IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B71 of 2010

BETWEEN:

AUSTRALIAN CRIME COMMISSION

Appellant

AND

LOUISE STODDART

First Respondent

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WILLIAM MCLEAN BOULTON

(EXAMINER, AUSTRALIAN CRIME COMMISSION)

Second Respondent

APPELLANT'S REPLY

Filed on behalf of the Appellant by:
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PART I: SUITABILITY FOR PUBLICATION

1. The appellant certifies that this reply is in a form suitable for publication on the Internet.

PART II: SUBMISSIONS IN REPLY

A. Non-existence of spousal privilege at common law

2. It is an important premise of the first respondent's argument that an "underlying right" – that of a person not to be compelled to incriminate his or her spouse – founds all three of the rule of evidence governing the incompetence of a witness spouse, the rule of evidence governing the non-compellability of a witness spouse, and the asserted spousal privilege: first respondent's submissions at [8], [14], [15], [19], [24], [25], [34], [36], [37], [40], [41], [49]. That premise is not, however, established by authority. First, the rule of incompetence was not based on any "right" or "immunity". As a testimonial disqualification, it was based on the interest of the wife (earlier, her legal unity with her husband), the danger of perjury, and an apprehension of repugnance likely to be felt by the public: *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 484-5 per Lord Wilberforce; appellant's submissions at [11]. Secondly, the rule of non-compellability was an incident of the qualifications upon, or exceptions to, the rule of incompetence, in the sense that a question of compellability arises only in relation to a competent witness. The rule of incompetence was always subject to exceptions, notably in cases of personal violence against the wife, and, it seems, in cases wherein the husband was not a party to the proceeding. But, as Lord Salmon explained in *Hoskyn* at 496, non-compellability in those exceptional cases was an incident of "the institution of marriage and the special relationship between husband and wife". It was not rationalised as a personal "right", contrary to the language of some submissions put to the House of Lords in the earlier case of *Leach v The King* [1912] AC 304 and repeated now at [32]-[35] of the first respondent's submissions.

3. Recognising that the rule of non-compellability arose as an incident of exceptions to the rule of incompetence also highlights the "meaningful explanation", contrary to the first respondent's submissions at [10], "why [a rule of non-compellability] would exist and spousal privilege not". The position is explained by the recognised distinction between rules of

evidence and substantive privileges: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552-553 [10], 563 [44], 575 [85]. Contrary to the first respondent's submissions at [34] that spousal privilege should be recognised "as a matter of logic", it is not open to identify in the authorities concerning rules of evidence one conceivable policy justification for those rules – such as an "underlying right" – and extrapolate "as a matter of logic" to new rules, such as a substantive privilege, that might, if they existed, share the justification.

4. The first respondent cites *Cartwright v Green* (1803) 8 Ves Jun 405 and *R v Inhabitants of All Saints, Worcester* (1817) 6 M & S 194; 105 ER 1215 ('*All Saints*') as "the two most significant cases in relation to the early development of spousal privilege": first respondent's submissions at [22]. The observation of Professor Heydon (as his Honour then was), in the NSW Law Reform Discussion Paper No. 7, *Competence and Compellability* (1980) at 11, to the effect that it is better to say these are the cases on which the privilege is founded, underscores the appellant's submission that, at the least, there is little evidence of the asserted spousal privilege prior to these cases. While the dicta in the cases may be susceptible of being interpreted as statements of spousal privilege, the decisions rest on other grounds and the dicta themselves are explicable on alternative legal bases: appellant's submissions at [18]-[19]. In those circumstances, there is insufficient reason to recognise the asserted spousal privilege. The evidence in favour of spousal privilege should be considered highly doubtful at best.

5. The doubtful historical position is not clarified by the newspaper reports referred to at [38] of the first respondent's submissions. It would be necessary to understand precisely the legal character and context of the powers exercised by the bodies in question before it could be concluded that their apparent actions recognised spousal privilege. For example, in relation to the Tasmanian coronial inquest referred to at [38](b) of the first respondent's submissions, it may be observed that a coroner had both power to bind over witnesses to prosecute and give evidence, and yet was also obliged to receive exculpatory evidence, even from an accused (and therefore almost certainly from his wife): see P S Tomlins, *The Coroners Guide: A summary of the duties, powers and liabilities of coroners from the most approved authorities*, Van Diemen's Land (1837) at 8, 11. In the non-adversarial context of an inquest (i.e. witnesses not called for a party, but examined by the coroner), the practice as reported in the *Hobart*

Town Daily Mercury might have been a pragmatic reconciliation of the coroner's duty to receive the wife's evidence for the husband with the wife's incompetence to give evidence against her husband. Thus the instruction appears to have been given "not to answer" a question, as distinct from a privilege not to answer. At all events, absent analysis of the legal context, the newspaper reports should be given no weight.

