IN THE HIGH COURT OF AUSTRALIA **No. A15 of 2011**
ADELAIDE REGISTRY

BETWEEN: **P, GA**

Appellant

AND: **THE QUEEN**

Respondent

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL OF QUEENSLAND

I. CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

II. BASIS OF INTERVENTION

2. The Attorney-General for Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is set out in the submissions of the appellant.

V. ARGUMENT

5. The Attorney General for Queensland limits his submissions to the matter raised in paragraph 2 of the appellant's s 78B notice.
6. It is respectfully submitted that proposition 2 in the appellant's s 78B notice is misconceived; no occasion has arisen for any consideration of "prospective

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overruling". The appellant's argument in this respect primarily depends upon a fallacious perspective of the task upon which the Court is engaged when declaring the common law; namely, that it "creates" new law, rather like a legislature.[1] However, a court which declares the common law is not determining what rights and liabilities ought to exist;[2] instead, it is determining the rights and liabilities that do exist.[3]

7. It is axiomatic that the High Court cannot legislate. No other conclusion is compatible with the separation of judicial power from executive and legislative in Chapter III of the Constitution. Nor do State courts legislate when they declare the common law.

8. A consideration of *R v L*[4] itself demonstrates that when considering the question whether a man could be found guilty of raping his wife, the Court was not legislating and creating a new rule. It was instead concerned to identify the principle which informed the supposed rule that a wife must be presumed to have consented to any[5] act of sexual intercourse. The Court sought to examine the foundation for that presumption and found that no principle inherent in the status of marriage was capable of giving rise to a rule which operated as an irrebuttable presumption of law that, by marriage, a woman irrevocably consented to sexual intercourse with her husband under all circumstances. Consequently, it was revealed that the view first expressed by Sir Matthew Hale that the presumption existed was wrong.

9. The distinction between a principle which operates at a high level of abstraction and a rule derived from such a principle, which then applies to specifically identified circumstances, is an important one to bear in mind when considering the nature of the task of an ultimate court of appeal when it declares the content of the common law. It is open to a court to consider the means by which a principle is vindicated in particular circumstances and, so as to ensure its applicability, to vary or create rules which give effect to that principle. It is not open to such a court to "fracture the skeleton of principle".[6]

10. In *R v L* the distinction can be discerned in each of the reasons for judgment but especially in the reasons of Brennan J.

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1 See, for example, paragraph 6.2 of the Appellant's submissions.

2 The object of creating of new rights and liabilities is a hallmark of legislative power: see *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463 (Isaacs and Rich JJ); *Re Ranger Uranium Mines Pty Ltd; Ex Parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189-190.

3 *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374-375 (Kitto J); *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109-110 [41]; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 577 [94] (Hayne J).

4 (1991) 174 CLR 379.

5 Subject to exceptions which are presently immaterial: see *R v L* (1991) 174 CLR 379 at 388.

6 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 29-30 (Brennan J).

11. Thus, Brennan J began by stating the asserted basis for proposition that a man could not rape his wife:[7]

> The argument assumes that, by the law of marriage, a husband has a right to have sexual intercourse with his wife whenever he wishes, irrespective of the circumstances and, if need be, to take her by force and that a wife has, by virtue of her marriage, consented to any act of sexual intercourse with her by her husband.

10 12. His Honour then considered marriage and what that status entailed.[8] His analysis required a consideration by him of the source of the law of marriage in the ecclesiastical courts and the recognition in that jurisdiction, over time, of the incidents of the status. His Honour's analysis demonstrated that no incident of the marriage, no principle discernable in the institution of marriage, could give rise to a rule that a wife must be taken to have given irrevocable consent to sexual intercourse with her husband. It followed inevitably that prior judicial and other statements to the effect that there was a rule for the purpose of rape cases that a wife's consent was the subject of an irrebuttable legal presumption were wrong. The conclusion that the common law had been misunderstood
20 was not a fig-leaf to hide judicial legislation.

