justice Stephen Gageler, 'Deference' (2015) 22(3) *Australian Journal of Administrative Law* 151.

68 Kirby , 'Precedent Law' (n 9) 251.

69 Ibid 252.

The following sections explore the plausibility of these claims, and their cogency, as part of a broader discussion of the bases on which a court might (now) conclude that a statutory precedent is 'plainly erroneous'.

1 *Changes in the Social, Economic, Scientific and Technological Context of a Statute*

One of the possible bases for overruling a statutory precedent is that it has been rendered unsatisfactory by broader economic, social, scientific or technological changes. Yet the ways in which such changes may (legitimately) lead a court to conclude that a statutory precedent ought to be overruled are complex. We note, but leave to one side, the notion that courts can 'update' the meaning of a statute in order to ensure that it coheres with contemporary values or public expectations. This appears to be something that the courts in other jurisdictions (such as the United Kingdom) may be willing to do, but which would be difficult to square with the mainstream understanding of judicial power and the constitutional parameters of statutory interpretation.[70]

However, Australian courts have endorsed the idea that statutes are 'always speaking', most recently and emphatically the High Court in *Aubrey*.[71] The idea that a statute is always speaking could be taken to mean several different things. Least controversially, it is shorthand for conveying the results of applying the well-known distinction between connotation and denotation. That is, 'the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change'.[72] Conventionally understood, then, the application of the 'always speaking' approach does not involve any change to the core or essential meaning of a statute, and hence it is a relatively uncontroversial basis on which a court may legitimately overrule a statutory precedent. A court may conclude that a statutory precedent ought not to be followed, not because it is incorrect or 'plainly erroneous' in the relevant sense, but because the denotation of the statutory text has changed since the time that precedent was laid down.[73]

Consequently, and importantly for present purposes, it is an interpretive technique that can accommodate changes in the social, economic, scientific and technological context of a statute. Consider the decision in *Aubrey* for example. There the High Court stated that '[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 held to be included'.[74] The

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70 As the United Kingdom Supreme Court arguably did in *Yemshaw v London Borough of Hounslow* [2011] 1 All ER 912. See Richard Ekins, 'Updating the Meaning of Violence' (2013) 129(Jan) *Law Quarterly Review* 17; Dharmananda (n 49); Justice James Edelman, '2018 Winterton Lecture Constitutional Interpretation' (2019) 45(1) *University of Western Australia Law Review* 1, 25–7; Andrew Burrows, *The Hamlyn Lectures: Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 21–34. See further Part IIIA below.

71 *Aubrey* (n 4) esp 325–6 [39].

72 *R v G* [2004] 1 AC 1034, 1054 [29] (Lord Bingham). This is how the 'always speaking' principle appears to have been understood in, for example, *R v A2* (2019) 93 ALJR 1106, 1134 [141] (Bell and Gageler JJ).

73 See, eg, *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327.

74 *Aubrey* (n 4) 321 [29] (Kiefel CJ, Keane, Nettle and Edelman JJ).

Court held that the approach was available and its application meant the transmission of a serious sexual disease now amounted to 'inflicting grievous bodily harm' for the purposes of the *Crimes Act 1900* (NSW). In doing so, as noted, the Court declined to follow a precedent established in 1888 that 'until this case … had not been distinguished or judicially doubted in New South Wales'.[75] That precedent 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'.[76] But as the generality of the statutory language attracted the operation of the always speaking approach, the joint judgment in *Aubrey* reasoned that

> even 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.[77]

On this account, the reasoning in *Aubrey* provides an example in which advances in medical science rendered a statutory precedent unfit for (contemporary) purpose. It was overruled as a consequence.

If, however, the always speaking approach means something more or different from the connotation/denotation technique, then it becomes more controversial. For example, a court may update the meaning of a statute by giving its words and phrases 'whatever meaning they happen to have at the time in the future when they are read and interpreted'.[78] But it would be problematic, on separation of powers grounds, for courts to change the core or essential meaning of a statute. In *Pape v Commissioner of Taxation*, Heydon J stated:

> [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.[79]

Yet, there is an argument that this is what the joint judgment did in *Aubrey*.[80] On that view, the Court updated the meaning of the word 'inflicts' to accommodate the changes in medical science and make the criminal statute fit for (contemporary) purpose, which changed the core meaning of 'inflicts grievous bodily harm' in the *Crimes Act 1900* (NSW).[81]

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75 Ibid 324 [35].

76 Ibid 332 [55] (Bell J), quoting *R v Clarence* (1888) 22 QBD 23, 41–2 (Stephen J, Huddleston B, Mathew, AL Smith and Grantham JJ agreeing).

77 Ibid 320 [24].

78 Jack Tsen-Ta Lee, 'The Text through Time' (2010) 31(3) *Statute Law Review* 217, 219. For an argument along these lines, see T Alexander Aleinikoff, 'Updating Statutory Interpretation' (1988) 87(1) *Michigan Law Review* 20.

79 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 145 [423] (emphasis added).

80 See Dan Meagher, 'The "Always Speaking" Approach to Statutes (and the Significance of its Misapplication in *Aubrey v The Queen*)' (2020) 43(1) *University of New South Wales Law Journal* 191.

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

In any event, as explained in Part IIB above, what is distinctive about the modern approach is that it requires consideration of statutory context in the first instance and in its widest sense. So, legislative ambiguity is not required before recourse may be had to extrinsic materials to assist in fixing the legal meaning of a statute. The relevant context also includes 'the state of the law when the statute was enacted, its defects, the history of the relevant law, parliamentary history of the statute, and historical context.'[82] If this wider context also includes the contemporary social and economic milieu in which a statute now operates, might it may lead a court to conclude that a long-settled statutory precedent ought to be overruled?

