IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B71 of 2010

BETWEEN:

AUSTRALIAN CRIME COMMISSION
Appellant

and

LOUISE STODDART
First Respondent

and

WILLIAM MCLEAN BOULTON
(EXAMINER, AUSTRALIAN CRIME COMMISSION)
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

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PART I: SUITABILITY FOR PUBLICATION

1. The first respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The first respondent is content with the statement of the issues presented by the appeal, at [2] of the appellant's submissions.

PART III: SECTION 78B JUDICIARY ACT

3. The first respondent certifies that she has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth), and believes that no notice should be given.

PART IV: STATEMENT OF CONTESTED MATERIAL FACTS

4. The first respondent accepts the appellant's narrative of facts and chronology as accurate, and sufficient for the purposes of this appeal, subject to also noting that the first respondent was asked and answered questions during her examination before claiming spousal privilege (AB 32-42).

PART V: APPLICABLE PROVISIONS

5. The first respondent accepts the appellant's statement of applicable legislative provisions as at the date of the judgment appealed from, attached as annexure A to the appellant's submission.

PART VI: ARGUMENT

6. The Full Court correctly recognised the privilege against spousal incrimination ("spousal privilege") as part of the common law of Australia. The Full Court also correctly held that the Act does not abrogate spousal privilege.

A. Spousal privilege is part of the common law of Australia

Introduction

7. The appellant's contention that spousal privilege is not part of the common law of Australia is founded on the assertion that scholars and jurists have repeatedly misread the historical record, and that references to the privilege in truth relate to spousal incompetence or non-compellability.

8. The appellant itself misreads and misunderstands the historical record. Analysis of the historical authorities and texts reveals a consistent approach to recognising that spouses have a fundamental right not to incriminate each other, or (put differently) an immunity from compulsion to do so (hereinafter called "the underlying right"). This right has sometimes been protected by the rule of evidence which is "incompetence", sometimes by "non-compellability" (to attend court at all, or to answer certain questions), and sometimes by "privilege". These expressions have been used in different ways, and the broader protections of incompetence (which renders consideration of the underlying right unnecessary) and non-compellability have meant that the occasion for specifically applying the narrower privilege did not very often arise. However, the historical record clearly shows the long-standing and continued existence of the underlying right and that, when the occasion does arise, the existence of the privilege is re-affirmed.

9. The appellant incorrectly asserts at [9] that the first Australian case to recognise spousal privilege was *Callanan v B* (2004) 1 Qd R 348. Spousal privilege has been explicitly or implicitly recognised by Australian courts (and leading Australian commentators) on a number of occasions since the beginning of the twentieth century and in a range of contexts (see [31] & [38] – [40] below). Its recognition is merely continued in the judgments of every member of the Queensland Court of Appeal (McMurdo P, McPherson and Jerrard JJA) in *Callanan v B* (2004) 1 Qd R 348, every member of the Full Federal Court (Black CJ, Jacobson and Greenwood JJ) in *S v Boulton* (2006) 151 FCR 364 and every member of that same court (Spender, Greenwood and Logan JJ) in the judgment below in the present case.

10. It is instructive that, although the appellant at [10] criticises the historical record in England and Australia as being "doubtful" as to whether spousal privilege exists, it does not identify any judicial statements, obiter or otherwise, to support its contention that there is no such privilege. The appellant accepts the existence of a common law rule of spousal non-compellability, and offers no meaningful explanation as to why it would exist and spousal privilege not. Also, the appellant fails to diminish the weight of foreign superior court authority which strongly supports the existence of the privilege.

Historical record

11. From the earliest days of the common law a married woman was *"not bound to discover the crime of her husband"*: Lusty, David *"Is there a Common Law Privilege Against Spouse-Incrimination?"* (2004) 27 UNSWLJ 1, at 7-10. This ancient principle, the existence of which has not been disputed by the appellant, was a substantive rule of law exempting a wife from criminal liability for being an accessory to, or committing misprision of felony in respect of, an offence of her husband. The principle appears to have had a significant influence on the early development of common law rules relating to spousal testimony.

12. In 1613, the principle was relied upon to exempt a bankrupt's wife from a compulsory examination. The Court reasoned that *"the wife is not bound in case of high treason to discover her husband's treason, although the son be bound to reveal it; therefore by the common law she shall not be examined"*: *Anonymous* (1613) 1 Brownl 47, 47 - 48; 123 ER 656, 656-657. Professor Holdsworth described this case as *"the case of a wife's privilege"*: Sir William S Holdsworth, *A History of English Law* (3rd ed, 1944) vol 9, 197 (n 3).