13. The reasons of Mason CJ, Deane and Toohey JJ involved a consideration whether earlier decisions and Hale's *History of the Pleas of the Crown* had "the backing of the common law"[9] for the proposition that "by virtue of her marriage, a wife gives her consent to sexual intercourse with her husband, whatever the circumstances".[10] As a consequence, their Honours thought "it is appropriate for this Court to reject the existence of such a rule as now part of the common law of Australia."[11]

30 14. Dawson J observed that the proposition was an asserted irrebuttable presumption.[12] In so characterizing it, his Honour was recognising that its existence depended upon the existence of a foundation for it in the institution of marriage.[13] That is to say, his Honour considered that the presumption, as an operative rule, had to be based upon a principle implicit in the institution of marriage. There being no such principle which could be identified, the supposed presumption was "nothing more than a fiction".[14]

15. If the foregoing characterization of the process of reasoning by the Court in *R v L* is accepted, as it is respectfully submitted it should be,[15] then it can be seen

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7 (1991) 174 CLR 379 at 391.5.
8 (1991) 174 CLR 379at 391.5-396.
9 (1991) 174 CLR 379 at 390.1.
10 (1991) 174 CLR 379 at 388.10.
11 (1991) 174 CLR 379 at 389.10.
12 (1991) 174 CLR 379 at 405.2.
13 (1991) 174 CLR 379 at 405.9.
14 (1991) 174 CLR 379 at 405.10.
15 In *Jones v Randall* (1774) 98 ER 706 at 707 Lord Mansfield said: "Precedent indeed may fix principles, which for certainty's sake are not suffered to be shaken, whatever might be the weight

that the appellant's description of the decision of the Court in *R v L* as involving "either a change to (or a fresh interpretation of) the common law" is misconceived or, at least, unhelpful in any consideration about why such a decision will affect conduct which occurred before the making of the decision.

16. It is inaccurate to describe the decision in *R v L* as "having the substantive effect of criminalising conduct which previously was not criminal"[16] for Brennan J (at least) was at pains to demonstrate that the law had never justified the presumption of consent. Further, the reasoning of the Court in that case shows that it is a misconception to refer to the "immunity" of a husband from being charged with raping his wife.[17]

17. The nature of the process by which the Court reached its conclusion in *R v L* falsifies the appellant's major premise, namely that his act has been "criminalised" by that case. In truth, the process engaged in by the Court in that case was orthodox and did not conclude in any creation of new law. Undoubtedly it altered the general understanding of the law. Deep consideration and logical and rigorous reasoning often has that effect. However, if it is true to say that a judge-made rule is legitimate only when it can be effectively integrated into the mass of principles, rules and statutes which constitute the common law and equity,[18] then the views on marital rape first expressed by Hale were not legitimate.

18. Nor does the description of the process undertaken by the Court in *R v L* involve uncritical and absolute acceptance of the declaratory theory of the common law.[19] Rather, it recognizes that the development of the common law arises not from any abandonment of fundamental principle but by other means. It may involve the development of rules to conform to local or new circumstances to ensure that the underlying principle continues to have effect; it may involve the re-articulation of the effect of statutes having regard to the discrediting of past assumptions of fact now shown to have been false.[20] Further, by reason of changes in circumstances or developments in cognate rules, a particular rule derived from a single principle might become otiose.[21]

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of the principle, independent of precedent. But precedent, though it be evidence of the law, is not law in itself; much less the whole of the law."

16 Appellant's submissions paragraph 6.1

17 For example, the appellant's submissions at paragraph 6.20.

18 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 593 (McHugh J).

19 *Giannarelli v Wraith* (1988) 165 CLR 543 at 584-5 (Brennan J). See also WMC Gummow, *Change and Continuity: Statute, Equity and Federalism*, 2004, p 42 (pointing out the difficulties of applying the declaratory theory to equity).

20 See *SGIC v Trigwell* (1979) 142 CLR 617 at 633-634 (Mason J); *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 592-593 (McHugh J); *Wik Peoples v Queensland* (1996) 187 CLR 1 at 179-180 (Gummow J).

21 See, for example, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 530-531 per Mason CJ, Deane, Dawson, Toohey and Guadron JJ.

