ACC V STODDART: DENIAL OF SPOUSAL PRIVILEGE AT COMMON LAW IN AUSTRALIA

ELIZABETH WARR*

I INTRODUCTION

The High Court's decision in *Australian Crime Commission v Stoddart*[1] has been described as 'a decision to send shivers down our better halves.'[2] Attracting strong media interest, the High Court, by a five to one majority, upheld an appeal from the decision of the Full Federal Court, declaring that spousal privilege, that is, the right not to give evidence that might incriminate one's spouse to conviction for a crime,[3] did not exist under Australian common law.[4] In reaching their decision the majority found that intermediate courts had erroneously recognised spousal privilege based upon on a misreading of the historical record.[5]

II BACKGROUND

Mrs Louise Stoddart, the first respondent, attended before an examiner of the Australian Crime Commission ('ACC') in response to a summons issued under s 28 of the *Australian Crime Commission Act 2002* (Cth) ('the Act'), in connection with the alleged illegal activities of her

---

* Fourth year LLB/BA student, University of Notre Dame Australia.

1 (2011) 244 CLR 554.

2 Ross Cameron, 'A Decision to Send Shivers Down Our Better Halves', *The Sydney Morning Herald* (online), 3 December 2011 < http://www.smh.com.au/opinion/society-and-culture/a-decision-to-send-shivers-down-our-better-halves-20111202-1ob2m.html>.

3 See *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 620[174] (Crennan, Kiefel and Bell JJ): Mrs Stoddart 'claimed to be entitled to another privilege, described as "the privilege of spousal incrimination" which is to say the right not to give evidence that might incriminate her husband'; 580 [69] (Heydon J): 'The question … was whether there is a common law privilege by which one spouse can decline to answer questions the answers to which may have a tendency to expose the other spouse to conviction for a crime'.

4 See, *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 571 [41] (French CJ and Gummow J); 636 [231] (Crennan, Kiefel and Bell JJ). In his dissenting judgment, Heydon J reached the opposite conclusion, finding that spousal privilege existed at common law: 614-19 [152]-[169].

5 See David Lusty, 'Is there a Common Law Privilege against Spouse-Incrimination?' (2004) *University of New South Wales Law Journal* 1, 2, who remarked that '[u]ntil *Stoddart*, the issue regularly, fell for determination by inferior courts with little guiding authority or instructive commentary'.

husband, a self-employed accountant.[6] In the course of examination, when she was asked whether she was aware of invoices prepared at the premises of her husband's practice for services provided by other entities, she claimed her right to spousal privilege and chose not to answer, on the ground that it may expose her spouse to conviction for a crime. The examiner adjourned the examination in order for her claim of spousal privilege to be determined elsewhere, as the Act did not mention such privilege.[7] Mrs Stoddart sought a declarative ruling from the Federal Court of Australia that she had firstly, a common law right of spousal privilege and secondly, that it was not abrogated by s 30 of the Act. She further sought injunctive relief to restrain the examiner from questioning her in relation to matters concerning her husband, based upon such privilege.

III Decision At First Instance

At first instance in the Federal Court, [8] the primary judge, Reeves J, affirmed that spousal privilege existed at common law, but that it was abrogated by the Act by necessary implication.[9] In affirming that spousal privilege existed at common law, the primary judge followed the Australian decisions in *Callanan v B*[10] (a unanimous decision of the Queensland Court of Appeal) and *S v Boulton*[11] (a unanimous decision of the Full Court of the Federal Court), which recognised the existence of common law spousal privilege and its application to both judicial and investigative proceedings.[12] The primary judge reasoned further that it would be 'perverse' for the legislature to abrogate the husband's

6 Section 30(2)(b) of the Act provided that a person appearing as a witness before an examiner shall not refuse or fail to answer a question that he or she is required to answer by the examiner.

7 The question of Mrs Stoddart competence or compellability was not in issue: *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 563-64 [10].

8 The decision at first instance in the Federal Court before the primary judge, Reeves J, was reported in *Stoddart v Boulton* (2009) 260 ALR 268.

9 Ibid 273 [26].

10 [2005] 1 Qd R 348. In this case, the Court of Appeal in Queensland held that at common law a person was privileged from giving evidence incriminating that person's spouse, whether in judicial or investigative proceedings. It followed *Leach v King* [1912] AC 305, 309; *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474; *Trammel v The United States* [1980] USSC 32; 445 US 40 (1980), 53; and *Hawkins v Sturt* [1992] 3 NZLR 602. It also held further that such privilege could be only overturned by a clear, positive and definite enactment and that the relevant provisions of the *Crime and Misconduct Act 2001* (Qld) was not such an enactment.