13. In 1618, Michael Dalton's *Countrey Justice* was published containing the following passage (at 270) relating to the power of Justices of the Peace to conduct preliminary examinations of witnesses and bind them to testify at trial pursuant to 2 & 3 Ph & M, c. 10 ("the Marian Committal Statute", of 1555):

"The Justices of Peace have authoritie (by the words of the Statute) to binde by Recognizance all such as do declare any thing materiall to prove the felony, to give evidence against the offender; And yet the wife is not to be bound to give evidence, nor to be examined against her husband; for by the lawes of God, & of this land, she ought not to discover his counsell, or his offence in case of theft, (or other felony, as it seemeth). See Stamf.26.b. Nay, I have knowen the Judge of Assise greatly to disallow, that the wife should be examined, or bound to give in any Evidence against others in case of Theft, wherein her husband was a partie, and yet her evidence was pregnant and materiall to have proved the against others that were parties to the same felony, and not directly against the husband" (quote from the London Professional Books republication in 1973, with letters modernised).

14. The two key features of this passage are that the common law rules of spousal testimony stated by Dalton are based on the ancient principle that a wife is not bound to discover the crime of her husband and, whatever the precise nature and scope of those rules, they exempted a wife from being examined or testifying against her husband notwithstanding the absence of any such limitation in the statute itself (Lusty 11-14). Dalton's treatise recognises the underlying right and provides strong support, either directly or by way of analogy, for the recognition specifically of spousal privilege. The case law thereafter, in relation to the various categories of proceedings examined by Mr Lusty, illustrates that the underlying right has remained and that spousal privilege has been recognised whenever the occasion has arisen to consider it.

15. The appellant at [13] to [17] seeks to assign disproportionate significance to a minor typographical error in McPherson JA's judgment in *Callanan v B*. In attempting to elevate the importance of Dalton's treatise beyond that ascribed to it by Mr Lusty or the intermediate appellate courts, the appellant re-agitates an

argument advanced unsuccessfully by Mr Du Cann QC for the Crown in *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 481E (submitting that Hale misread Dalton); even if correct - and the first respondent submits it is not – the point does not negate the existence of the underlying right or the privilege and does not undermine the authorities in which they were recognised.

16. Whether or not Dalton used the word "bound", on one or both of the occasions it is used in the relevant passage (with the second occasion arguably more significant for present purposes), in a special sense of binding over by recognizance or the ordinary sense of meaning "obliged" or "compelled", the effect of the principles stated by Dalton was that a wife who did not wish to be examined or testify against her husband could not be compelled to do so.

17. Both Sir Matthew Hale and Mr Serjeant Taulford regarded Dalton as stating a rule of non-compellability rather than incompetence. In Hale's *History of the Pleas of the Crown* (c 1676), vol 1, it is said at 301 with citation of Dalton: *"a woman is not bound to be sworn or to give evidence against another in case of theft, &c. if her husband be concerned, tho it be material against another, and not directly against her husband"* (emphasis added). In Talfourd's *Practical Guide to The Quarter Sessions*, (4th ed, 1838), this appeared at 507 with citation of Dalton and Hale: *"The wife... cannot be compelled to... give evidence against another in case of theft, &c. if her husband be concerned, though material against another, and not directly against her husband"* (emphasis added). Samuel Phillips, in *A Treatise on the Law of Evidence* (3rd ed, 1817), observed at 67: *"Lord Hale's ... authority goes no further than this, that the wife is not compellable to give any evidence charging the husband with an offence"* (emphasis added). Further, notwithstanding the argument by the Crown in *Hoskyn* referred to above, the accuracy and authoritativeness of Hale's interpretation of Dalton was not questioned by any of the Law Lords in that case (see, eg, 476E, 485A, 491C & 496B).

18. The appellant's argument at [12] "*that the common law never had occasion to develop spousal privilege*", because of the common law rule of spousal

incompetence, is fundamentally flawed as a matter of logic and of law. The rule of spousal incompetence is accurately stated at [11] of the appellant's submissions: *"At common law ... there was a rule of evidence that a party's spouse was incompetent as a witness either for or against the party"*. As is apparent from this statement, this was a mere rule of evidence, which only applied to the giving of "evidence" by witnesses in judicial proceedings and only came into effect where the witness' spouse was a party to the proceedings (also see Lusty, 4 & 13/14).

