CITATION:	*Bauwens & Anor v The Territory Coroner* [2022] NTSC 92
PARTIES:	BAUWENS, Lee and ROLFE, Zachary v THE TERRITORY CORONER and ATTORNEY-GENERAL OF THE NORTHERN TERRRITORY and NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY and NORTHERN TERRITORY POLICE FORCE and WALKER, Alice; LANE, Joseph; ROBERTSON, Rickisha
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-02673-SC

DELIVERED: 12 December 2022

HEARING DATES: 23 & 24 November 2022

JUDGMENT OF: Kelly J

CATCHWORDS:

Coroners Act 1993 (NT) ("the Act") – application for declarations that common law penalty privilege is not abrogated by the Act; and that, notwithstanding s 38 of the Act, in respect of any questions the answers to which would tend to subject or expose the plaintiffs to a penalty the plaintiffs are entitled to refuse to answer the question(s); and the Coroner cannot direct or compel them to answer the question(s) – declarations refused.

Coroners Act 1993 (NT) s 4(3), s 6(2), s 7, s 19, s 20, s 21, s 24, s 25, s 26, s 34, s 35, 36(2), s 38(1)-(3), s 39, s 40(2), s 41(a)-(d), s 41(3), s 46.

Coroners Act 2003 (SA).

Coroners Amendment Act 2002 (NT) cl 6.

Inquest into the death of Kumanjayi Walker (Ruling No 5) [2022] NTLC 024 *Attorney General v Borland* [2007] NSWCA 201, *Construction Forestry Mining & Energy Union of Australia v Inspector Alfred* (2004) 135 FCR 459; [2004] FCAFC 36, *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; 213 CLR 543, *Decker v State Coroner of New South Wales* (1999) 46 NSWLR 415, *Deputy Coroner of SA v Bell* [2020] SASC 59, *Domaszewicz v State Coroner* (2004) 11 VR 237, *Doomadgee v Clements* (2006) 2 Qd R 352, *Migration Agents Registration Authority v Frugtniet* [2018] FCAFC 5 , *Naismith v McGovern* [1953] HCA 59; (1953) 90 CLR 336, *Police Service Board v Morris* [1985] HCA 9; 156 CLR 397, *Priest v West* (2012) 40 VR 521, *Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; 152 CLR 328, *R v IBAC* (2016) 256 CLR 459, *Refrigerated Express Lines (Australasia) v Australian Meat and Livestock Corporation* (1979) 42 FLR 204, *Refrigerated Express Lines (Australasia) v Australian Meat and Livestock Corporation (supra), Rich v Australian Securities and Investments Commission* [2004] HCA 42; 220 CLR 129, *Sorby v Commonwealth* [1983] HCA 10; 152 CLR 281, *Trade Practices Commission v Abbco Iceworks Pty*

Limited [1994] FCA 1279; (1994) 52 FCR 96, *X v Deputy State Coroner for New South Wales* (2001) 5 NSWLR 312, referred to.

REPRESENTATION:

Counsel:

First Plaintiff:	T Boyle with K McNally
Second Plaintiff:	B Doyle KC with L Officer
Defendant:	P Coleridge with B Wild
First Intervenor:	T Game SC with K Edwards
Second Intervenor:	E Nekvapil SC with B Wild
Third Intervenor:	Dr I Freckelton AO KC with A Bernard
Fourth Intervenor(s):	A Boe with G Boe

Solicitors:

First Plaintiff:	McNally & Co
Second Plaintiff:	Tindall Gask Bentley Lawyers
Defendant:	Solicitor for the Northern Territory
First Intervenor:	Solicitor for the Northern Territory
Second Intervenor:	North Australian Aboriginal Justice Agency
Third Intervenor:	Solicitor for the Northern Territory
Fourth Intervenor(s):	Hearn Legal

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Bauwens & Anor v The Territory Coroner [2022] NTSC 92
No. 2022-02673-SC

BETWEEN:

LEE BAUWENS
First Plaintiff

AND:

ZACHARY ROLFE
Second Plaintiff

AND:

THE TERRITORY CORONER
Defendant

AND:

ATTORNEY-GENERAL OF THE NORTHERN TERRRITORY
First Intervenor

AND:

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY
Second Intervenor

AND:

NORTHERN TERRITORY POLICE FORCE
Third Intervenor

AND:

ALICE WALKER; JOSEPH LANE; RICKISHA ROBERTSON
Fourth Intervenor(s)

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 12 December 2022)

Introduction

[1] The Northern Territory Coroner is holding an inquest in the Coroners Court of the Northern Territory at Alice Springs into the death of Kumanjayi Walker, a 19-year-old Warlpiri man who died while 'held in custody' within the meaning of s 12(1) of the *Coroners Act 1993* (NT) ("the Act"), on 9 November 2019. Kumanjayi Walker was fatally shot by Constable Zachary Rolfe ("Constable Rolfe") in a house at Yuendumu in the course of an attempted arrest. Constable Rolfe was acquitted of murder and two alternative offences on 11 March 2022.

[2] On 24 October 2022, a witness at the inquest, Sergeant Paul Kirkby, objected to giving evidence in the inquest on the basis that his answer might tend to expose him to a disciplinary penalty. Sergeant Kirkby invoked what he asserted to be his common law privilege against self-exposure to civil and disciplinary penalties ("penalty privilege"). The plaintiff (Sergeant Lee Bauwens) and Constable Rolfe, made submissions in support of the objection. They contended that the penalty privilege afforded them an absolute immunity from examination in respect of any matter that might tend to expose them to a penalty under the *Police Administration Act 1978* (NT).

[3] The Coroner dismissed the objection, publishing reasons on 8 November 2022 (Ruling No 5).[1] The Coroner held that, to the extent that it might otherwise have applied in an inquest under the Act, penalty privilege was abrogated by s 38 of the Act.

[4] On 25 October 2022, the plaintiff instituted these proceedings seeking declarations that:

(1) common law penalty privilege is not abrogated by the Act; and

(2) a Coroner does not have power, pursuant to s 38(1) of the Act to compel a person.

[5] It is convenient to set out the terms of s 38 of the Act at the outset. Section 38 provides as follows.

> **38 Statements made by witnesses**
>
> (1) If:
>
> (a) a person summoned to attend at an inquest as a witness declines to answer a question on the ground that his or her answer will criminate or tend to criminate him or her; and
>
> (b) it appears to the coroner expedient for the purposes of justice that the person be compelled to answer the question;
>
> the coroner may tell the person that, if the person answers the question and other questions that may be put to him or her, the coroner will grant the person a certificate under this section.
>
> (2) A person who has been offered a certificate under subsection (1) is no longer entitled to refuse to answer questions on the ground that his or her answers will criminate or tend to

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1 *Inquest into the death of Kumanjayi Walker (Ruling No 5)* [2022] NTLC 024.

criminate him or her and, when the person has given evidence, the coroner must give the person a certificate to the effect that the person was summoned to attend at an inquest as a witness, the person's evidence was required for the purposes of justice and the person gave evidence.

(3) Where a person is given a certificate under this section in respect of evidence given at an inquest, a statement by the person as part of that evidence in answer to a question is not admissible in evidence in criminal or civil proceedings, or in proceedings before a tribunal or person exercising powers and functions in a judicial manner, against the person other than on a prosecution for perjury.

Applications to join proceedings

[6] Constable Rolfe has applied to be joined as a plaintiff.

[7] On 7 November 2022, the Attorney-General intervened in the proceedings as of right pursuant to s 17(a) and (b) of the *Crown Proceedings Act 1993* (NT). The Attorney-General opposes the making of the declarations sought by the plaintiff.

[8] The Walker, Lane and Robertson families ("the Families"), the Northern Territory Police Force ("NTPF"), and the North Australian Aboriginal Justice Agency ("NAAJA") have all applied to intervene. Each of these proposed interveners also oppose the making of the declarations sought.