19. In a paper delivered at a conference,[22] McHugh J considered the theoretical foundations for the process of judicial determination of the common law. In so doing, his Honour cited "numerous High Court decisions [which] have extended or changed the law".[23] It is submitted that in each of those cases it can be seen that the Court was concerned with a consideration of how a particular common law principle (the existence and nature of which was not questioned or challenged)[24] should be applied in particular circumstances; that is to say, the Court was concerned with the nature of the rule or rules which would appropriately vindicate the principle. There was no question of altering the fundamental principles of the common law; rather, the Court was concerned either with the question whether an existing rule was apt to give effect to a particular principle of the common law in the circumstances before it or whether any rule existed at all. It is sufficient to consider two examples in order to demonstrate this proposition.

20. It is significant that in *Cullen v Trappell*, one of the cases cited by McHugh J in his paper, Barwick CJ actually articulated the task before the Court in such terms:[25]

> What ought the approach of this Court to be when, for the first time, it is asked to declare the principles of the common law in some particular area of human activity?

21. In considering the question before the Court, whether income tax deducted from wages should be taken into account when computing damages for loss of earning capacity, his Honour first identified the applicable principle which was engaged:[26]

> The problem is to value the capital asset of the injured person, namely, his capacity to earn money.

22. Implicitly, the principle which was engaged was that when a person suffers loss by reason of negligence, that person should recover damages to compensate for every incident of that loss. That task for the Court was to articulate the particular rule which, when applied to loss of earning capacity, vindicated that principle.

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22 The Hon Justice Michael McHugh, *The Law-making Function of the Judicial Process* (1988) 62 *Australian Law Journal* 15, 116.

23 The Hon Justice Michael McHugh, *The Law-making Function of the Judicial Process* (1988) 62 *Australian Law Journal* 15 at 23: *Cullen v Trappell* (1980) 146 CLR 1; *R v O'Connor* (1980) 146 CLR 64; *R v Darby* (1982) 148 CLR 668; *Codelfa Consruction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 330; *R v Toohey: Ex parte Northern Land Council* (1981) 151 CLR 170; *FAI Insurances Ltd v Winneke* (1983) 151 CLR 342; *Legione v Hateley* (1983) 152 CLR 406; *Jaensch v Coffey* (1984) 155 CLR 549; *Hackshaw v Shaw* (1984) 155 CLR 614; *Sutherland Shire Council v Heyman* (1985) 175 CLR 424; *Cook v Cook* (1986) 61 ALJR 25; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

24 Although its precise content might be the subject of differences of opinion.

25 (1980) 146 CLR 1 at 6.

26 (1980) 146 CLR 1at 7.9.

23. His Honour then went on to consider:

(a) That what was being valued ought to be "what was lost or impaired" and not "the ultimate benefit of which the injured person might have derived from the exercise of the capacity to earn";[27]

(b) The irrelevance of the universality of income tax as a logical factor in determining upon a rule to give effect to the principle;[28]

(c) The fallacy in thinking that the amount of a weekly pay packet is the sum of what a worker earns;[29]

(d) That to take into account and to deduct income tax when assessing such a loss would, in its effect, fail to give full value to that which was lost.[30]

24. His Honour's reasoning did not involve any possibility of abandonment or change to the fundamental common law principle that loss suffered by another's negligence should be compensated; instead, it involved a consideration of the rule which would, when applied to a valuation of lost earning capacity, best vindicate that common law principle.

25. A similar analysis of any of the other cases referred to by McHugh J in his paper reveals the same process of reasoning. Thus, for example, in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW,*[31] in the circumstances of the case before it and in the legal context of the issues upon which the parties had joined, the Court was concerned to articulate the rules which would most aptly give effect to the common law principle that the "law as it affects the construction of contracts ... centres upon the presumed, rather than the actual, intention of the parties."[32] That principle gave rise to the statement of rules relating to the use of parol evidence,[33] implication of terms,[34] and frustration.[35]

26. It can be seen that none of these cases was concerned with the invention, from scratch, of any new common law principle.[36] Rather they were each concerned with how to apply an existing principle to new cases;[37] *a fortiori* when