This appears to be what Justice Kirby had in mind when he suggested that the modern approach will, inevitably, erode the doctrine of *stare decisis* in the context of statutory precedents.[83] In the United States ('US'), Eskridge has forcefully argued for a similarly relaxed approach in this context.[84] Relevantly, he advocates 'an "evolutive" approach, under which a statutory precedent might be overruled if its reasoning has been exposed as problematic and its results pernicious, *and* it has not broadly influenced subsequent lawmaking and private planning.'[85] These ideas are not alien to Australian law. They are broadly consistent with the principles that guide the High Court in determining whether to overrule one of its own common law or constitutional precedents:

> The first was that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases. The second was a difference between the reasons of the justices constituting the majority in one of the earlier decisions. The third was that the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience. The fourth was that the earlier decisions had not been independently acted on in a manner which militated against reconsideration …[86]

We argue below that this methodological parallel is both significant and no coincidence.[87] Yet the evolutive approach appears to go further, and considerably so. Eskridge rhetorically asks that

> [i]f subsequent legislative developments may justify overruling a statutory precedent, why shouldn't other subsequent developments — in social mores, public policy, and social trends — also justify such overruling, if they expose the precedent as a wrong turn in the judiciary's development of a statutory scheme?[88]

This aspect of the evolutive approach is consistent with his preference for, and sophisticated theory of, dynamic statutory interpretation.[89] It contemplates that the wider, external and contemporary (social, economic, scientific, technological)

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82 Dharmananda (n 49) 341.
83 Kirby, 'Precedent Law' (n 9).
84 William N Eskridge Jr, 'Overruling Statutory Precedents' (1988) 76(4) *Georgetown Law Journal* 1361.
85 Ibid 1385 (emphasis in original).
86 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9.
87 See Part IIC(4) below.
88 Eskridge, 'Overruling Statutory Precedents' (n 84) 1392.
89 See William N Eskridge Jr, *Dynamic Statutory Interpretation* (Harvard University Press, 1994).

context may render a statutory precedent 'obsolescent'.[90] This is, we think, quite different from saying that the reasoning that underpinned the original precedent was unprincipled, conflicted or without use or reliance. Moreover, it seems at some remove from the 'plainly erroneous' test articulated in *Babaniaris* — for one may accept the soundness of the original reasoning, but still decide it is ill-suited to its contemporary context. The evolutive imperative of 'that was then, this is now' dilutes the normative and doctrinal force of *stare decisis*.

It is this kind of evolutive account that animates Justice Kirby's conception of the proper relationship between the modern approach to interpretation and statutory precedents. That is the significance of his assertion that under such an approach 'the construction of a particular word or phrase, used in a new context, will *need* to be reconsidered when presented in a later case'.[91] On this account, the lodestar of the modern approach is to attribute a meaning to a statutory text that best fits and furthers its purpose *in the contemporary context in which operates* — and that entails a more relaxed approach to statutory precedents.

2 *Changes in the Legal Context of a Statute*

As explained in Part IIB above, the context which informs the meaning of a statute includes the broader legal framework within which it must operate. This point was emphasised by Gageler in an article highlighting what he claimed to be unappreciated similarities between the common law method and the process of statutory interpretation.[92]

A statute must necessarily be read in light of existing statute and common law, Gageler argued, because of the institutional context in which statutory interpretation occurs. While it is often examined in that way by academic commentators, statutory interpretation is not an end in itself. Rather, it is part and parcel of the performance of the judicial role of determining the relevant law, so as to resolve a dispute about its application. When we refer here to the relevant law, we necessarily mean a complex mix of legal norms derived from both statute and the common law. On Gageler's account, the context of a statutory text legitimately includes the accumulated experience of a court in interpreting legislation so as to apply it to an ever-changing range of legal disputes.[93] Whereas some have argued that statutory precedents ought to be treated differently to precedents of common law, this seems to be a call for methodological convergence.

While Gageler gave the point fresh emphasis, the idea that a statute ought to be construed in light of its legal context is not a controversial one.[94] It has long been accepted that statutes should be interpreted in light of other statutes *in pari materia*.[95] Beyond this, examples can be found in which the provisions of one

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90 See Eskridge, 'Overruling Statutory Precedents' (n 84) 1388.
91 Kirby, 'Precedent Law' (n 9) 252 (emphasis added).
92 Gageler, 'Common Law Statutes' (n 15).
93 Ibid 2–3.
94 See also Bennion (n 56) 589.
95 That is, 'reference may be made to similar statutes within the same [or another] jurisdiction in ascertaining the meaning of an Act before the court': Pearce and Geddes (n 19) 128.

statute are taken to inform the meaning of another. For example, in *Federal Commissioner of Taxation v Futuris Corporation Ltd*, the High Court concluded that s 175 of the *Income Tax Assessment Act 1936* (Cth) — which stated that non-compliance with that Act did not affect the validity of a taxation assessment — did not excuse *deliberate* failures to comply.[96] This reading was informed by another key piece of legislation governing the powers and duties of public servants: the *Public Service Act 1999* (Cth). That Act enjoined public servants

> to act with care and diligence and to behave with honesty and integrity. This is indicative of what throughout the whole period of the public administration of the laws of the Commonwealth has been the ethos of an apolitical public service which is skilled and efficient in serving the national interest.[97]

This contextual evidence, the majority concluded, 'point[ed] decisively against a construction of s 175 which would encompass deliberate failures to administer the law according to its terms'.[98]

The point for present purposes is that the extended conception of the context, which is central to the modern approach, may make it more likely that the meaning of that text will evolve. For the context, so defined, is never static: the common law evolves, albeit ideally via slow and incremental steps; legislation is inherently vulnerable to change, and in the Australian legal system it does so frequently. As courts are called upon to apply legislation to resolve new controversies within an always developing legal (common law and statutory) matrix, they will continually see that legislation in a fresh light — which might lead to the view that previous interpretations of that statute are now 'wrong', or at least no longer fit for purpose.

3 *Statutory Context and the Common Law Canons*

The seminal passage of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky*[99] outlines other principles that inform the courts' reading of a statute — and that may lead a superior court to conclude that it is 'plainly erroneous'. For example, the importance of the canons of construction was recognised in *Project Blue Sky*. One of the unique features — if not, internal contradictions — of the modern approach case is its twin emphases on the primacy of statutory text, and a rich and robust set of interpretive canons that may lead a court to conclude that the legal meaning of that text is not the same as its ordinary or grammatical meaning. Perhaps this can be understood as but another example of reading *text* in *context.* The point for present purposes is that a statutory precedent may be challenged on the basis that the prior court failed to apply, or to properly apply, one of the many canons of construction.

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96 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.
97 Ibid 164 [55] (Gummow, Hayne, Heydon and Crennan JJ).
98 Ibid 164–5 [55] (Gummow, Hayne, Heydon and Crennan JJ).
99 See above n 55 and accompanying text.