11 (2006) 151 FCR 364. In this case, the Full Court of the Federal Court held unanimously that spousal privilege extended only to lawfully married, as opposed to de facto spouses. However, the Full Court here was divided in its observations (which were merely obiter dicta) concerning whether there had been abrogation of spousal privilege by s 30 of the ACC Act.

12 See, *Stoddart v Boulton* (2009) 260 ALR 268, 269 [6]-[7].

privilege against self-incrimination in the Act, and yet 'keep in place his wife's privilege not to incriminate him'.[13] He therefore concluded that spousal privilege which existed at common law had been abrogated by the Act.[14]

IV Decision By Full Court

The majority of the Full Court of the Federal Court (Spender and Logan JJ, with Greenwood J dissenting)[15] accepted the existence of spousal privilege at common law, the position taken by the primary judge.[16] However, the Full Court found that the Act did not abrogate common law spousal privilege whether by necessary implication or otherwise.[17] It found that the primary judge erred in finding that the Act had abrogated the privilege.

Spender J described spousal privilege as a 'distinct privilege, more ancient than the privilege against self-incrimination'[18] and 'not a mere emanation'[19] of the privilege against self incrimination. He added that for common law spousal privilege to be abrogated it required a 'high degree of certainty as to the intention of the legislature'[20] and in his opinion there was 'nothing to suggest that the legislature directed its attention to the question of abrogation of spousal privilege, and consciously determined that the privilege was to be excluded.'[21]

Viewing the issue on appeal as a 'narrow but highly significant and controversial one'[22] as to whether s 30 of the Act abrogated spousal

13 Ibid 273 [28]. Reeves J was greatly influenced by the following observation of Hayne J in *S v Boulton* (2006) 151 FCR 364, that '[i]f the person who is incriminated by the answer has no privilege, save the limited use immunity for which the Act prescribes, why should someone who is not incriminated be outside the reach of the otherwise general obligation to answer what you are asking?' See also *Stoddart v Boulton* (2010) 271 ALR 53-54[5]-[6].

14 Mrs Stoddart's application for a declarative and injunctive relief was therefore dismissed.

15 The Full Court of the Federal Court's decision was reported in *Stoddart v Boulton* (2010) 271 ALR 53.

16 Ibid 56 [19]: Spender J noted that 'Reeves J in first instance held that spousal privilege existed at common law' and that there has been 'no notice of contention, or cross appeal, by the respondent in respect of that finding' and the 'only question on this appeal, therefore, is whether spousal privilege has been abrogated by s 30' of the Act.

17 Ibid 56 [24], 90 [163].

18 Ibid 55 [17].

19 Ibid. Logan J also made similar observations that spousal privilege is a 'distinct privilege' and 'not a mere emanation' of the privilege against self incrimination: at 88 [158].

20 Ibid 56 [26].

21 Ibid.

22 Ibid 80 [130].

privilege, Logan J concluded upon examining the authorities that 'it should be declared that the common law privilege against spousal incrimination has not been abrogated by the ACC Act.'[23] Recognising spousal privilege as a 'fundamental right'[24] he went on to state that if it was to be abolished to serve the purposes of the Act 'that is an issue which ought directly to be confronted by the Parliament'. [25]

In his dissenting judgement, Greenwood J took a similar stand as the primary judge, finding that the Act had abrogated spousal privilege by 'necessary implication'.[26]

V Decision by High Court

The ACC's appeal, on the ground that there was no common law spousal privilege, or alternatively that the Act abrogated such privilege, meant that the High Court had to determine two issues:

1) Whether spousal privilege existed at common law in Australia; and
2) If so, whether the Act abrogated such privilege.

By a five to one majority, the High Court determined that spousal privilege did not exist at common law in Australia. This made it unnecessary to consider the second issue.

As the majority delivered two joint judgments, one by Crennan, Kiefel and Bell JJ, and the other by French CJ and Gummow J, these will be considered separately below, followed by the dissenting judgment of Heydon J.

However, with all three judgments considering it important to initially distinguish between the separate concepts of *competency*, *compellability* and *privilege*, it would be useful to briefly summarise these distinctions at this stage. A person would be regarded as *competent* if that person may lawfully be called upon to give evidence.[27] A person would be regarded as *compellable* if that person may lawfully be obliged

---

23 Ibid 90 [163].

24 Ibid 82 [136].

25 Ibid 89 [159].

26 Ibid 63 [53]. Greenwood J provided the following explanation: 'It follows that the necessary implication to be drawn from a consideration of the Act, its objectives, purposes and the history of the legislation, is that the unqualified obligation to answer the examiner's questions as required is unconstrained by any common law spousal incrimination immunity and thus the Act, by necessary implication, abrogates the subsistence of that privilege in examinations conducted under the Act': at 62 [51].