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27 (1980) 146 CLR 1 at 8.2.
28 (1980) 146 CLR 1 at 8.9-9.2.
29 (1980) 146 CLR 1 at 9.3.
30 (1980) 146 CLR 1 at 10.2.
31 (1982) 149 CLR 337.
32 (1982) 149 CLR 337 at 353.2.
33 (1982) 149 CLR 337 at 352-353.
34 (1982) 149 CLR 337 at 353.5, 354.2.
35 (1982) 149 CLR 337at 357.2, 360.4.
36 The universality of common law principle is the reason why scholarship from other common law jurisdictions, as well as case law from ultimate courts of appeal in the UK, the US, Canada and New Zealand, remain relevant despite the differential in application of common principles to diverse situations: for example, *Scott on Trusts, Wigmore on Evidence, Williston on Contracts.*
37 References to "policy" as informing judicial reasoning is really a reference to the application of individual judgment in applying a principle to particular circumstances before a particular court: *cf Australian Consolidated Press v Uren* (1969) 1 AC 590 at 641, 644.

considering the common law of crime because judges cannot create new offences.[38]

27. Similarly, in *R v L* this Court was not concerned to create a new offence or to alter or abolish a common law principle. As Lord Lane CJ said in *R v R* when explaining the view of the Court of Appeal concerning its rejection of the presumption of consent in rape cases:[39]

> This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.[40]

28. Once *R v L* was decided, the law as declared applied to persons charged after the decision in relation to acts done before the decision.[41] That accords with the traditional view of the effect of common law decision-making.[42]

29. It is respectfully submitted that reliance placed by Gray J below upon the dicta of Sackville J in *Torrens Aloha Pty Ltd v Citibank NA* ("*Torrens*")[43] was unjustified. Justice Sackville, with whose reasons Foster and Lehane JJ agreed, considered a submission that a cause of action in restitution "did not first accrue" for the purposes of a limitation of actions statute until the High Court had "changed the law in *David Securities*".[44] Although Sackville J observed that the declaratory theory of the common law was no longer to be uncritically accepted, he reaffirmed that judicial decisions operated retrospectively.[45] Indeed, his Honour rejected the appellant's submission that because "judges make law",[46] it necessarily followed that a cause of action did not come into

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38 *Abbott v The Queen* [1977] AC 755 at 767 (Lord Salmon); *R v Gotts* [1992] 2 AC 412 at 440; ATH Smith , *Judicial Law Making in the Criminal Law* (1984) 100 *Law Quarterly Review* 46 at 54-55; but *cf Shaw v DPP* [1962] AC 220 at 268 per Viscount Simonds who considered that the House of Lords could create offences; and see *contra* at 275 per Lord Reid.

39 [1992] 1 AC 599 at 611.

40 For this reason, the appellant's characterization of the presumption as "an immunity" is apt to lead one into fallacy by drawing attention to status. There has never been an immunity for a husband who is a rapist. Rather, he was able to assert that the Crown would never prove the absence of consent to intercourse.

41 *R v Graham L* [2003] EWCA Crim 1512 at [20]; *R v C* [2004] 1 WLR 2098 at [22], [25].

42 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 586 (Barwick CJ); *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202 at 208 (Barwick CJ); *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 677-678 (Deane J); *Giannarelli v Wraith* (1988) 165 CLR 543 at 586 (Brennan J); *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 at 358-359 (Lord Browne-Wilkinson), 378-379 (Lord Goff), 411 (Lord Hope); *In re Spectrum Plus Ltd* [2005] 2 AC 680 at 690 (Lord Nicholls), 706 (Lord Hope); *Deutsche Morgan Grenfell Group v Inland Revenue Commissioners* [2007] 1 AC 558 at 570 (Lord Hoffman).

43 (1997) 72 FCR 581.

44 (1997) 72 FCR 581 at 593.

45 (1997) 72 FCR 581 at 594-595.