Consider the decision of the Full Federal Court of Australia in *Minister for Immigration and Citizenship v Haneef*.[100] The legislation in question in that case empowered the Minister to cancel a visa on character grounds. Section 501(6)(b) of the *Migration Act 1958* (Cth) provided that a person failed the character test if he or she had an 'association' with someone whom, or with a group or organisation which, the Minister reasonably suspected had been involved in criminal conduct. Emmett J had previously ruled that the word 'association' encompasses an 'innocent association', and did not require 'that there be some nexus between the visa holder and the criminal conduct of the person with whom the visa holder was associated'.[101] The Full Court overruled this statutory precedent as Emmett J failed to give adequate weight to the principle of legality. Relevantly, the Court emphasised that 'Acts should be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms'.[102] The legislation in question here had the potential to affect the 'valuable rights' afforded by a visa: rights to 'be at liberty' in Australia, 'to work here', and to continue residing with his wife.[103] For this and other reasons, the Full Federal Court concluded that the word 'association' should be construed more narrowly than Emmett J decided.

In some instances, it may be relatively uncontroversial for a court to conclude that a statutory precedent is 'wrong' on this kind of basis. For example, there may be easy cases where it is clear that the prior court simply failed to apply a canon, the existence and content of which is clear (such as one of the relatively straightforward rules prescribed in an Acts Interpretation Act). But in many cases, the position will be more complex and fluid.

The first reason for this is that the content of many of the canons of construction is not clear or uncontested — especially not those canons that are creatures of the common law. Consider, for example, the principle of legality, which was the focal point in *Haneef*. Different judges have explained and applied this principle in different ways.[104] It is not entirely clear which rights and principles are protected by this presumption.[105] The level of ambiguity required to engage the principle of legality — or, put differently, the level of clarity that is required to rebut it — is also a matter of particular debate.[106]

Second, in stating that another court misapplied a canon of construction, the superior court may in fact be developing that canon. Indeed, this might be viewed

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100 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414 ('*Haneef*').

101 Ibid 433–4 [69]–[73], esp quoting *Minister for Immigration and Multicultural Affairs v Chan* (2001) 34 AAR 94, [7] (Emmett J).

102 *Haneef* (n 100) 442 [107]. See also 447 [128]–[129].

103 Ibid 443 [110].

104 See Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329.

105 For example, in recent years there has been particular confusion as to whether the principle only protects 'fundamental' rights (and if so, what these are): Francis Cardell-Oliver, 'Parliament, the Judiciary and Fundamental Rights: The Strength of the Principle of Legality' (2017) 41(1) *Melbourne University Law Review* 30; *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 95 NSWLR 157, 167 [46] (Basten JA).

106 Cardell-Oliver (n 105); Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413. See further and generally Jason NE Varuhas, 'Conceptualising the Principle(s) of Legality' (2018) 29(3) *Public Law Review* 196.

as an alternative basis on which a superior court might overrule a statutory precedent. That is, the court may decide that the previous understanding of the canons of construction, which produced the precedent, was itself wrong; that a different interpretive approach is required, and hence a different result. While judges often insist that the interpretive principles they apply have a long and unbroken lineage, it is clear that almost all of the interpretive principles presently applied by Australian courts have changed over time. Some of those changes have been subtle, others more dramatic. In recent case law, some judges have openly championed such change.

In *Plaintiff M79/2012 v Commonwealth*, for example, Hayne J advocated for the recognition of a new presumption of statutory interpretation that should be deployed if Parliament purports to permit the Executive to dispense with general legal requirements; this would entail reading any such provision narrowly.[107] In *Hossain v Minister for Immigration and Border Protection*, a majority of the High Court held that statutory conferrals of executive power should now be interpreted on the presumption that Parliament does not intend 'immaterial' errors to invalidate the exercise of that power, whereas this was not previously the case.[108] And in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*, Gageler J argued that we should no longer presume that Parliament does not intend to restrict judicial review, or at least, not in such indiscriminate terms: rather, we must pay close attention to the basis on which review is being sought.[109] As his Honour explained it:

> The common law principles of interpretation applicable to determining whether legislation manifests an intention that a decision or category of decisions not be quashed or otherwise reviewed are not static. As with other common law principles or so-called 'canons' of statutory construction, they have contemporary interpretative utility to the extent that they are reflective and protective of stable and enduring structural principles or systemic values which can be taken to be respected by all arms of government. And as with other common law principles of statutory construction, they are not immune from curial reassessment and revision.[110]

It therefore seems undeniable that the canons of construction — as creatures of the common law — do change. Yet, this sits in obvious tension with another principle that is central to the modern approach to statutory interpretation. That is the idea that the canons of construction derive some legitimacy from the fact that they are known to, and accepted by, the other branches of government.[111] If the canons of construction change, it becomes difficult to say that these are effective tools for

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[107] *Plaintiff M79/2012 v Commonwealth* (2013) 252 CLR 336, 366–7 [85]–[87].

[108] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134 [29] (Kiefel CJ, Gageler and Keane JJ); 146 [67] (Edelman J). The novelty of this presumption is highlighted by the fact that Nettle and Gordon JJ railed against it in *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 458–60.

[109] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 23 [59]–[60], 30–1 [77]–[78]. While their Honours did not put the point so clearly, the conclusion reached by the plurality indicates that they endorsed this approach.

[110] Ibid 22 [58].

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

ascertaining what Parliament intended. That is especially so if (as in the case of the examples given above) the changes seem to be motivated by judicial concerns about the protection of systemic values and principles, and not facts that alter the courts' perception of what Parliament *actually* intends.

The problem is more pertinent for those who argue that parliamentary intention is not real in any meaningful sense; on that view, the fact that the canons of construction are known and accepted is sometimes said to provide an independent normative justification for their application. As French J said in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*, in a passage subsequently endorsed by the High Court:

> Where the words expressed by Parliament are interpreted by the Court according to commonly understood rules of interpretation a court is entitled to make the normative statement that it has interpreted them in accordance with the legislative intention.[112]

This is a particularly difficult proposition. It suggests that we have a clear and accepted catalogue of what the canons of construction are, and moreover that they are organised into some sort of hierarchy that stipulates the proper relationship between them. This, of course, is not the case. We need not necessarily go so far as Llewellyn and suggest that the principles of interpretation are so malleable that they can be marshalled in an endless number of combinations, capable of justifying any interpretive conclusion a judge chooses.[113] However, this is a potential danger of the modern approach, or at least its more radical manifestations.

Historically, the concept of parliamentary intention may have provided a yardstick against which a judicial interpretation could be judged: it was a sound interpretation if it was the one that Parliament was most likely to have intended. If the canons of construction are untethered from the concept of parliamentary intention, then some other, alternative standard is needed in order to assess whether a precedent-setting interpretation of a statute is 'right' or 'wrong' in the relevant sense. As others have noted, those who would jettison parliamentary intention as our interpretive 'lodestar' are yet to articulate any satisfactory alternative.[114] Given this, it might be pondered whether this more radical form of the modern approach is more likely to lead judges to conclude that the overruling threshold has been met, and a statutory precedent is wrong.