[9] Constable Rolfe has now objected to answering a question in the inquest on the basis that the answer might tend to expose him to a disciplinary penalty. Accordingly, the issue of the status of the penalty privilege, and its potential abrogation, legitimately arises for determination in relation to him, and neither the plaintiff nor the Attorney-General objected to his being joined as

a plaintiff. In my view, therefore, it was appropriate that he be joined as a plaintiff and I so ordered.

[10] Each of the proposed interveners has been granted leave to appear at the inquest as a person or entity with a 'sufficient interest' in those proceedings under s 40(2) of the Act, and neither the plaintiff nor the Attorney-General has opposed their intervention. In my view, each of them has a sufficient interest in the outcome of this proceeding and it was appropriate for each of them to be granted leave to intervene and I so ordered.

Proposed amendments to the declarations sought

[11] Constable Rolfe seeks to amend the terms of the second declaration as follows:

> Notwithstanding s 38 of the Coroners Act 1993 (NT), in respect of any questions the answers to which would tend to subject or expose him to a penalty (with the meaning of the privilege against exposure to penalty):
>
> (a) Constable Zachary Rolfe is entitled to refuse to answer the question(s); and
>
> (b) the Coroner cannot direct or compel him to answer the question(s).

[12] The plaintiff consented to that amendment and neither the Attorney-General nor the other interveners objected.

The issues

[13] In this Court, the plaintiffs' application for declaratory relief raises two substantive issues:

(a) the legal status of the penalty privilege: whether it would apply in an inquest under the Act except to the extent that it is abrogated by the Act; or whether it would only apply to the extent conferred by s 38 of the Act;

(b) on the assumption that penalty privilege is a 'substantive common law rule' that would apply unless and until abrogated by statute, whether the privilege has, like the privilege against self-incrimination, been abrogated (or partly abrogated) by s 38 of the Act. (Alternatively, if the privilege applies only to the extent conferred by the Act, whether it has been conferred in a qualified fashion by s 38).

[14] All parties (using that as a term of convenience) concede that the extent to which penalty privilege is available to be claimed by a witness in an inquest, and the consequences of such a claim, are questions of statutory construction of the Act.

The plaintiffs' contentions

[15] Written submissions by the plaintiff and Constable Rolfe differ somewhat in structure and emphasis but, in essence, the plaintiffs' contentions are threefold.

(1) Penalty privilege is capable of being relied upon in a proceeding such as an inquest save to the extent that it has been expressly abrogated or where the privilege is abrogated by necessary intendment.

(2) Section 38 is concerned with self-incrimination privilege and not penalty privilege.

(3) It cannot be concluded that penalty privilege is impliedly abrogated by the provisions of the Act including s 38.

[16] For the first contention, the plaintiffs begin with the proposition that the inquest is a curial proceeding, relying on the following:

(a) Section 6(2) of the Act provides that a Coroner has "jurisdiction and power conferred by the common law".

(b) Under the common law the Coroners Court was a court of record.[2]

(c) Section 42 of the Act provides that "a coroner must conduct an inquest in open court".

(d) Section 4(3), provides that a "Local Court Judge" is an entitling status that renders someone a Coroner under the Act and by s 4(2), only a Local Court Judge may be appointed "the Territory Coroner" by the Administrator.

(e) Under s 7 of the Act, the immunity conferred on a Coroner is co-extensive with that of a Local Court Judge.

[17] The plaintiffs contend that it follows from the curial nature of a coronial inquest that penalty privilege applies in such proceedings. The plaintiffs

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2 Coke, (Court of the Coroner) 4 Inst at 271; Jervis on Coroners 8th ed (1946) at 78; *X v Deputy State Coroner for New South Wales* (2001) 5 NSWLR 312 at [13] per O'Keefe J.

rely on *Deputy Coroner of SA v Bell*,[3] and seek to distinguish *Migration Agents Registration Authority v Frugtniet.*[4]

[18] In *Bell*, the plaintiff correctional services officers sought judicial review of decisions by a Deputy State Coroner in the course of an inquest into a death in custody. The plaintiffs contended (inter alia) that the Deputy Coroner exceeded jurisdiction by determining that penalty privilege was not available to the plaintiffs in the inquest.