46 (1997) 72 FCR 581 at 595.

existence until that decision was made.[47] Nothing in *Torrens*[48] therefore justifies Gray J's reliance on the decision.[49]

30. Further, it is respectfully submitted that the reasons of Gray J fail to articulate any reasoned basis upon which it could be concluded that the law in 1963, correctly analysed and declared, would have allowed the presumption of consent to operate.

31. It is true that if the appellant had been tried in 1963, he might well have been acquitted because of a mistaken view that a presumption of consent to sexual intercourse was inferred as an incident of the institution of marriage. However, that possibility is irrelevant because the question which the South Australian Court of Criminal Appeal had to answer was not a question of hypothetical history but a question of law: was the law in 1963 such that the appellant could be tried and convicted of rape on the facts alleged?[50] It is respectfully submitted that, for this reason, Doyle CJ was correct in concluding that the effect of the Court's statements in *R v L* concerned "the content of the common law as it was and had been."[51]

32. The approach of courts to the consideration of the meaning of statutes, as having an effect which might shift with time although the words of the statute remain the same, is analogous.[52]

33. The appellant can obtain no assistance from the general principle that laws should not expose a person to criminal liability for actions to which criminal liability would not have attached at the time of their commission.[53] This does not apply, in anything like an unqualified form, to the developments in the common law. In *Zecevic v Director of Public Prosecutions (Vic)*,[54] for example, this Court reformulated the law of self-defence and in doing so overruled its earlier decision in *Viro v The Queen*.[55] Even Deane J, who dissented, said:[56]

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47 (1997) 72 FCR 581 at 595-599. To have concluded otherwise, it is submitted, would have been to decide that a Chapter III court is not engaged in adjudicating existing rights and liabilities.

48 (1997) 72 FCR 581.

49 Insofar as Gray J relied on the decision in *Torrens* for the proposition that *Ha v New South Wales* (1997) 189 CLR 465 at 504 and 515 had not finally determined the question of the power to make prospective and partially retrospective declarations of the common law, that reliance was misplaced: the decision in *Torrens* was handed down before the decision in *Ha*, and could not have considered the latter in any way.

50 The question as actually put to the Court is slightly tendentious in asking whether the offence was "an offence *known* to the law of South Australia" (emphasis added). The correct question was formulated by Doyle CJ at [6] and answered by him at [93].

51 [2010] SASCFC 81 at [65].

52 See Pearce and Geddes, *Statutory Interpretation in Australia,* 7th ed, pp 124ff.

53 For an example, see *Criminal Code* (Qld), s 11.

54 (1987) 162 CLR 645.

55 (1978) 141 CLR 88.

56 (1987) 162 CLR 645 at 677.

> There may be circumstances in which an ultimate appellate court is justified in overruling a pervious decision of its own with the consequence that what had previously been accepted as a defence to the charge of murder is no longer, and never was, such a defence.

34. The position is no different even where there are human rights instruments that purport to prevent the retrospective imposition of criminal liability. In *SW and CR v United Kingdom*,[57] the issue was whether developments in the British common law that had enabled the prosecution of a husband for rape violated Article 7(1) of the European Convention on Human Rights. This relevantly provided:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

35. The European Court of Human Rights held that there was no violation of Article 7(1) where the person could foresee, to a degree that was reasonable in the circumstances, the consequences which a given action might entail. It said:[58]

> [I]n in the United Kingdom...the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen...
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> ...
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> [T]here was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.

36. The Court added:[59]

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57 (1996) 21 EHRR 363.

58 (1996) 21 EHRR 363 at [34], [41].

59 (1996) 21 EHRR 363 at [42]. Compare *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 689 (Toohey J) (pointing out that the principle against retrospective application of criminal laws depends on the circumstances and may not apply where "the alleged moral transgression is extremely grave, where evidence of that transgression is particularly cogent or whether the moral transgression is closely analogous to, but does not for some technical reason amount to, legal transgression").

> The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords—that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim—cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment...What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.