4 *The Judicial Treatment of Statutory and Common Law Precedents: The Emergence of Methodological Convergence under the Modern Approach?*

Part II of this article sought to clarify the nature and scope of the overruling threshold for (non-binding) statutory precedents and the various bases that the

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[112] *NAAV* (n 63) 412 (French J); endorsed in *Zheng* (n 111) 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Cross* (n 63) 389 [25] (French CJ and Hayne J); *Momcilovic* (n 63) 44–5 [38] (French CJ); 85 [146] (Gummow J); *Lacey* (n 58) 592 [43]–[44].

[113] Karl N Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rule or Canons about How Statutes are to be Construed' (1950) 3(3) *Vanderbilt Law Review* 395.

[114] Ekins and Goldsworthy (n 64) 43.

application of the modern approach may generate for doing so. In *Babaniaris*, the High Court stated that it could — and indeed, must — overrule a statutory precedent that is 'plainly erroneous'. Yet our analysis of *Babaniaris* and subsequent cases highlighted the ambiguity of that test. There are many reasons that apparently now justify a court in concluding that a statutory precedent ought to be overruled, which are difficult to describe as manifest errors. That is especially so given the sensitivity to a wide and fluid range of contextual material that the modern approach to statutory interpretation requires.

Relevantly, the foundations of a statutory precedent may be destabilised by changes in the social, economic, scientific and technological context of a statute, the wider legal context in which a statute must operate, and the common law interpretive framework that is applied to determine its legal meaning. Thus considerations of *stare decisis* are diluted under the modern approach to statutory interpretation. In other words, a statutory precedent might now be overruled because it is anachronistic, obsolescent or incompatible with the wider legal (constitutional, statutory and common law) context in which it is situated — not because it is 'plainly erroneous' in any meaningful sense.

As noted above, the foundation of the approach to statutory precedents is that 'the judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law'.[115] Yet the modern approach may in fact entail a methodological convergence, according to which judges apply common law reasoning and technique to the task of considering when (and why) statutory precedents ought to be re-evaluated and overruled. Justice Gordon recently observed that '[t]he common law must respond to "developments of the society in which it rules". A previously understood principle of the common law may become ill-adapted to modern circumstances.'[116] There are indications, at least from some judges and in some cases, that a similar outlook now animates the manner in which Australian courts evaluate statutory precedents. That is, the application of the modern approach has resulted in judges seeking to ensure that statutes are fit for (contemporary) purpose and a willingness to overrule those interpretations which are not.

As we noted above, the emergence and development of the modern approach was (and remains) a distinctly common law phenomenon. It may be seen as the result of judges refining and reframing what they considered to be the proper approach to their core task of statutory interpretation. Given this, the application of common law reasoning and technique to the task of considering when (and why) statutory precedents ought to be re-evaluated and overruled should come as no surprise. Even so, we consider that statutory precedents have particular characteristics and raise distinctive issues that ought to inform the judicial role in this context. These are the focus of Part III.

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[115] *Brennan v Comcare* (n 16) 572 (Gummow J). See also 573.

[116] Justice Michelle Gordon, 'Analogical Reasoning by Reference to Statute: What is the Judicial Function?' (2019) 42(1) *University of New South Wales Law Journal* 4, 21 (citations omitted).

III Overruling Statutory Precedents under the Modern Approach: Relevant (*Stare Decisis*) Considerations

In this Part, we turn to squarely confront the question of whether and when a court should decide not to follow a statutory precedent, by examining the constitutional and broader normative principles that are implicated by its decision to consider doing so. To this end, we outline a number of important *stare decisis* considerations which may arise under the modern approach and which ought, then, to inform the decision of a superior court whether to overrule a statutory precedent. Thus, it is neither inevitable nor desirable that the contemporary re-evaluation of a statutory precedent ought to lead to its overruling. Before doing so, we note that there are potentially additional, specific reasons why the court of one state should follow that of another with regards to national uniform or federal legislation — the most obvious of which is consistency across the nation. However, we focus on the general principles that should inform the courts' approach.

A *Parliamentary Supremacy, the Separation of Powers and Statutory Precedents*

At the outset, we noted that the approach to statutory precedents is said to be informed by special considerations that do not apply to precedents of common law, and that countervail the concerns of certainty, equality, efficiency and the appearance of justice, which are said to justify the doctrine of precedent. The particular considerations highlighted in *Babaniaris* are those of parliamentary supremacy and the separation of powers. Relevantly, the courts are said to have a constitutional duty to give effect to the law laid down by Parliament, and so cannot perpetuate erroneous constructions of legislation or allow them to stand.

Thus the High Court stated in *Weiss v The Queen* that '[i]t is the words of the statute that ultimately govern, not the many subsequent judicial expositions of that meaning which have sought to express the operation of the proviso'.[117] The Court has made similar statements in the context of national uniform legislation. While, in the interests of consistency, intermediate appellate courts should generally follow the interpretation of national uniform legislation placed on it by intermediate appellate courts in other jurisdictions,

> that does not mean that the courts of Queensland, when construing the legislation of that State, should slavishly follow judicial decisions of the courts of another jurisdiction in respect of similar or even identical legislation. The duty of courts, when construing legislation, is to give effect to the purpose of the legislation. The primary guide to understanding that purpose is the natural and ordinary meaning of the words of the legislation. Judicial decisions on similar or identical legislation in other jurisdictions are

[117] *Weiss v The Queen* (2005) 224 CLR 300, 305 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Weiss*'). See also *Brennan v Comcare* (n 16) 572–3 (Gummow J).

> guides to, but cannot control, the meaning of legislation in the court's jurisdiction.[118]

Though our focus is on the approach taken by Australian courts, similar ideas have been espoused elsewhere.[119] These principles seem to lead inevitably to the conclusion that it is the constitutional duty of a superior court to find and give effect to the 'right' interpretation of a statute.[120] But on closer inspection, the position is more complex.

It is not the purpose of this article to delve into theoretical disputes about the content of the law. However, even brief recourse to legal theory reveals the difficulty of asserting that one interpretation of a statute is 'right', and another 'plainly wrong'. Some theorists appear to argue that there is one right answer to every legal question that at least a judicial Hercules could discover.[121] But most would agree that the claim that 'legal texts … contain … answers to every question, which merely await judicial discovery' is little more than a fairy tale.[122] The reasons for this include the fact that Parliament is not omniscient and that the English language is fallible, and hence no legislature could ever eradicate ambiguity or vagueness from the law.