27 See, *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 566 [20] (French CJ and Gummow J); 622 [184] (Crennan, Kiefel and Bell JJ); 575 [59] (Heydon J).

to give evidence.[28] Questions involving competence and compellability are usually determined before the witness enters the witness box.[29] Once a witness is sworn, he or she must answer all relevant and proper questions put, unless a privilege conferred by the law (such as, spousal privilege), gives the witness the right to refuse to answer particular questions asked.[30] Unlike competence and compellability which attaches to the witness, privilege attaches to the evidence itself.[31] A 'true privilege' operates as a 'substantive rule of law and not as a rule of evidence'[32] and this therefore 'enables a person, who is otherwise competent and compellable as a witness, to refuse to answer a question'[33] relevant to a matter in issue. A privilege therefore gives the witness a choice whether to claim it or not.[34]

A *Joint Judgment - Crennan, Kiefel and Bell JJ*

Crennan, Kiefel and Bell JJ stated in their joint judgement, that Mrs Stoddart's claim of a spousal privilege was made on the basis that 'the common law long ago created a right of a fundamental nature which entitled a spouse to refuse to answer questions which might incriminate the other spouse'.[35] They added that in such a case the principle of legality would apply, requiring 'clear and definite statutory language to affect or negate it'.[36]

They therefore pointed out that the principal question in the appeal was whether spousal privilege was 'recognised by the courts and *clearly* so'[37] and 'whether that recognition is evident from the historical record.'[38]

In considering this question, they set out what was accepted, or purported, to be the authorities for spousal privilege in Australia:

> The existence of a common law privilege of [spousal incrimination] ... was accepted by the Queensland Court of Appeal in *Callanan v B* and a Full Court of the Federal Court in *S v Boulton* followed that decision.[39]

---

28 Ibid 566 [20] (French CJ and Gummow J); 622[184] (Crennan, Kiefel and Bell JJ); 575 [60] (Heydon J). It was noted that although the general rule is that all competent witnesses are compellable, there are exceptions.

29 Ibid 622 [184] (Crennan, Kiefel and Bell JJ); 575 [60] (Heydon J).

30 Ibid 566 [20] (French CJ and Gummow J); 622[184] (Crennan, Kiefel and Bell JJ); 576 [62] (Heydon J).

31 Ibid 623 [186] (Crennan, Kiefel and Bell JJ); 576 [62] (Heydon J).

32 Ibid 623 [186] (Crennan, Kiefel and Bell JJ).

33 Ibid.

34 Ibid.

35 Ibid 622 [181].

36 Ibid.

37 Ibid 622 [182] (emphasis added).

38 Ibid 622 [183].

39 Ibid 620 [175].

It should be noted that in *Callanan v B*[40] the Court of Appeal in Queensland held that at common law a person was privileged from giving evidence incriminating that person's spouse, whether in judicial or investigative proceedings. In citing *Callanan v B*,[41] Crennan, Kiefel and Bell JJ pointed out in relation to McPherson JA's decision in this case, that although he remarked that he was disposed to agree with the conclusion of the trial judge that there was no spousal privilege at common law, a paper which had recently been published by David Lusty, influenced him to a contrary view.[42]

In citing *S v Boulton* ,[43] Crennan, Kiefel and Bell JJ pointed out that the Full Court of the Federal Court in this case considered a further question, as to whether common law spousal privilege would extend to de facto spouses (as opposed to lawfully married spouses), holding that it did not so extend to de facto spouses, and holding further that common law spousal privilege had, in any event, been abrogated by the Act.[44] Crennan, Kiefel and Bell JJ also cited *R v Inhabitants of All Saints, Worcester* (*'All Saints'*),[45] pointing out that the rule of competency was held in this case, not to apply where the wife's evidence would only indirectly incriminate her husband by rendering him liable to charges.

In light of the distinctions drawn between the concepts of competence, compellability and privilege, Crennan, Kiefel and Bell JJ expressed the view that '[o]bservations made' in *R v Inhabitants of All Saints, Worcester* (*'All Saints'*)[46] and 'references in later cases', including commentary upon them, which served as 'the principal source' for the ACC's argument for the existence of spousal privilege only related to compellability and not privilege.[47]

In reaching their decision that 'the cases and historical materials'[48] do not provide a sufficient basis for a conclusion that spousal privilege existed at common law they reasoned as follows:

---

40 *Callanan v B* [2005] 1 Qd R 348.

41 Ibid.

42 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 620-21 [175]. The published paper referred to was: David Lusty, 'Is there a Common Law Privilege Against Spouse-Incrimination?' (2004) *University of New South Wales Law Journal* 1.