37. The appellant's submissions are inconsistent with the functions of a court under our constitutional arrangements. That function is to determine controversies. A court does so by applying the law as it exists at the time when the matter comes before it. When a court applies the common law, it applies the law to the controversy before it as it declares it to exist at the date of the decision.[60] Once the court has determined the law and applied it by making an order, its function is concluded. Absent a valid statute authorizing it to do so, no part of the function of the court can involve it in making orders about parties who are not before it in order to protect them from what might happen to them.[61]

38. Nor can any expression of opinion by a court that it would be unjust for the law to apply to a class of persons, for example, those who have performed acts before the date of the decision, have any effect. A court acts by making orders not by expressing opinions.

39. The concern that the declaration of the common law by a court may work injustices upon parties not before it and who have conducted themselves upon an alternate belief in the law is answered by the following considerations:

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60 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 586 (Barwick CJ); *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202 at 208 (Barwick CJ); *Giannarelli v Wraith* (1988) 165 CLR 543 at 586 (Brennan J); *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 at 358-359 (Lord Browne-Wilkinson), 378-379 (Lord Goff), 411 (Lord Hope); *In re Spectrum Plus Ltd* [2005] 2 AC 680 at 690 (Lord Nicholls); *Deutsche Morgan Grenfell Group v Inland Revenue Commissioners* [2007] 1 AC 558 at 570 (Lord Hoffman). See also *Griffith v Kentucky* (1987) 479 US 314 at 322-323, 328; *James B Beam Distilling Co v Georgia* (1991) 501 US 529 at 547 (Blackmun J); *Torrens* (1997) 72 FCR 581 at 594-595 (Sackville J). What of the law relating to collateral matters? If a person is charged with a murder committed 50 years ago, should the judge today sum up to the jury in terms which were acceptable 50 years ago (when "we still had the White Australia Policy, when Aboriginals were not counted as part of the population for certain purposes": Appellant's submissions, paragraph 6.2)? Should a judge admit or refuse to admit evidence according to the law of 50 years ago? The answer, of course, is 'no'. See *Campbell v HM Advocate* (2004) SLT 397.

61 It is, of course, significant that after *R v L* it became clear that L (and any other man who had done the same thing to his wife) could be tried and convicted of the rape of his wife although it had previously been understood (if the appellant's submissions to that effect are accepted) that a husband could not rape his wife. It is difficult, therefore, to see how the appellant can justly claim to be placed in a different position in a case to be determined 20 years later.

(a) Courts do not create new offences; they elucidate the law.

(b) The doctrine of precedent and the judicial hierarchy in Chapter III mean that the occasions are very rare when courts (other than the High Court) are able to consider a fresh or original application of rules guided by common law principles.[62]

(c) Courts exercise great restraint before venturing to extend a rule or to formulate a rule to apply in new circumstances and are conscious, before so doing, of the possibility of effects upon those who are not parties to the controversy.

(d) The merger of causes in a judgment precludes the re-agitation of spent matters.[63]

(e) In the civil sphere, statutes which impose time limitations for bring proceedings will reduce the occasions upon which an unexpected legal consequence might result.

(f) Ignorance or misunderstanding of the law has never been a defence.

(g) It is firmly entrenched in common legal understanding that the affairs of persons subject to the common law will be adjudicated by courts upon the basis of the law as it is declared at the date of hearing and not as it might once have been understood.

(h) On the rare occasions when an exposition of the law is perceived to cause disadvantage,[64] it is the role of the legislature, upon information obtainable by it from interested parties, to pass a law which is suitably drafted to have the necessary effects.

40. Consequently, this case raises no need to consider "prospective overruling". The appeal should be dismissed.

Dated: 18 August 2011

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62 In *Farah Constructions v Say-Dee* (2007) 230 CLR 89 at [134], Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ indicated that intermediate courts of appeal should follow seriously considered obiter dicta of this Court. The effect of such obiter dicta will therefore be to create rules and principles that will bind other courts in the future cases although they would not determine the result in the case before this Court.

63 *R v Unger* (1977) 2 NSWLR 990.

64 However, the "legal chaos [which] may be expected to flow from a retroactively effective new rule" (see B Juratowtich, *Questioning Prospective Overruling* (2007) NZLR 393 at 413) is only remarkable by its total absence from Australia's legal history.