The ubiquity of ambiguity and vagueness should inform the court's approach to statutory precedents.[123] If it is difficult to ascertain the meaning of a statute, and reasonable minds are likely to differ as to what it is, then it is problematic for a judge to assert that another's interpretation is 'plainly erroneous'. Courts must frankly assess the benefit of overturning a longstanding precedent as against its potential detriments — detriments that we examine in Parts IIIB–C below. But if a statute is vague, this does not merely mean that it is difficult to precisely ascertain what it means. It means that *there is no precise meaning.* The legislation itself does not determine what it means in this regard. In other words, there is a gap in the legislation, or a place at which the law runs out.

Yet, as noted, the 'plainly erroneous' test articulated in *Babaniaris* seems to assume that interpretations of a statute can be categorised as 'right' or 'wrong'. On

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118 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259, 270 [31] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), quoting *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603, 632–3 [62] (McHugh J).

119 See *Ogden Industries* (n 19) 127.

120 Mason J stated as much in *Babaniaris* (n 7) 14 (citations omitted):

> Although the use of expressions [such] as 'plainly' and 'manifestly' erroneous has been criticized in contexts where the question is one on which different minds might reach different conclusions, this criticism does not diminish the utility of the expression in their application to a case in which the question on analysis is capable of but one answer.

See also Wilson and Dawson JJ at 23.

121 See, eg, Ronald Dworkin, 'On Gaps in the Law' in Paul Amselek and Neil MacCormick (eds), *Controversies About Law's Ontology* (Edinburgh University Press, 1991) 84. Specifically, Dworkin seems to argue that vagueness in (for example, statutory) language does not necessarily generate indeterminacy in the law, for the law provides resources that allow a judge to determine what the right answer should be. See further Timothy A O Endicott, *Vagueness in Law* (Oxford University Press, 2000) 57.

122 Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 230.

123 As the Federal Court appeared to acknowledge in *Treloar* (n 13) 602–3 [27] (Branson and Finkelstein JJ).

the other hand, it is now increasingly common for Australian judges to speak of 'constructional choice'.[124] That language acknowledges that many statutes will be open to more than one reasonable interpretation.

Relatedly, it is commonly asserted that it is the exclusive role of the judiciary to make binding determinations about the meaning and effect of statute law — but beyond the powers of the courts to decide what the content of the law should be.[125] Strictly speaking, it is difficult to reconcile this proposition with the inevitability of statutory ambiguity and more importantly, vagueness. It seems to suggest that, confronted with an indeterminate statute, an Australian court must simply throw up its hands and admit that there is no law that governs the dispute before it. It may be possible to identify cases where courts have adopted something close to this approach,[126] but these are extremely rare. It seems altogether more likely that courts routinely step in to fill the gaps in vague legislation in the course of exercising judicial power. Most theorists would accept that this is sound and does not undermine parliamentary supremacy.[127]

The preceding analysis raises difficult questions of legal theory and the nature of judicial power that it is not possible to resolve in this article. Nonetheless, the complexities revealed are clearly relevant for our understanding of statutory precedents. The first and obvious point that follows is that it is difficult for a court to simply assert that a statutory precedent is 'plainly erroneous'. To push the point, it might be argued that to state that a precedent is 'plainly erroneous' at this level of the judicial hierarchy 'may be [to express] little more than a difference in judicial temperament and expression'.[128]

Consider, for example, the history of the litigation and the nature of the interpretive disagreement that culminated in the High Court's decision in *Babaniaris*. The relevant statutory precedent was established in 1953 by a judge (Judge Stretton) with extensive knowledge of the relevant jurisdiction. That precedent was affirmed and applied by the expert tribunal (Workers Compensation Board of Victoria) for over 30 years including in the *Babaniaris* matter. During that time there were successive amendments to the *Workers Compensation Act 1958* (Vic) to extend its protection, and the Victorian Parliament did not legislate to disturb or clarify that precedent.[129] An experienced member of a senior appellate

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124 Including, for example, in the case of *Haneef* discussed above nn 100–3 and accompanying text. See further Gordon Brysland and Suna Rizalar, 'Constructional Choice' (2018) 92(2) *Australian Law Journal* 81. As Brysland and Rizalar note, the phrase was a favourite of Chief Justice French.

125 *Momcilovic* (n 63) 92 [169] (Gummow J).

126 See, eg, *DPP (Vic) v Walters* (2015) 49 VR 356. In this case, the Victorian Court of Appeal held (by majority) that legislation enacted by the Victorian Parliament (which, broadly speaking, purported to direct courts to issue criminal sentences in such a way as to 'raise' the median sentence for certain crimes) could not be given any effect. A sentencing judge could not know how an individual sentence would affect the median.

127 See Goldsworthy (n 122) 231. See also Justice Nye Perram, 'Context and Complexity: Some Reflections by a New Judge' [2010] *Federal Judicial Scholarship* 19, [6]: 'the Parliament authoritatively speaks, the Courts authoritatively interprets. The writer cannot stop writing and the reader cannot give the author up no matter how inaccessible it finds the prose style.'

128 Kirby, 'Precedent Law' (n 9) 247.

129 *Babaniaris* (n 7) 25–6 (Brennan and Deane JJ).

court (Nicholson J) then held that the interpretive reasoning that underpinned the precedent was correct. To be sure, the other two members of that Court rejected that view and even the two dissenting judges on High Court were 'not disposed to agree with Judge Stretton's construction'.[130] Even so, one might query whether characterising the statutory precedent as 'plainly erroneous' or 'manifestly incorrect' in these circumstances was entirely satisfactory. One might reasonably suggest that the detailed, careful and plausible reasoning of Nicholson J's dissent on the Full Court alone cast at least some doubt on the meaning of the statute.

This may suggest the wisdom of Brandeis J's famous observation that '*[s]tare decisis* is usually the wise policy, because, in most matters it is more important that the applicable rule of law be settled than that it be settled right.'[131] Indeed, it reveals a need for caution — and judicial humility — in speaking about 'right' and 'wrong' interpretations of a statute.

Second, the relationship between parliamentary supremacy and statutory interpretation must be understood in light of the constitutional role of the court to decide to legal disputes that come before it. This permits a court to choose between possible interpretations of ambiguous statutes,[132] and fill gaps or add meaning when the statute is truly indeterminate. Where a court has reached a conclusion about the meaning of a statute of this kind, the precedent it sets does not rest in its entirety upon the text of the legislation enacted by Parliament. Rather, it 'consists of the statute *plus* the decision of the Court'.[133] Given this, it is far from clear that parliamentary supremacy demands courts to take a more activist approach to statutory precedents than to those of common law.