43 *S v Boulton* (2006) 151 FCR 364. The Full Court here was, however, divided in its observations (which were merely obiter dicta) concerning whether there had been abrogation of spousal privilege by s 30 of the Act.

44 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 620-21 [175].

45 (1817) 105 ER 1215, 1218.

46 Ibid.

47 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 624 [190] (Crennan, Kiefel and Bell JJ).

48 Ibid 624 [191].

> Opinions may differ as to the interpretation of statements made in older texts and cases. Such statements which suggest that one spouse might not be obliged to give evidence or answer questions which may tend to incriminate the other, do not provide a sufficient foundation for a conclusion that a spousal privilege of the kind claimed existed. Statements in *All Saints* were addressed to the question of compellability and later cases show that they have been so understood. Those observations are consistent with a view that the court retains the power to determine the question of the wife's compellability. Even so, the question of compellability was not finally determined in that case. Its lack of resolution until much later, in England, does not suggest that the topic of a substantive witness privilege was likely to have been addressed. The later application of some of the old common law views towards marriage, which informed the rule of competency, and about which it is not necessary to proffer a view on this appeal, with respect to the compellability of a spouse in criminal proceedings, does not point to the existence of a privilege. It merely states an assumption that those views meant that a privilege arose. It has not been shown that that question has been addressed by the common law courts.[49]

Finally, referring to the observations of Justice Oliver Wendell Holmes concerning the creation of legal doctrine occurring upon a series of determinations and by a process of induction, Crennan, Kiefel and Bell JJ stated that no such development was evident in the cases and materials examined in relation to the matter of spousal privilege.[50] They suggested that, at most, a spouse 'might seek a ruling from the court that he or she not be compelled to give evidence which might incriminate the other spouse.'[51]

B *Joint Judgment - French CJ and Gummow J*

Upon noting that Mrs Stoddart was a competent and compellable witness under the Act,[52] French CJ and Gummow J considered the issue of spousal privilege and its authorities:

> As Kiefel J noted in *S v Boulton*, the critical authority said to favour the extension to one spouse of the privilege to the other against self-incrimination appears to be that of the Court of King's Bench in *R v Inhabitants of All Saints, Worcester* ['*All Saints*']. The case thus invites some attention ...[53]

---

49 Ibid 636-37 [231]. Cases examined in the joint judgment, such as *All Saints* (in particular, the statements of Bayley J); *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 (House of Lords) and *Riddle v The King* (1911) 12 CLR 622 and commentary in texts such as Taylor were shown to only involve compellability, and those such as *Leach v The King* [1912] AC 304 and other texts were shown to involve only competency. Crennan, Kiefel and Bell JJ also pointed out that if spousal privilege existed at common law, the Common Law Commissioners would have mentioned it in their second report of 1853: at 635 [229]. The last point was also made by French CJ and Gummow J at 568 [27].

50 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 637 [232].

51 Ibid.

52 Ibid, 563-564 [10].

53 Ibid, 568 [29].

Upon examining *All Saints*[54] and a number of subsequent decisions, such as *Hoskyn v Metropolitan Police Commissioner*[55] and *Riddle v King*,[56] French CJ and Gummow J reached the conclusion that these cases involved compellability, and not spousal privilege:

> In our view, it cannot be said that at the time of the enactment of the Act in 2002 the common law in Australia recognised the privilege asserted by Mrs Stoddart or that it does so now. We agree with the conclusion of Kiefel J in *Boulton* that in *All Saints* and the subsequent decisions, in particular *Hoskyn* and *Riddle*, the term 'compellable' was used to indicate that the witness might be obliged to give evidence in the ordinary sense of the term, not that, in response to particular questions, a privilege might be claimed by the witness.[57]

French CJ and Gummow J therefore concluded that spousal privilege did not exist at common law in Australia.

C *Dissenting Judgment - Heydon J*

Heydon J[58] delivered a strong and persuasive dissenting judgment, which affirmed that spousal privilege existed at common law and that the Act did not abolish it.[59] His judgment demonstrates the strict and complete legalistic position from which he approaches judicial decision-making.[60] One commentator described his judgment as 'dissect[ing] the winning argument, line by line, blow by blow, with brutal, relentless efficiency, leaving a smoking pile of intellectual ruin.'[61]

---

54 *R v The Inhabitants of All Saints Worcester* (1817) 105 ER 1215.

55 *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474.

56 *Riddle v King* (1911) 12 CLR 622.

57 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 571 [41].