19. At [13], the appellant argues that the thesis advanced in Mr Lusty's article is based on the premise that Lord Coke erroneously asserted a rule of spousal incompetence in 1628. This argument is rejected by the first respondent. Mr Lusty states that Coke's declaration constituted "a major augmentation" of the law, but this does not constitute a critical plank in his thesis. The existence of the rule of spousal incompetence, which Mr Lusty acknowledged throughout his article, does not in any way negate or detract from the existence of the underlying right or of spousal privilege. In truth, again, the wide application of the rule of incompetence inevitably diminished the occasions for consideration of the underlying right. But there remained a wide range of situations in which the rule of parties' incompetence had no application. In these situations there was occasion to apply and develop the underlying right and spousal privilege, and the common law did so. Examples include non-judicial contexts, pre-trial procedures for the disclosure of information and judicial proceedings in which the witness's spouse was not a party.

20. Notwithstanding the above, and before turning further to the authorities, the first respondent pauses to observe that there appears to be little or no support for the appellant's apparent contention that the rule of incompetence existed prior to the statement of Lord Coke in 1628. For example, Professor Wigmore stated: *"This singular condition of the law may perhaps be laid to the blame of Lord Coke. It was he who struck the first false note"*: *Evidence in Trials at Common Law* (1961) vol 8, §2228. Professor Holdsworth expressed a similar view at 195-197 of his *A History of English Law*, cited above at [12]. Glanville Williams also

identified Lord Coke's statement as the earliest authority for "the disability" (incompetence): *The Legal Unity of Husband and Wife* (1947) 10 Modern Law Review, 19.

21. Although Parliament in 1623 granted a new power to bankruptcy commissioners to examine a bankrupt's wife, the power only arose *after* the declaration of bankruptcy and only for the purpose of identifying the bankrupt's estate: 21 Jac 1, c.19, s.6. This reflected the continued existence - despite Coke's statement - of the common law principles stated by Dalton, in that the wife could not be bound to give evidence establishing bankruptcy (which was often a criminal offence): *Ex Parte James* (1719) 24 ER 538. Lord Parker LC's reasons for judgment in that case may include the language of incompetence, as the appellant asserts at [20], but it is apparent that the husband had been declared bankrupt at the time of the examination challenged and that the wife could properly have been compelled to answer the permissible questions but refuse to answer those touching her husband's bankruptcy. Mr Lusty's identification of spousal privilege in this decision (at 11) is correct.

22. The two most significant cases in relation to the early development of spousal privilege are *Cartwright v Green* (1803) 8 Ves Jun 405 / 32 ER 412; 2 Leach 952 / 168 ER 574) and *R v Inhabitants of All Saints, Worcester* (1817) 6 M & S 194; 105 ER 1215. As Professor Heydon (as his Honour then was) opined in 1980, when discussing the common law "privilege against crimination of spouse", the better view is that these are the cases on which the privilege is founded: NSW Law Reform Commission Discussion Paper No. 7, *Competence and Compellability* (1980), 11 (n 17). The first respondent respectfully agrees with the analysis of those two cases by Professor Heydon and Mr Lusty (at 14-20), which accords with the treatment of the two cases by the House of Lords in *Hoskyn* particularly at 485/6 and 196, and, obiter, by Griffith CJ in *Riddle v The King* (1911) 12 CLR 622, 627-629. It also accords with the weight of opinion of Britain's most influential text writers of the nineteenth and twentieth centuries in

this field (see, generally, the references cited by Mr Lusty at footnotes 104-106, 115-121, 146-147).

23. The appellant's analysis at [19] of *Cartwright v Green* is flawed. It is true that the case stands for the proposition that discovery should not be given in aid of an action founded in felony. However, it also stands for the general proposition, as stated in the headnote, that *"A married woman may demur to a discovery, that may subject her husband to a charge of felony"*. One of the submissions made to the court in that case (recorded at 2 Leach 952, 953; 168 ER 574, 575) was that Mr Green's wife could not *"be called upon to criminate her husband"*. None of the reported submissions suggested that this rule did not exist.