B *Statutory Precedent as Context: Predictability, Prospectivity and the Rule of Law*

As explained, the modern approach calls for courts to read statutes in context, understood in its widest sense and in the first instance. To that end, the analysis undertaken in Part IIC above explained how the expanding matrix of materials and (fluid) contextual factors that now inform the determination of statutory meaning might make the courts more likely to conclude that previous interpretations were 'plainly erroneous' or, more accurately, unfit for their (contemporary) purpose.

Yet, the modern approach itself may guard against this instability — and, indeed, require that a court give considerable weight to statutory precedent. For example, in his sophisticated account, Gageler argues that a statutory precedent itself forms a crucial part of the context in which the correctness of a statutory

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130 Ibid 28 (Brennan and Deane JJ).

131 *Burnet v Coronado Oil & Gas Co* (1932) 285 US 393, 406. See also at 407–8.

132 As noted above in Part IIB, this may raise an issue if one subscribes to what we have described as the more radical strands of the modern approach. The orthodox position would probably be that, when faced with ambiguity, a court should choose the meaning that is most likely to reflect Parliament's (authentic) intentions. If one does not take this approach, a tension between statutory interpretation and parliamentary supremacy may emerge.

133 Frank E Horack Jr, 'Congressional Silence: A Tool of Judicial Supremacy' (1947) 25(3) *Texas Law Review* 247, 251 (emphasis in original).

precedent must be assessed.[134] The very existence of the statutory precedent is a significant weight on the scales that a superior court must balance against other concerns in deciding whether it ought to be overruled.

The broader point is that, of course, no statute exists in a vacuum. In Australia, statutes are enacted into, and must interpreted in light of, a constitutional system of government underpinned and informed by the common law. Two fundamental features of this constitutional framework are pertinent here, both of which have already been noted. The first is the supremacy of Parliament; the second is that it is the exclusive province of the judicial branch to make legally binding determinations as to what a statute means, and in doing so resolve disputes about its application. The High Court plays a special role as it has *final* say as to what a statute means, from which there is no further avenue of appeal. If Parliament is unhappy with the way in which its legislation has been interpreted, its only option is to attempt to make its 'intentions' plainer, via the enactment of more or different statutory text.

The significance of this for present purposes is that, while legislation is undoubtedly a superior source of legal norms than common law, our constitutional arrangements dictate that it is the judicial exposition of statutes that is legally binding. A great many statutory provisions may never be the subject of judicial scrutiny. In those instances, ordinary people and government actors alike must form their own view of what the statute means. But when a statute is considered by a court, its exposition of the statute — in other words, the statutory precedent — is, for all intents and purposes, the law. When a court overrules a statutory precedent, it changes the law in this practical sense — and retrospectively so.

The joint judgment decision of the majority in *Aubrey* provides a particularly stark example of this kind of retrospective change. The High Court's decision not to follow the relevant 130-year-old statutory precedent resulted, necessarily, in the retrospective operation of the criminal offence.[135] Relevantly, the application of the always speaking approach 'change[d] the legal status of previous acts on a backward-looking as well as forward-looking basis'.[136] It meant that the transmission of a serious sexual disease would now — and regarding the facts that gave rise to *Aubrey* — amount to inflicting grievous bodily harm for purposes of the *Crimes Act 1900* (NSW). In doing so, the decision in *Aubrey* extended criminal liability to new circumstances and developments. The upshot was a conviction (and lengthy jail term) for conduct that would have led to an acquittal on the earlier, long-settled interpretation of that criminal statute. This was an interpretive step that Bell J, in dissent, was not prepared to take: '[I]t is 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.'[137]

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134 Gageler, 'Common Law Statutes' (n 15) 7.

135 See Dan Meagher, 'Two Reflections on Retrospectivity in Statutory Interpretation' (2018) 29(3) *Public Law Review* 224, 236–7.

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

137 *Aubrey* (n 4) 332 [55]. See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 596 (Kirby J) ('*Brodie*').

Similar observations can be made about the precedent overruled in *Babaniaris*. The relevant precedent stood unchallenged and undisturbed by the legislature — that is, it was the law in the sense described above — for over 30 years. Over that time, it was frequently relied upon by claimants and routinely followed by the relevant expert tribunal. That being so, the outcome of the majority approach was particularly unfair on the appellant and others similarly situated, as Brennan and Deane JJ explained in dissent:

> The present case is one where intervention to correct an error is likely to create serious embarrassment for those who acted on the faith of the earlier decision. Independent contractors like Mrs Babaniaris have been working, some of them (we should think) for the greater part of their working lives, believing themselves to be covered by workers' compensation and perhaps abstaining from seeking other insurance. No doubt insurers have been charging the 'employers' of independent contractors premiums assessed on the footing that independent contractors … are covered and, if *Little's Case* were now overruled, insurers would obtain a windfall liberation from the risk of undischarged liabilities to independent contractors against which the employers were insured. There is no practical injustice in leaving *Little's Case* stand, especially as the operation of the Act will fall away as the *Accident Compensation Act 1985* (Vict.) comes into effect.[138]

Of course, the age of a statutory precedent alone cannot and should not insulate it from critical judicial reassessment, especially by an ultimate appellate court. But the length of its existence will often generate relevant considerations of *stare decisis*.[139] In *Babaniaris*, concerns of context strengthened rather than undermined the case for standing by the precedent. Those concerns included the individual injustices highlighted in the above quoted passage, and the commercial consequences of discarding the statutory precedent, especially in light of the wider legislative context that soon would cover independent contractors.[140]

As this makes clear, overruling a statutory precedent has real and serious consequences for the predictability, accessibility and retrospectivity of the law. These concerns are often captured in the notion and ideal of 'the rule of law'. There is always a need to treat that phrase with caution, for the rule of law is an internally complex and contested concept. Yet, despite that complexity and contestation, one of its core and uncontroversial characteristics is that the law should be knowable. The first reason for this is a pragmatic one: if the people who are supposed to be bound by the law cannot know what it is, then they are less likely to follow it.[141] The second is a point of principle. Law is a tool of governance that is — or at least, should strive to be — distinct from coercion or brute force.[142] Governing through law acknowledges that the people are

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138 *Babaniaris* (n 7) 30–1.

139 See, eg, the powerful dissenting judgment of Gleeson CJ in *Brodie* (n 137) 534–6.

140 See *Accident Compensation Act 1985* (Vic) ss 8–9.

141 See especially Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2009) 210-232. In more recent work, Raz acknowledged that the rule of law serves other broader purposes: 'The Law's Own Virtue' (Columbia Public Law Research Paper No 14-609, 6 October 2018) <https://ssrn.com/abstract=3262030>.