58 Heydon J has made a name for himself as the outlier of the High Court, having dissented in more than 45 per cent of the cases on which he sat in 2011. He has gradually encroached upon the 'great dissenter' status, previously held by the former Justice Kirby. See, Andrew Lynch, 'By Nature, High Court Judges are Seldom in Agreement', *The Australian* (online), 17 February 2012 < http://www.theaustralian.com.au/business/legal-affairs/by-nature-high-court-judges-are-seldom-in-agreement/story-e6frg97x-1226273205281>. Lynch noted that no other member of the court has exceeded a personal dissent rate of 10 per cent (with three being on less than 5 per cent). Lynch also noted that the former Justice Kirby dissented in more than 48 percent of cases in 2006.

59 See, *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 572 [44]-[47], 619 [167].

60 See Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (Speech delivered at the Quadrant Magazine Dinner, Sydney, 30 October 2003). Justice Heydon expressed his approval of Justice Owen Dixon's 'excessive legalism' as being the only safe guide to judicial decisions in the solution of great conflicts.

61 Cameron, above n 2. Cameron continued with these further comments: '[Heydon J] then proves that spousal privilege is (or was, until his judgment) not merely a rule of law but a rule of substantive law – in the process furnishing a dozen substantive reasons why the doctrine is in the interests of justice and comity'.

In his judgment, Heydon J examined initially the ACC's contention that the court should not recognise spousal privilege unless it was 'clear'.[62] He then looked into the issue of whether a curial spousal privilege existed at common law.[63] There are, however, overlaps between the two issues.

Heydon J made a number of compelling points in addressing the ACC's contention that the court should not recognise spousal privilege unless it was 'clear'.[64] He noted that although the court cannot recognise a common law rule unless it believes after making due inquiries that such a rule exists, it is not necessary for that belief to 'rise to the level of "certainty".'[65] He stated that there were many cases in which the appellate courts have concluded, but only by bare majority, that a rule of law exists; an example being *Donoghue v Stevenson*[66] (which established the fundamental rule of law imposing a duty of care by only a bare majority).[67] Seen in this light, it would be 'hard to describe the existence of that rule as "certain" or "clear".'[68]

Heydon J further questioned whether a rule of law depended upon a series of rulings. The majority had cited with approval the observation of Justice Holmes that a 'well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step.'[69] Heydon J reasoned that this was not an exhaustive test for identifying common law rules as it did not explain how one ascertained what the law was 'before it becomes "well settled".'[70]

Also, citing Justice Holmes again, where he stated that it is 'the merit of the common law that it decides the case first and determines the principle afterwards',[71] Heydon J made the point that where there was not a 'long stream of decided cases having a relevant ratio decidendi',[72] the relevant materials which could be used in these situations may (as a consequence) include the following - 'prior dicta, arguments by analogy,

62 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 572 [49].
63 Ibid 581 [71]: Heydon J stated that the ACC had 'argued, first that there is no spousal privilege at common law, and, secondly, that the Court should not now create one' and he observed further that the ACC had not argued 'that if there were spousal privilege at common law the Court should now abolish it'.
64 Ibid 572 [49].
65 Ibid 572 [50].
66 [1932] AC 562.
67 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 573 [52].
68 Ibid.
69 Ibid 637 [232].
70 Ibid 573 [53].
71 Ibid 573 [54].
72 Ibid 574 [55].

arguments seeking to avoid incoherence, moral criteria, the teachings of practical pressures, and the opinions of learned writers.'[73]

Heydon J stated that although there was no decision, precisely on the question of spousal privilege, there was the obiter dictum of Bayley J[74] in *All Saints*,[75] that spousal privilege existed at common law in Australia. Therefore, as Heydon J points out, for this reason, as well as those outlined below, spousal privilege recognised under Bayley J's dictum should be followed:

> What Bayley J said is not to be followed because it is a 'previous decision and for no other reason.' It is to be followed because it is the work of 'a revered master' which is 'right', 'logical', 'just' and beneficial. It accords with 'the weight of authority', limited though that is. It has been 'generally accepted and acted on' for many generations in the sense that only one judicial opinion [ie, *S v Boulton*] is adverse to it, until very recently no text writer had criticised it, and very many treatises have asserted it to be true.[76]

Heydon J held firm the belief that the obiter dictum of 'a Judge of very great experience and learning'[77] who was also a 'master of the common law'[78] could make the law. He noted further that 'the opinions of Bayley J entered the common law in part through treatises.'[79]

Giving credence to his argument, Heydon J examined how several pertinent legal writers throughout '90 editions of the 13 weightiest evidence treatises'[80] had accepted the dicta of Justice Bayley in *All Saints*,[81] as authority for the existence of spousal privilege.[82] Stemming from his examination of these works, Heydon J made these pertinent remarks:

> The submissions of the appellant entail an assumption that the body of legal writing from 1817 to 1980 surveyed above represents a massive deception of the reading public – the judiciary, practitioners and students – stemming from a

---

73 Ibid.

74 Ibid 574 [57].

75 *R v The Inhabitants of All Saints Worcester* (1817) 105 ER 1215.