24. Lord Eldon LC, after reserving his decision, specifically responded to the submission by declaring: *"Here the wife, if the act was a felony in the husband, would be protected: at all events she could not be called upon to make a discovery against her husband"*: 8 Ves Jun 405, 409/10. This ruling was arguably part of the ratio decidendi in respect of Mr Green's wife and it is apparent that the Lord Chancellor intended to lay down a principle of general application, which reflects the underlying right. As to Lord Eldon's former role as advocate in *Le Texier v The Margrave of Anspach* (1800) 5 Ves Jun 322; 31 ER 610, the latter report reveals his submissions as emphasising the *"general rule of law"*, which is *"very old, and constantly adhered to"* that a wife could not be a witness against her husband. His Lordship's subsequent reference in *Cartwright* to this rule applying *"at all events"* reveals recognition of the underlying right and, contrary to the appellant's assertion at [21], is consistent with spousal privilege.

25. The appellant's analysis of *All Saints* at [18] is also contested. Bayley J said at 1218 that the wife in that case was competent but *"If she had thrown herself on the protection of the Court on the ground that her answer to the question put to her might criminate her husband, in that case I am not prepared to say that the Court would have compelled her to answer; on the contrary, I think she would have been entitled to the protection of the Court."* The appellant might be correct to say that this was a statement of non-compellability, but it was a statement of non-compellability to answer a question which might incriminate the spouse.

That is not only a clear recognition of the underlying right, but also a clear statement of the availability of spousal privilege to give effect to the right. It was treated as such, for example, by Taulford (cited at [17] above, 508) when he cited it for the proposition that, where a spouse witness was competent, nevertheless *"the witness may object to the examination, as likely to criminate the wife or husband"*. Further, it is a statement *"of the highest persuasive authority"* by *"a master of the common law"* (*Hoskyn* at 496 per Lord Salmon) and *"a judge of outstanding quality" (Hoskyn* at 502 per Lord Edmund-Davies, who also expressly described *All Saints* as concerned with privilege rather than non-compellability).

26. During the nineteenth and early twentieth centuries, the spousal privilege recognised in *Cartwright v Green* and *All Saints* was accepted and/or applied in a number of Australian, English and foreign cases. Some important examples are discussed below.

27. The *Southampton Case* (1842) Barr & Aust 376 saw a straightforward application of spousal privilege in a non-judicial context, when a wife, after answering various questions, successfully objected to a specific question which might have incriminated her husband for electoral bribery. The Committee resolved at 399: *"That the question may be put, but that the witness be cautioned that she is not bound to answer any question which is calculated to criminate her husband; in which case she will state her objection when the question is put"*. Although the nature of the issues subsequently deliberated by the members, referred to by the appellant at [22], are not entirely clear, the result seems to have been a 5:2 re-affirmation of the form of the resolution. In any event, discussion of whether the witness should instead be excluded altogether may indicate some doubt over the witness' competence but does not suggest any such doubt about whether, if competent, the privilege would apply.

28. In *R v Hamp* (1852) 6 Cox CC 167, a criminal case, Lord Campbell CJ was required to rule on a female witness' objection to answering a question which arose during the course of cross-examination. The question concerned the whereabouts of her husband, who was not a defendant in the trial. His Lordship

required her to answer or provide a reason for not doing so, to which she replied: *"I decline to answer the question, because my husband did not appear to his recognizance"*. Lord Campbell then said that *"the question ought not be pressed"*, and it was withdrawn. The headnote records that the case raised *"Privilege of wife to refuse to answer questions as to the residence of her husband, who is liable to be apprehended"*. As with *Southampton*, this appears to be a straightforward application – this time in a judicial context – of the privilege against spousal incrimination.

29. The Supreme Court of Pennsylvania considered spousal privilege in some detail in *Commonwealth v Reid*, 4 Am.L.Times Rep.141 (1872), where a witness testified for the prosecution of a doctor on a charge of illegal abortion performed upon the witness. Her husband was a co-defendant not then on trial. The trial judge overruled an objection to her competence. On appeal, Paxson J reviewed the English authorities and texts and accepted the general principle of spousal incompetence but held it not to apply in a collateral case. However, his Honour expressly recognised the existence of spousal privilege not to testify in respect of some facts only and cited *All Saints* in this context (146, 147). He stated the relevant rule as follows: *"[W]hile... the husband or wife is a competent witness for the commonwealth, it is, notwithstanding, his or her privilege to decline to testify to such facts as will incriminate the other"* (149). He also noted that it was a proper instruction for the examining lawyer, or the court, to advise a witness upon taking the stand that *"she was not bound to answer any questions which would criminate her husband"* (150).