6. In response to the first respondent's submission at [10] that the appellant "does not identify any judicial statements, obiter or otherwise, to support its contention that there is no such privilege", the appellant repeats paragraph [12] of its submissions and its reliance upon the observations of Kiefel J in *S v Boulton* (2005) 155 A Crim R 152. Indeed, the absence of direct authority explicitly against the existence of spousal privilege is consistent with her Honour's observation that "the question of privilege would almost never arise". The "uncertain nature of the authorities" was noted also by Dowsett J in *Stoten v Sage* (2005) 144 FCR 487 at [14].

7. In response to the first respondent's submission at [41] that the evidence acts "assume the existence of the underlying common law right and spousal privilege", the better view is that in dealing with the competence and compellability of a spouse, but not with the asserted privilege, the legislation proceeds rather on an assumption that there is no privilege, for a statutory reversal of the evidentiary rules of incompetence and non-compellability would be defeated by the asserted privilege unless it too were overridden by the statute: see New South Wales Law Reform Commission, Discussion Paper No. 7 *Competence and Compellability* (1980) at 12.

B. Abrogation of spousal privilege

8. The first respondent is correct to submit at [50] that "a right or immunity either exists and is sufficiently fundamental as a matter of common law to invoke the presumption [against abrogation] or not". But this does not speak to the criteria by which a common law right is to be identified as relevantly "fundamental". The appellant's submission at [34] is that the nature of the presumption against abrogation – not merely descriptively, but also normatively – as a "working hypothesis, the existence of which is known to Parliament and the courts", serves to identify those common law rights so "fundamental" as to be within the scope of the presumption. They are those rights similarly "known to Parliament and the courts" as

fundamental rights. This does not invite any subjective inquiry into the actual knowledge of Parliament or individual legislators. As knowledge of the presumption itself is imputed to Parliament by virtue of its entrenched and consistent recognition in the decided cases, so knowledge may be imputed to Parliament of those rights enjoying similarly entrenched and consistent recognition in the decided cases as fundamental rights. Spousal privilege is not of that character.

9. Contrary to the first respondent's submission at [54]-[55] (see also AB 70, reasons for judgment of Spender J at [7] and AB 121-122, reasons for judgment of Logan J at [160]) no inference of non-abrogation should be drawn from the fact that the Act does not provide use immunity in respect of a spouse's answers. Although reliance was placed in *A v Boulton* (2004) 136 FCR 420 upon the provision for use immunity, it did not fall to be decided in that case whether s 30 exhaustively defines the qualifications placed upon the duty of a witness to appear and answer questions. Furthermore, in the criminal proceedings contemplated by the use immunity, the respective statuses of an accused and his or her spouse are different. Throughout Australia, an accused is not a competent witness for the prosecution: ss 17(2), 190 *Evidence Act 1995* (Cth); ss 17(2), 190 *Evidence Act 1995* (NSW); ss 17(2), 190 *Evidence Act 2008* (Vic); ss 17(2), 190 *Evidence Ace 2001* (Tas)); s 18 *Evidence Act 1929* (SA); s 8(1) *Evidence Act 1977* (Qld); s 8(1) *Evidence Act 1906* (WA); s 9(2)(a) *Evidence Act* (NT); see also *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at 585-586 [115] per Heydon J. Conversely, an accused's spouse is not only competent for the prosecution but (with the exception of Western Australia: s 9 *Evidence Act 1906* (WA)) either compellable (s 8(2) *Evidence Act 1977* (Qld); s 9(5) *Evidence Act* (NT)) or prima facie compellable (s 18 *Evidence Act 1995* (Cth); s 18 *Evidence Act 1995* (NSW); s 18 *Evidence Act 2008* (Vic); s 18 *Evidence Act 2001* (Tas)); s 21 *Evidence Act 1929* (SA)). Use immunity for the accused, therefore, preserves the substance of his or her position as an incompetent witness for the prosecution, especially in light of the exception to the hearsay rule in the uniform evidence act jurisdictions for a statement, by a person unavailable to give evidence in a criminal proceeding, made under a legal duty: e.g. s 65(2)(a) *Evidence Act 1995* (Cth). But use immunity for an accused's spouse would serve no purpose where the spouse is, in any event, compellable to testify for the prosecution. Even in circumstances where a spouse may object to being compelled, he or she may be treated as "unavailable" under the uniform evidence acts (Dictionary, Part 2, Item 4(1)(f) *Evidence Act 1995* (Cth); Dictionary, Part 2, Item 4(1)(g)

Evidence Act 1995 (NSW); Dictionary, Part 2, Item 4(1)(f) *Evidence Act 2008* (Vic); s 3B(1)(g) *Evidence Act 2001* (Tas)) such that the admissibility of his or her answers to the ACC, being made under a legal duty, has been contemplated by the legislatures: e.g. s 65(2) *Evidence Act 1995* (Cth).

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