76 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554,575 [57].

77 Ibid 584 [85] (Heydon J, citing Griffith J in *Riddle v The King* (1911) 12 CLR 622, 628).

78 Ibid 584 [85] (Heydon J, citing Lord Salmon in *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 496).

79 Ibid 608 [137].

80 Cameron, above n 2. Heydon J examined works from Australia, Britain, the US, India and New Zealand.

81 *R v The Inhabitants of All Saints Worcester* (1817) 105 ER 1215.

82 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 607-08 [135]: Heydon J was of the opinion that '[t]heir works reveal a general professional consensus. Writings of that kind generated out of that professional tradition are capable of constituting a source of law in their own right'.

> general self-delusion on the part of nearly seventy writers and editors over nearly two centuries. With respect to the appellant's position, it is not possible to accept that assumption.[83]

In addition, Heydon J also cited many authorities that supported the existence of spousal privilege.[84] Of significant interest was *Tinning v Moran*[85] in which the Full Bench of the New South Wales Industrial Commission espoused support for the existence of spousal privilege. In addition, he drew attention to several instances of spousal privilege being 'applied'[86] in the cases of *R v Hamp*[87] and *Lamb v Munster*.[88] He further examined instances where *All Saints*[89] had been cited with approval in other common law jurisdictions, such as America,[90] Canada[91] and New Zealand.[92]

Heydon J also made a number of compelling points in addressing the issue as to whether a curial spousal privilege existed at common law.[93] He stated that the ACC's submission that the common law 'never had occasion' [94] to consider spousal privilege was 'incorrect',[95] in view that occasions could arise, although relatively limited, 'when a spouse was competent and compellable',[96] and also when a spouse 'was competent, and though not compellable, chose to enter the witness box, while reserving a desire not to answer particular questions which might

---

83 Ibid 608 [138].

84 Ibid 610-14 [141]-[151]. Interestingly, Heydon J cited case authorities for the existence of spousal privilege that pre-dated the Queensland Court of Appeal decision in *Callanan v B* [2005] 1 Qd R 348.

85 (1939) AR 148, 151.

86 This included extra-curial bodies and other unreported Australian cases that assumed the existence of spousal privilege: see *ACCC v Stoddart* (2011) 244 CLR 554, 610-13 [140]-[151]. Heydon J attached only secondary significance to these sources, whilst remarking it was also evident that the legislatures had assumed its existence at common law.

87 (1852) 6 Cox CC 167, 170.

88 (1882) 10 QBD 110, 112-113.

89 (1817) 105 ER 1215.

90 *Commonwealth v Reid* (1871) 4 Am L Times Rep 141. America is now governed by the 'privilege against adverse spousal testimony' which is similar to common law spousal privilege.

91 *Millette v Litle* (1884) 10 Ont Pr Rep 265.

92 *Hawkins v Sturt* [1992] 3 NZLR 602.

93 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 581 [71]: Heydon J stated that the ACC had 'argued, first that there is no spousal privilege at common law, and secondly, that the Court should not now create one' and he observed further that the ACC had not argued 'that if there were spousal privilege at common law the Court should now abolish it'.

94 Ibid 581 [72].

95 Ibid.

96 Ibid.

incriminate the other spouse'.[97] He cited the seminal case of *All Saints*[98] as falling within the latter situation which contained the following dicta of Bayley J, upon which the existence of spousal privilege was relied upon, and which was also later cited with approval by the cases of *Hoskyn*,[99] *Riddle*[100] and *Leach v The King*:[101]

> It does not appear that she objected to be examined, or demurred to any question. If she had thrown herself on the *protection* of the Court on the ground that her answer to the question 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. [102]

He explained that Bayley J's references to *protection* in the above passage 'do not point unequivocally and exhaustively to *non-compellability*', [103] but instead point to *privilege* (which he reasoned could be accepted either as a positive statement of spousal privilege, or impliedly through a process of negative elimination).[104] Therefore, in his view, the 'most probable characterisation' of what had happened in *All Saints*[105] was that 'a claim to privilege ha[d] succeeded'.[106]