30. An Ontario appeal court had occasion to consider the issue in a civil context shortly after *Commonwealth v Reid* and came to the same conclusion: *Milette v Litle* (1884) 10 Ontario Practice Reports 265. A husband and wife each refused to answer a specific category of questions (but apparently not all) on the ground that the answers might tend to expose the other to a charge of criminal libel. At first instance, the objection was refused. On appeal, Galt J was referred by counsel to authorities including *All Saints*, and held *"that the witness's privilege*

of refusing to answer, extended to cases where the danger so apprehended was the criminal prosecution of the wife or husband of the witness".

31. Griffith CJ considered the question of spousal privilege in *Riddle v The King* (1911) 12 CLR 622. Albeit obiter, his Honour reviewed the authorities and endorsed the judgment of Bayley J in *All Saints* and the statement in *Taylor on Evidence*, 10th ed, para 1368 that a wife's competence to give evidence incriminating her husband does not mean she is *compelled* to do so *"and the better opinion is that under it she may throw herself on the protection of the Court, and decline to answer any question which would tend to expose her husband to a criminal charge"* (628). His Honour accepted it to be the state of the common law that a wife is not compellable (629).

32. The House of Lords decision in *Leach v R* [1912] AC 304; 7 Cr.App.R 157 concerned the question whether section 4 of the *Criminal Evidence Act 1898*, in providing for new exceptions to the rule of spousal incompetence so that an accused's spouse "may be called as a witness" in respect of certain offences, thereby necessarily made the spouse compellable. On initial appeal to the Court of Criminal Appeal (*R v Acaster and Leach* (1911) 7 Cr.App.R 84), Mr Milward of counsel for Leach, emphasising the difference between competence and compellability, said *"A common law right of such long existence should not be taken away without clear words of a statute to support such a course"* (at 87, emphasis added). The Court of Criminal Appeal held as a matter of construction that the statute made the spouse compellable, but said nothing to suggest any doubt about counsel's submissions regarding the common law position.

33. In the House of Lords, Mr Milward repeated the "right" submission in almost identical terms (7 Cr.App.R 157, 161). Their Lordships unanimously upheld the appeal, on the basis that it would require very clear legislation to overturn (by reference to the Cr.App.R pages): the *"fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband, especially in matters of a criminal kind"* (the Lord Chancellor, 169); the *"fact"* or *"law"* to the same effect which *"has lasted for centuries and which is almost ingrained in the English Constitution"* (the Earl of Halsbury, 170 and 171);

and *"the principle that a wife is not to be compelled to give evidence against her husband [which] is deep-seated in the common law of this country"* (Lord Atkinson, 171). Importantly, in considering whether the legislation meant that the wife *"must give evidence against her own will"*, the Lord Chancellor echoed the language of Mr Milward in saying that definitely stated legislation would be required *"before the right of this woman can be affected"* (169/170).

34. As did Bailey J in *All Saints*, it is submitted that the House of Lords in *Leach* recognised spousal non-compellability as (or as reflecting) a wife's right not to give evidence incriminating her husband. That right might manifest as non-compellability where the non-witness spouse is the accused, because the assumption would be that all evidence in the case would infringe the right, but equally it must – as a matter of logic – manifest as a privilege not to answer specific questions or categories of questions in collateral proceedings where answering would similarly infringe.

35. The dicta supporting the existence of spousal privilege in *Leach* were expressly applied by majority in the House of Lords in *Hoskyn* in 1978. Lord Salmon said of *Leach*: *"Although their Lordships were only construing a statute, their ratio decidendi was based largely on their opinion as to the effect of the common law and therefore cannot in my view be regarded as merely obiter dicta"* (at 497). As Mr Lusty says (23), any doubt then remaining about the existence of the privilege at common law should be regarded as having been dispelled by *Hoskyn*.