142 Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 33–91. This aspect of Fuller's theory is highlighted and explored at length in Kristen Rundle, *Forms Liberate: Reclaiming the*

autonomous agents who are entitled to know what the law is, and choose whether to obey it. Of course, not every law will be just or fair, no matter how clear and accessible its content. But every unknowable law is unjust in a particular way: in that it fails to treat its subject as agents deserving of respect as such.

This analysis suggests that unknowable laws are problematic for reasons that transcend the particular unfairness that results when a person relies upon the law and it is subsequently changed. Nonetheless, reliance interests are a powerful reason for a superior court to adhere to a longstanding statutory precedent. As Mason J observed in *Babaniaris*:

> There is certainly strong authority for the view that a decision of long-standing, on the basis of which many persons will have arranged their affairs, should not be lightly disturbed by a superior court.[143]

That is especially so 'when departure from precedent would prejudice the security of transactions and vested rights':[144]

> Take, for example, title to property and the rules and practices according to which business contracts are made. Likewise, changes in criminal law and practice which would prejudicially affect the rights of an accused person. So also with changes in administrative law that adversely affect arrangements made respecting personal liberty.[145]

These are no small matters in a common law system (like Australia), presumptively hostile to retrospective lawmaking for its capacity to undermine the core rule of law values of certainty, accessibility and prospectivity.[146] That hostility is an institutional and doctrinal recognition of retrospectivity's core vice, which is to 'defeat the expectations of citizens formed in reliance on the existing state of law'.[147] The rule of law — understood in a particular sense — is a core constitutional value, which the text and structure of the *Australian Constitution* evidently protects and promotes in various ways.[148] If it is to be taken seriously, then interpretive principles — including the doctrine of precedent — must be articulated and applied in a way that is consistent with it, so far as constitutional norms allow.[149]

In addition, if the executive branch is to administer the law within the legal parameters that have been set, it is imperative that the legal meaning of statutes be reasonably ascertainable. If statutory precedents are routinely overruled, government actors and their legal advisors are put in an invidious position. What is

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Jurisprudence of Lon L Fuller (Hart Publishing, 2012). See also Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24(3) *Law and Philosophy* 239.

143 *Babaniaris* (n 7) 13 (citations omitted).

144 Mason, 'Use and Abuse of Precedent' (n 12) 106.

145 Ibid.

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

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

148 See Lisa Burton Crawford, 'The Rule of Law' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 77.

149 For example, it is this normative concern that, arguably, underpins the common law interpretive presumption against the retrospective operation of legislation: *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ).

the conscientious actor to do: follow the existing statutory precedent, or the interpretation of the statute that they think is likely to find favour with a court if it is reconsidered? Again, the constitutional purist may simply reply that the Executive must comply with the statute *correctly* interpreted, and that there is no virtue in complying with a statutory precedent if it does not accord with a senior appellate court's view. But the complexity of statutes, the interpretive reality of 'constructional choice' and the constitutional value of the rule of law are all important parts of the wider legal context in which legislation operates that must be considered under the modern approach — and all seem to call for a more nuanced view of and approach to statutory precedents and the *stare decisis* considerations that inform it.

C *Constitutional Responsibility for Correcting 'Plainly Erroneous' Statutory Precedents*

The constitutional distribution of powers between Parliament and the courts is said to require the courts take a more activist approach to statutory precedents than those of common law, correcting any that they subsequently consider to be 'wrong'. Yet, maybe the separation of powers requires courts to take a rather different approach. In short, it could be argued that constitutional responsibility for correcting statutory precedents — or keeping them fit for (contemporary) purpose — rests with the legislature. Bell J, for example, expressed support for this approach in her dissenting judgment in *Aubrey*:

> It is, of course, the responsibility of the court to give effect to the legislative intention expressed in s 35(1)(b) of the *Crimes Act* [*1900* (NSW)]. Nonetheless, it is 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. … If that settled understanding is ill-suited to the needs of modern society, the solution lies in the legislature addressing the deficiency …[150]

This might be understood as a more limited argument, that courts should not overrule statutory precedents in order to keep pace with social developments. But it could be expanded to a broader proposition — that far from requiring courts to vigilantly monitor the 'correctness' of statutory precedents, the constitutional distribution of powers entrusts that task to the legislative branch. This proposition is well-established in the US, as Eskridge, Frickey and Garrett have explained:

> [T]he Court does say that Congress is the more appropriate body for correcting erroneous constructions of statutes. At least in part the difference between the supposed 'ordinary' stare decisis for common law decisions and the heightened stare decisis for statutory decisions is based on a rather formalistic distinction between legislative and judicial roles. The basic idea is that, although the legislature can, by ordinary legislation, override both common law decisions and decisions interpreting statutes, the legislature has greater responsibility to monitor the latter (where the courts have interpreted

[150] *Aubrey* (n 4) 332 [55].

> a legislative product) than the former (where, arguably, courts have a larger, ongoing responsibility to monitor a judicial product, the common law).[151]

This is a proposition that ought to resonate in Australia where, as in the US, the *Constitution* insulates the judicial power from the political arms of government.[152] It would seem particularly powerful in instances where the statutory precedent is longstanding, or the consequences of overruling it would be significant in some of the ways discussed above — for example, where there is evidence that various parties have relied upon the previous understanding of the law, as in the case of *Babaniaris*, or where overruling would retrospectively extend criminal liability, as in the case of *Aubrey*. As Bell and Gageler JJ stated in *R v A2*, it is a 'fundamental principle that a criminal norm should be certain and its reach ascertainable by those who are subject to it'.[153]

In addition to these constitutional principles, the merit or otherwise of the argument should be informed by an understanding of how the two branches of government operate in practice.[154] As Pearce and Geddes have observed: 'Unlike the common law, which is largely left to the courts to develop with only occasional forays by the legislature, legislation emanates from the parliament and can be altered somewhat more easily than the common law.'[155]

Courts must wait until they are presented with a case that requires them to (re)interpret a statute, whereas the legislature is not so constrained. Further, it is said that courts should only construe those parts of the legislation that they are required to in order to resolve the particular dispute before them.[156] These institutional constraints were demonstrated in the recent case of *Plaintiff M47/2018 v Minister for Home Affairs*,[157] where the High Court was invited to depart from or overrule the notorious statutory precedent from *Al-Kateb v Godwin*.[158] That precedent, in short, entailed that provisions of the *Migration Act 1958* (Cth) authorised potentially indefinite detention of certain asylum seekers. Many would argue that this precedent was 'wrong', either because it gave insufficient weight to constitutional principle or interpretive canons like the principle of legality. Yet, the Court could (or at least, would) not decide the interpretive question, as on the facts it was not clear that Plaintiff M47 faced potentially indefinite detention as Mr Al-Kateb had done.[159] By contrast, Parliament would be free to alter the meaning of these parts of the *Migration Act 1958* (Cth) as and when it thought fit.