Heydon J also referred to the decisions of the Court of Appeal of Queensland in *Callanan v B*[107] and the Full Court of the Federal Court in *S v Boulton*[108] and described them as 'correct' in accepting that the common law had already recognised spousal privilege 'for some time'.[109] He acknowledged that there were cases which served 'as pointers' to a state of 'professional opinion'[110] which recognised the existence of spousal privilege. He also acknowledged that legislatures 'have assumed' the existence of spousal privilege at common law, 'by enacting legislation abolishing it in relation to particular curial or extra-curial proceedings.'[111]

---

97 Ibid.
98 *R v Inhabitants of All Saints, Worcester* (1817) 105 ER 1215.
99 [1979] AC 474, 487 (Lord Salmon).
100 (1911) 12 CLR 622, 628-629 (Griffith CJ).
101 [1912] AC 304 (Lord Atkinson).
102 See *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 582 [73] (emphasis added).
103 Ibid (emphasis added).
104 Ibid 582-83 [77]-[78].
105 *R v Inhabitants of All Saints, Worcester* (1817) 105 ER 1215.
106 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 583 [78].
107 *Callanan v B* [2005] 1 Qd R 348. See n 10.
108 *S v Boulton* (2006) 151 FCR 364. See n 11.
109 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 614 [152].
110 Ibid 609- 610 [140].
111 Ibid.

Heydon J also scrutinised Lord Diplock's statements and claims made in *Rio Tinto Zinc Corp v Westinghouse Electric Corp*[112] that 'there [was] "no trace in the decided cases" and "no textbook old or modern" suggesting that the privilege against self-incrimination applie[d] beyond the incrimination of the person claiming it'.[113] In rejecting Lord Diplock's statements, Heydon J pointed to his detailed examination of textbooks, treatises and cases, which revealed a contrary position:

> The materials examined above provide many illustrations of old and modern textbooks suggesting that [the privilege] extend[ed] to the spouse ... [a]nd those materials all construe *R v Inhabitants of All Saints, Worceste*r as a case stating a position which is to the contrary of Lord Diplock's. A statement, per incuriam, by a single member of the House of Lords on a point not argued without offering any reasoning cannot alter the law stated in the treatises described above. And, as will be seen below, it is not true that there is "no trace in the decided cases" of spousal privilege.' [114]

In relation to the recent (post-1980) questioning of the existence of spousal privilege in England and elsewhere, Heydon J felt that these may have been stimulated or encouraged by the English Law Reform statement in 1967 that the position was 'not clear', and also by the English Criminal Law Revision Committee's statement in 1972 that the common law position was 'doubtful'. However, as Heydon J pointed out rather significantly, 'no one has explained why the position is unclear or doubtful'.[115]

Heydon examined various considerations which underlie spousal privilege and accepted that these would support spousal privilege as a rule of substantive law, rather than as merely a rule of evidence.[116] He observed that although many may disagree with these considerations, 'the law assumes them to be sound' and on that assumption they

---

112 *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547. In the course of his judgment, Heydon J also made this observation of *R v Inhabitants of All Saints, Worcester* (1817) 105 ER 1215 and *R v Pitt* [1983] QB 25: 'These two English cases, not directed to the present problem and not containing any reasoning germane to it, cannot affect Australian law': *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 604 [129].

113 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 603 [127] (Heydon J quoting Lord Diplock in *Rio Tinto Zinc Corp v Westinghouse Electric Corp* [1978] AC 547, 637-638).

114 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 603 [127].

115 Ibid 604 [131].

116 Ibid 617 [161]. Heydon J argued by analogy to legal professional privilege that spousal privilege was a substantive rule of law. As a substantive rule of law, spousal privilege would be available to both curial and non-curial proceedings.

are 'plainly important.'[117] In accepting that spousal privilege was a substantive rule of law[118] Heydon J found that the Act did not abolish it:

> If the Act is to be construed as modifying or abolishing spousal privilege it is necessary to find in it explicit language or a necessary implication to that effect. There is none. [119]

VI Commentary

The High Court's majority decision signifies an authoritative declaration that spousal privilege does not exist at common law in Australia. This means that cases previously relied upon to justify the presence of such a privilege would no longer hold the persuasive power previously attached to them. However, the strongly reasoned dissent of Heydon J indicates that the matter of spousal privilege will continue to attract discussion.

An important aspect of Heydon J's judgment is his analysis of the rationale underlying spousal privilege. He was of the opinion that it would be important to uphold the doctrine behind spousal privilege at common law, for similar reasons that spousal non-compellability is being upheld. Whilst the biblical foundations of the rule as espoused in Lusty's article[120] may no longer be entirely relevant to the application of the law, the existence of spousal non-compellability provisions in contemporary legislation, affirms that the rationale behind spousal privilege remains relevant to Australian society today.