36. The question before the Law Lords in *Hoskyn* was whether a wife deemed competent to testify against her husband at common law, because of the traditional exception to spousal incompetence in cases of inter-spousal violence, was thereby also compellable in accordance with the general rule that witness competence also meant compellability. Each of Lord Wilberforce, Viscount Dilhorne, Lord Salmon, and (by joining with Lord Wilberforce) Lord Keith of Kinkel separately endorsed *All Saints* and the statement from Taylor on Evidence (9th Edn (1895), 892) that when a wife is permitted to give evidence: *"it by no means follows that she can be* compelled *to do so; and the better opinion is that she may throw herself on the protection of the Court and decline to*

answer any question which would tend to expose her husband to a criminal charge". Lord Edmund-Davies dissented, for reasons not currently relevant, but also cited *All Saints* and Taylor approvingly while, as noted above, expressly characterising *All Saints* as a case of privilege (at 502). The majority's emphatic conclusion that competence does not mean compellability, for a witness-spouse in a criminal case against the other, is founded on the underlying right. As it is put by Mr Lusty (20), *Hoskyn* is *"the next best thing to an express ruling that there is a common law privilege against spouse-incrimination".*

Creation of "new" privileges

37. It is not accurate to say, as the appellant does at [23], that Jerrard JA's cited comment in *Callanan* is "the position" in intermediate Australian appellate courts. The judgments in that and the other decisions referred to [9] above generally reveal a cautious approach, leading to results consistent with the historical position as summarised above. A more comprehensive examination, and a proper understanding of the underlying right which is the common foundation of spousal non-compellability and privilege, removes any meaningful doubt about the historical basis for recognition of the privilege. Confirming this recognition does not amount to creating any new right or privilege.

38. The historical record in Australia also does reveal some recognition of spousal privilege prior to *Callanan*, which may be less clear than in England but stands against the apparent absence of material to the contrary. The privilege was specifically recognised by Henry Shaw in the NSW edition of *Stephen's Digest of the Law of Evidence* (1909), 156. While the earliest reported Australian case identified by the first respondent is *Riddle* in 1911, referred to at [31] above, there is some indication from newspaper reports that spousal privilege was previously recognised and applied in Australia in a range of contexts. For example, it is reported that:

a) in 1831, a witness in a collateral criminal proceeding claimed *"that she should not be bound to answer questions which might have a tendency to criminate*

her husband" and the Solicitor-General undertook not to ask such questions - *Hobart Colonial Times*, 20 July 1831;

b) in 1859, a witness at a coronial inquest *"was cautioned by the Coroner not to answer any questions that might criminate her husband" - Hobart Town Daily Mercury*, 25 June 1859; and

c) in 1906, a Royal Commissioner in Western Australia told a witness that *"she need not answer any question tending to incriminate her husband" - Sydney Morning Herald*, 11 September 1906; *The Mercury (Hobart)*, 12 September 1906.

10 39. There is obiter support for the existence of spousal privilege in the reasons of the Full Bench of the NSW Industrial Commission in *Tinning v Moran* (1939) AR 148, 151, in the context of considering a witness' claim during cross-examination for privilege against self-incrimination in respect of a particular question. In *Re Wagner* [1958] QWN 49, a bankrupt undergoing public examination declined to answer a question on the ground that it might tend to incriminate his wife. As Mr Lusty explains (33 and n220), Hanger J seems to have incorrectly (contrary to *Leach*) required the question to be answered based on broad language in the applicable legislation but his Honour did not dispute the existence at common law of the privilege claimed.

20 40. As noted above at [22], the existence of spousal privilege was accepted in a NSW Law Reform Discussion Paper prepared by Professor Heydon (as his Honour then was) in 2007, wherein it was also observed that the privilege *"has an operation much like a rule against compellability... [and], in a criminal trial, there is a coalescence of the question of compellabilty at the suit of the Crown and the question of privilege"*. This point recognises that, as argued above, the common law rule of spousal non-compellability (which the appellant does not apparently dispute exists) and the privilege are founded on the same underlying right and the question of which is applicable (absent statutory abrogation) is determined only by the circumstances of the proceeding in which the right arises.

41. The appellant asserts at [27] that recognising (the appellant says "creating") spousal privilege would defeat the purpose of legislative regimes and contradict the clear view of Australian legislatures as to where the public interest lies. It is submitted that this view is misconceived. As with previous legislation considered by historical authorities, these regimes only govern the proceedings within the scope of each Act. By making provision for dealing with objections to spousal evidence in those proceedings, the better view is that they assume the existence of the underlying common law right and spousal privilege and seek to provide a mechanism for balancing them against the interests of justice. They certainly do not suggest a universal legislative belief that the underlying right does not exist at common law or should as a matter of policy now be removed completely. If that is the belief, in any event, it remains open to the legislature to enact the necessary provisions to make this clear in the Act now under consideration.