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151 William N Eskridge Jr, Philip P Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation* (Foundation Press, 2nd ed, 2006) 286.

152 *New South Wales v Commonwealth* (1915) 20 CLR 54; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

153 *R v A2* (n 72) 1134 [141].

154 See generally Cass R Sunstein and Adrian Vermeule, 'Interpretation and Institutions' (2003) 101(4) *Michigan Law Review* 885.

155 Pearce and Geddes (n 19) 13–14.

156 See further Gageler, 'Common Law Statutes' (n 15) esp. 3; Paul Yowell, 'Legislation, Common Law and the Virtue of Clarity' in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis, 2011) 101, 124–5.

157 *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 ('*Plaintiff M47/2018*').

158 *Al-Kateb v Godwin* (2004) 219 CLR 562.

159 *Plaintiff M47/2018* (n 157) 291 [7] (Kiefel CJ, Keane, Nettle and Edelman JJ; Bell, Gageler and Gordon JJ agreeing at 302 [49]).

Whether there would be political impetus to do so is, of course, another question. If legislative dysfunction — or inertia at the very least — is widespread, then it may not be appropriate to rely upon the legislative branch to actively monitor and correct the courts' interpretation of legislation. The argument has particular salience in the US, where increasing congressional gridlock is the new norm.[160] In Australia, however, this argument has less purchase. The constitutional principle of responsible government, which lies at the core of our parliamentary system,[161] provides the 'efficient secret'[162] that makes navigation of the legislative process considerably easier for governments.[163] A government can always, by definition, secure passage of its legislation through the lower house of Parliament. And recent experience suggests that even a government with minority status and without a Senate majority can be remarkably successful in securing its legislative agenda.[164] Moreover, the convention that Parliament will provide the government with supply ensures the latter can properly discharge its executive and legislative responsibilities.[165] It makes legislative rectification of statutory precedents much easier in Australia as a political and constitutional matter.

In any event, one should not assume that legislative inertia shifts responsibility for 'fixing' statutory precedents to the courts. A failure to legislate does not translate to (implicit) legislative endorsement of a statutory precedent.[166] But the length of non-disturbance — especially if it extends over multiple parliaments and governments of different political stripes — might signal that the legislature is not interested in, or willing to, change the existing law, or at least has not reached a consensus as to *how* it should be changed. The point for present purposes is that the separation of powers does not necessarily demand that courts be particularly willing to overrule statutory precedents. A more nuanced inquiry is required, which will involve consideration of how the branches of government actually interact in practice, and the normative implications of those interactions.

IV Conclusion

This article did not seek to develop a fully-fledged theory of precedent (and overruling) in the context of the judicial interpretation of statutes. Our aim was far more modest. We sought to outline and critique the current overruling threshold for

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160 See Derek Willis (ProPublica) and Paul Kane (The Washington Post), 'How Congress Stopped Working' *ProPublica* (online, 5 November 2018) <https://www.propublica.org/article/how-congress-stopped-working?fbclid=IwAR29vxf3Qxk1vaH14vo_Y7BK7nv3Hf-DIo5EHu7weW92Sfj20WkNwJbPjgU>.

161 *Egan v Willis* (1998) 195 CLR 424.

162 Walter Bagehot, *The English Constitution* (Collins, The Fontana Library, 1963) 65.

163 Of course bicameralism qualifies this point. But even when the Government of the day does not control the Upper House, it still has far greater control over the legislative agenda than is the case in the US: see Bagehot (n 162) 65–81.

164 For example, the Labor Government led by Prime Minister Julia Gillard (2010–13) successfully implemented its legislative agenda notwithstanding that it was a minority government and did not control the Senate: see Nick Evershed, 'Was Julia Gillard the Most Productive Prime Minister in Australia's History?' *The Guardian* (online, 28 January 2013) <https://www.theguardian.com/news/datablog/2013/jun/28/australia-productive-prime-minister>.

165 See George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 5–11.

166 See *Babaniaris* (n 7) 24 (Wilson and Dawson JJ).

statutory precedents in Australian law. The orthodox view is that statutory precedents ought to be treated differently to those of common law, for it is the text of the statute — not the courts' exposition of it — that is the law. Courts are said to have a constitutional duty to give effect to the law laid down by Parliament, and so cannot allow 'plainly erroneous' interpretations of legislation to stand.

Yet the very distinction between statutory and common law precedents raises questions. Some cases (particularly *Aubrey*) and some judges (particularly Gageler J) seem to call for greater methodological convergence: for the application of common law reasoning and technique to the interpretive task. This reflects the fact that statutory interpretation is not an end in itself, but part and parcel of the performance of the judicial function of ascertaining and enforcing the law, which is now a complex mix of statutory and common law norms.

Our analysis did suggest that the modern approach to statutory interpretation may dilute the strength of statutory precedents. In particular, its emphasis on reading text in *context*, broadly understood, seems to generate many bases on which a superior court might conclude that a previous interpretation ought not now be followed. Even so, we argued that there are still compelling reasons for a court to uphold a statutory precedent. While one cannot deny that '[i]t is the words of the statute that ultimately govern',[167] the nuance and complexity of statute law and the interpretive task require a cautious approach. The line between 'right' and 'wrong' statutory precedents is elusive, and the interpretive questions that reach senior appellate courts are, by definition, hard. These are simple but important facts.

In deciding whether to depart from a statutory precedent, we outlined three factors that a court ought to consider. The first of these is internal to the modern approach itself. Properly understood, the existence of a longstanding precedent, and the (potentially, negative) implications of departing from it, are important parts of the context to which the modern approach demands a court must have regard. Second, while statutory precedents must be viewed in light of the constitutional principles of parliamentary supremacy and the separation of powers, neither necessarily demands a more activist approach to statutory precedents than those of the common law; at the very least, the position is more complex. Third, broader (one might say, 'small c') constitutional concerns of predictability, prospectivity and the rule of law may provide powerful reasons for a superior court to stand by what has been decided.

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[167] *Weiss* (n 117) 305 [9].