Recognition of spousal privilege at common law would have the effect of giving precedence to matrimonial harmony, over ensuring the availability of all witnesses and their testimony. The ACC argued that this was not warranted, and cited the observation of Brennan J in *Dietrich v The Queen*:

> The contemporary values which justify judicial development of the law are not transient notions which emerge in relation to a particular event of which are inspired by the publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community.[121]

---

117 Ibid.

118 Ibid 619 [165]-[169]. The principle of legality attaches itself to substantive rules of law and therefore a 'clear, definite and positive enactment' would be required to modify or abrogate spousal privilege: at 619 [165].

119 Ibid 619 [167].

120 Lusty, above n 5, 6-7.

121 (1992) 177 CLR 292, 319. See, Australian Crime Commission, 'Appellant's Submissions', Submission in *Australian Crime Commission v Louise Stoddart,* B71/2010, 31 January 2011, [25].

It would be impertinent to dismiss the recognition of spousal privilege based on the notion that it does not fall within 'relatively permanent values of the Australian community' as ACC submitted. To the contrary, the legislative provisions that provide for spousal non-compellability are based upon the existence of the 'underlying right' of a spouse not to give evidence tending to incriminate his or her spouse. Thus, if the High Court had given recognition to the existence of spousal privilege at common law, the privilege established would have been complementary to the purpose of legislative regimes and upheld the public interest and acceptance of spousal privilege.

Interestingly also, legal commentators have described the rejection of spousal privilege as a violation of human rights, with some even citing this case as evidence of the need for a charter of human rights in Australia.[122] Heydon J touched upon this briefly, stating, inter alia, that recognition of spousal privilege could '[preserve] a small area of privacy and immunity from the great intrusive powers of the state, and those who invoke them.'[123] Whilst this could be an important consideration, it did not, however, weigh upon the decision of the majority.

The case of *S v Boulton*[124] is also of interest here. The case, in finding that spousal privilege did not extend to de facto spouses, exemplified the difficulties courts have with bringing the law up-to-date with contemporary societal expectations. As with this case before the High Court, had the court found in favour of the existence of spousal privilege, it is doubtful that the privilege would have been extended to reflect the acceptance of de facto couples in Australia.

There are practical implications to the majority's decision. It will have most significant ramifications for spouses testifying in non-curial proceedings, such as the ACC. The compellability of each spouse will now depend upon the guiding statutory provisions of each proceeding and the nature and circumstances of the offence. It is important to note that the High Court's decision will not invalidate any safeguarding provisions of Commonwealth, state or territory legislation in criminal

122 See generally, 'Quis custodiet ipsos custodes', (9 October 2009) < http://www.summarycrime.com/2009/10/common-law-spousal-privilege.html>. It was argued that a charter of human rights would 're-balance the scales in favour of the protection of the individual' and in the absence of such protection, individual rights would continue to be eroded as seen in *Stoddart v Boulton* (2009) 260 ALR 268 where the court held that the Act abrogated spousal privilege by necessary implication.

123 *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 618 [163].

124 (2006) 151 FCR 364.

proceedings.[125] For example, the rights of spouses not to give incriminating testimony are protected to a certain extent under various statutory provisions. One such example is, s 18(6) and (2) the *Evidence Act 1995* (Cth) which provides that a judge has a discretion to exempt an otherwise compellable spouse or de facto spouse, if there is a likelihood of harm directly or indirectly to the witness or the relationship between the witness and the accused and the nature and extent of that harm outweighs the desirability of having the evidence given.

VII Conclusion

The High Court's decision has resonated throughout the legal community. In finding that no spousal privilege existed at common law, the court overturned what many had previously accepted as an established common law principle. While the decision has been championed by legal commentators, it has also been criticised by civil libertarians. The practical consequences of the decision have yet to be fully seen, but it is anticipated that proceedings in non-curial courts will be impacted, the extent of which will depend upon the circumstances of each case. At the least, the decision will provide 'practitioners [with] a clearer understanding of those circumstances in which a spouse's evidence will be competent and compellable, and where there may be opportunities to see the court's discretion to exclude this evidence.'[126]

Heydon J's dissenting judgment has attracted and will continue to attract interest and further discussion. No doubt, his analysis and reasoning, as well as his detailed and extensive examination of the historical record will be a useful addition to the law relating to spousal privilege, as well as competency and compellability.

125 See, eg, *Evidence Act 1995* (Cth) ss18-19; *Evidence Act 1906* (WA) s 18; *Evidence Act 1995* (NSW) ss 18-19.

126 James Farrell, 'Pillow Talk and Evidence: High Court Rejects Privilege Against Spousal Incrimination' on *Deakin Speaking* (7 March 2012) < http://www.deakin.edu.au/deakin-speaking/node/264>.