Foreign law

42. The development of relevant law in foreign jurisdictions does not support the appellant's submissions.

43. The position in England at common law has been summarised above. The unanimous view of the members of the English Law Reform Committee, referred to by the appellant at [29], was that any uncertainty about the existence of spousal privilege at common law should be resolved by expressly recognising it in statute. The enactment of s.14 of the *Civil Evidence Act 1968* significantly reduced the likelihood of a court being required to determine this issue, and probably explains the lack of directly relevant case law in that jurisdiction in recent decades.

44. The appellant incorrectly submits that the statutory position in the United Kingdom illustrates that spousal privilege is based on statutory enactment and not in the common law. The better view is that s.14 of the *Civil Evidence Act 1968* is *"merely declaratory of the common law"* and was inserted *"to make assurance doubly sure with regard to the incrimination of the witness's spouse"*: Sir Rupert Cross, *Evidence* (4th ed, 1974, 246 and n3). There is no reason to

doubt that spousal privilege still exists in contexts beyond the scope of that provision, such as in criminal proceedings. The commentaries referred to by the appellant at [29] do not suggest otherwise. In *Cross and Tapper on Evidence* (12th ed, 2010), 425, it is merely stated that it is "uncertain" whether spousal privilege existed at common law. Mr Lusty (22-23) convincingly demonstrates that Mr Tapper's views are based on a misplaced reliance on the irrelevant (for present purposes) dicta of Lord Diplock in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547. Although the current edition of *Halsbury's Laws of England* does suggest in the Criminal Procedure section at [503] that spousal privilege only exists in civil cases by virtue of s.14 of the *Civil Evidence Act 1968,* the current Civil Procedure sections seem to assume a prior common law existence and include reference to *Cartwright v Green* and *All Saints*: Vol 11 (5th ed, 2009), Civil Procedure, at [580] and n19; and at [974] and n9. In addition, in all previous editions of *Halsbury's Laws of England* a common law privilege against spousal privilege was specifically recognised (Lusty at 18, n 120).

45. Regarding the United States, the early decisions in collateral cases, including *Commonwealth v Reid* referred to at [29] above, illustrate the historical acceptance there of spousal privilege by reference to English authorities including *All Saints.* Although the development of principles in this area was subsequently overshadowed by the different "privilege against adverse spousal testimony", the current scope of that privilege appears to be essentially the same as a common law privilege against spousal incrimination: Lusty at 26-7. The appellant attempts at [30] to minimise the significance of *Trammel v United States* 445 US 40 (1980). The US Supreme Court there noted the ancient roots of the privilege claimed ([16]) and confirmed a witness-spouse's privilege to refuse to testify adversely against their party-spouse. The Court did employ the explicit statutory authority (to which the appellant refers at [30]) to continue the evolutionary development of testimonial privileges in federal matters *"governed by the principles of the common law as they may be interpreted... in light of reason and experience"*, in order to modify the previous rule that the party-spouse could prevent the witness-spouse from testifying against them: [15]. In

doing so, however, it was not moulding a new privilege but rather, it seems, reverting an existing expanded privilege to one reflecting the extant underlying right at its core. That is the same underlying right which arises in this case.

46. It may be that the significance of *R v Kabbabe* (1997) 6 CR (5^{th}) 82 is unclear and that, as Mr Lusty acknowledges (30), the existence and scope of spousal privilege in Canada is yet to be confirmed by the Supreme Court. However, the appellant at [31] accepts that the common law of Canada includes a rule of spousal non-compellability. As noted at [30] above, spousal privilege was applied in *Millette v Litle* in 1884. Mr Lusty explains that its existence has subsequently been acknowledged and endorsed by Mills J of the Supreme Court of Canada in *Gosselin v The King* (1903) 7 CCC 139, 162-3; and by the Ontario Court of Appeal in *R v Mottola* (1959) 124 CCC 288, 294.

47. In New Zealand, of which the appellant makes no mention, Tompkins J of the High Court in 1992 upheld and applied *"the fundamental common law principle that a spouse is not to be compelled to give evidence against the other spouse"* and said that he could see no reason to distinguish between compellability to attend and give (any) evidence and being compelled to answer potentially spouse-incriminating questions: *Hawkins v Sturt* [1992] 3 NZLR 602 at 610.

B. The Act does not abrogate spousal privilege

48. The principles governing the statutory abrogation of fundamental principles, rights, freedoms or immunities are well settled and were summarised by Jacobsen J (with whom Greenwood agreed at [170]) in *S v Boulton* at [120] to [127], relevantly citing: *Sorby v Commonwealth* (1983) 152 CLR 281 at 289-90, 309, 311, 316; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341; *Hamilton v Oades* (1989) 166 CLR 486 at 495; *Coco v The Queen* (1994) 179 CLR 427 at 437-8; *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [11]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [30]; and *Griffin v Pantzer* (2004) 137 FCR 209 at [46], [53]. See also now: *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259, 271.

Presumption against abrogation

49. As demonstrated above, the underlying right of spouses not to incriminate each other has been long recognised as fundamental whether it manifested as non-compellability or privilege. Indeed, it is appropriate that the appellant at [35] cites *Leach* in this connection: as submitted at [32] to [34] above, *Leach* is an example of the application of the underlying right and the need for "clear, definite and positive" abrogation thereof.

50. The thrust of the appellant's submissions at [34] is unclear. It is *the presumption against abrogation* which is held in the authorities cited to be *"a working hypothesis, the existence of which is known to Parliament and the courts"*. The authorities do not provide that the presumption only applies to rights "known to Parliament"; it would be impossible to assess, with any degree of accuracy, precisely what the legislature "knew" when passing any legislation in which a question of abrogation arises. A right or immunity either exists and is sufficiently fundamental as a matter of common law to invoke the presumption, or not. If a fundamental right exists, it will not be abrogated if it appears that Parliament has simply failed to direct attention to it: *Coco* at 437. In any event, as noted at [41] above and by Mr Lusty at 34, parliaments including the Commonwealth legislature have enacted legislation showing awareness of at least the possibility that spousal privilege exists.

No displacement of the presumption

51. The test for abrogation by implication is a "very stringent" one: *Coco* at 438. "[I]rresistible clearness" and "a high degree of certainty" as to the legislative intention are required: *Saeed* at 259; *Hamilton v Oades* (1989) 166 CLR 486 at 495.

52. The Act does not exhibit the unmistakable and unambiguous expression of intent which is necessary to establish that the legislature sought to exclude the underlying right and spousal privilege: there is no reference to the position of spouses.

53. Where general words are relied on to establish implied abrogation, as the appellant does here, the implication is possible if *"it is necessary to prevent the statutory provisions from becoming inoperative or meaningless"* but *"it would be very rare for general words in a statute to be rendered inoperative or meaningless if no implication of interference with fundamental rights were made, as general words will almost always be able to be given some operation, even if that operation is limited in scope"*: *Coco* at 438. It cannot be accepted that the Act, or any part of it including section 30, would be rendered inoperative or meaningless without abrogation of spousal privilege. The Act and section 30 retain very broad operation without such abrogation. The maintenance of spousal privilege does not frustrate the statutory purpose any more than the express partial maintenance of legal professional privilege (section 30(3) and (9)) and, arguably, the full maintenance of public interest immunity and parliamentary privilege.

54. While recognising that the Act specifically provides a limited use immunity in relation to the abrogation of the privilege against self-incrimination, the appellant fails to acknowledge that the abrogation, and the limited use immunity, work conjunctively. There is a substantial difference between being required to give evidence, which, in the event it could be used against the person giving that evidence, would be self-incriminating, and being required to give evidence which can be used to incriminate another person. The appellant's submission at the end of [43], is telling: while it may be that a person's incrimination by a spouse is less likely to occasion marital dissension when the person can be compelled to incriminate themselves, the existence of the limited use immunity for the person but not the spouse negates this: the consequences of incriminating spousal testimony are potentially far worse.

55. The appellant does not address the significance of the use immunity provided in respect of the privilege against *self*-incrimination, by section 30(4) and (5) of the Act, which was a key point in the judgments below of Justices Spender (AB 72, [21]) and Logan (AB 121/2, [160]). The existence of the use immunity was a foundation of the Full Federal Court's decision in *A v Boulton* (2004) 136 FCR

420, that the Act impliedly abrogated the privilege against self-incrimination. In the reasons of Kenny J, with which Beaumont and Dowsett JJ agreed, her Honour referred to *Sorby* and said at [65]: *"The provision for a use immunity in s 30(5) gives a very clear indication of a legislative intent to abrogate the privilege of self-incrimination".* There is no such clear indication in respect of spousal privilege, and it cannot sensibly be suggested that subsections (4) and (5) provide any use immunity in respect of spousal privilege: see *S v Boulton* at [58] per Black CJ.

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