[19] Blue J in the Supreme Court of South Australia held that penalty privilege was not abrogated by the *Coroners Act 2003* (SA) and that, if established, the privilege affords a ground entitling a witness to decline to answer a question or produce a document at an inquest. After reviewing the authorities, Blue J said:[5]

> There is an obvious tension between the decisions of the High Court in *Pyneboard Pty Ltd v Trade Practices Commission*, *Sorby v The Commonwealth* and *Police Service Board v Morris* on the one hand and the "seriously considered obiter" remarks by the High Court in *Daniels*. It is preferable that this tension be resolved by an authoritative decision of the High Court. As it is not essential for me to decide the question, I do not do so.

[20] His Honour then went on to decide the case on the construction of s 23 of the *Coroners Act 2003* (SA) which, after empowering the Coroner to do a range of things including require a person to answer questions and to

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3 [2020] SASC 59 ("*Bell*").

4 [2018] FCAFC 5 ("*Frugtniet*").

5 *Bell* at [163].

produce documents, and providing that a person who fails to comply commits a contempt of court, provided (relevantly):

> (5) However, a person is not required to answer a question, or to produce a record or document, under this section if -
>
> (a) the answer to the question, or the contents of the record or document, would tend to incriminate the person of an offence; or
>
> (b) answering the question, or producing the record or document, would result in a breach of legal professional privilege.
>
> (6) This section does not derogate from Parts 7 and 8 of the *Health Care Act* 2008.

[21] His Honour held that on its proper construction, s 23 did not abrogate penalty privilege.[6]

> Most lawyers, let alone laypersons, would be unable to list the different common law privileges and immunities that (absent statutory abrogation) entitle a person to decline to answer a question or produce a document to a court. It is a very unlikely intention to impute to Parliament that it intended by section 23 to abrogate all personal common law privileges and immunities unless Parliament had first identified all such privileges and immunities and made a deliberate policy decision that they should all be abrogated, apart from self-incrimination and legal professional privilege. Conversely, if it is imputed that Parliament was aware of all personal common law privileges and immunities and intended to abrogate all but two, one would expect Parliament to have effected the abrogation expressly.
>
> Turning to context, there is nothing in the context of section 23 that points to abrogation of common law privileges apart from two. Section 23 does not create an offence of failing to answer a question or produce a document. Rather, subsection 23(4) provides that a person who, amongst other things, fails without reasonable excuse to comply with a summons issued to produce documents or refuses to obey a lawful direction of the Court commits a contempt of the Court. The fact that the section adopts the common law procedure and sanction of contempt is consistent with a lack of intention on the part of Parliament to abrogate common law privileges.

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6 *Bell* at [177]-[179].

> Sections 10 and 11 create and constitute the Court as a court of record, which is also a common law concept. The fact that Parliament chose to create the Court as a court, and that courts traditionally recognise common law privileges, is consistent with a lack of intention on the part of Parliament to abrogate common law privileges.

[22] It should be noted that this analysis assumes that penalty privilege is a common law privilege which would apply to coronial proceedings under the South Australian legislation unless abrogated by the statute. That is to say, his Honour applied the approach of the majority in *Pyneboard Pty Ltd v Trade Practices Commission.*[7]

[23] In *Frugtniet*, the Full Court of the Federal Court considered appeal against orders made by the primary judge setting aside an Administrative Appeals Tribunal ("AAT") decision which had affirmed the appellant's cancellation of the respondent's registration as a migration agent. The issue on the appeal was whether penalty privilege was available to the respondent in his AAT proceedings. The Full Court held that if penalty privilege is to apply in a non-curial setting, it must have a basis in the language of the relevant statute. Accordingly, penalty privilege was not available to the respondent in his AAT proceedings. The appeal was allowed and the orders of the primary judge set aside.

[24] In so deciding the Full Court reviewed the High Court authorities of *Sorby v Commonwealth*,[8] *Pyneboard*, *Police Service Board v Morris*,[9]

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7 [1983] HCA 9; 152 CLR 328 ("*Pyneboard*").

8 [1983] HCA 10; 152 CLR 281.

9 [1985] HCA 9; 156 CLR 397.

Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission,[10] and *Rich v Australian Securities and Investments Commission*.[11]

[25] Upon a review of those authorities, the Full Court followed the observations of the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Daniels*, in particular, the observation at [15] to the effect that the double negative statement in *Pyneboard* – "*not prepared to hold that the privilege is inherently incapable of application in non-judicial proceedings*" – did *not* amount to a holding that penalty privilege *is* available in non-judicial proceedings, and the statement at [31]:

> Today the privilege against exposure to penalties serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it. However, there seems little, if any, reason why that privilege should be recognised outside judicial proceedings. Certainly, no decision of this Court says it should be so recognised, much less that it is a substantive rule of law.
>
> (footnotes omitted).

[26] The Full Court concluded:[12]

> Following *Sorby*, the starting point for the privilege against self-incrimination is that it exists and applies unless abrogated. However, that is not the starting point for penalty privilege, which is not, following *Daniels* and *Rich*, a substantive rule of law, let alone an important and fundamental common law immunity, having, as it does, a very different origin and history. In each setting where penalty privilege is claimed, the opening question is whether that privilege applies in the first place, not whether it has been abrogated. This

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10 [2002] HCA 49; 213 CLR 543 ("*Daniels"*)

11 [2004] HCA 42; 220 CLR 129 *("Rich"*).

12 *Frugtniet* at [77] and [79].

> emphasises the critical importance of considering carefully the statutory provisions in question, as well as the particular proceedings, the relief sought and the particular adverse consequences faced by the person claiming the benefit of penalty privilege.
>
> .....
>
> It follows from the analysis of *Daniels* and *Rich* above that for penalty privilege to apply as a matter of course, three factors will ordinarily be present, at least in a federal context:
>
> (1) penalty privilege is claimed in curial proceedings;
>
> (2) the proceedings expose the claimant to penalties or forfeitures; and
>
> (3) penalty privilege is claimed as protection from compulsory disclosure of information, where requiring that disclosure would represent a departure from the principle that those who allege the commission of a crime or imposition of a penalty should prove it and should not be able to compel the defendant to provide proof against him or herself.

[27] On that approach, as the Full Court pointed out at [47], in enacting s 155 of the *Trade Practices Act*, the legislature had been entirely rational and consistent. Given that the privilege against self-incrimination would otherwise apply as a fundamental common law right, Parliament had expressly excluded its operation under s 155. However, there was no need for Parliament to expressly exclude penalty privilege, given that it would not apply in such a non-curial setting as the AAT unless expressly provided for under the legislation.

[28] The plaintiffs contend that *Frugtniet* is distinguishable, submitting first, that the decision was confined in terms to the AAT only and, second, that it does not provide guidance as to how the Court should approach the question of the penalty privilege in the present case. The plaintiffs reiterate that the starting position is that penalty privilege is applicable owing to the curial

nature of the proceedings before the Coroner, and must apply unless it has been abrogated by the Act. Notwithstanding the conclusion of the Full Federal Court at [79] (quoted above), the plaintiffs contend that it does not matter that the proceedings before the Coroner are not ones in which any penalty might be imposed on the plaintiffs citing *Bell* at [149] and the authorities cited therein.[13] The passage in *Bell*, relied on, states:

> It is common ground in the present case that penalty privilege can be claimed in curial proceedings notwithstanding that the penalty could not be imposed in those proceedings but might be imposed in different proceedings.

[29] The cases cited in *Bell* as authority for that proposition include *Refrigerated Express Lines (Australasia) v Australian Meat and Livestock Corporation,*[14] in which Deane J said:

> It is a well-established principle that a defendant in proceedings which are solely for the recovery of a pecuniary penalty should not be ordered to disclose information or produce documents which may assist in establishing his liability to the penalty (see, generally, per Isaacs J. in *R. v. Associated Northern Collieries* (1910) 11 C.L.R. 738, at pp. 741748.; *Naismith v. McGovern* (1953) 90 C.L.R. 336, at pp. 341-342.and *Martin v Treacher* (1886) 16 Q.B.D. 507). Even where, as in the present case, the proceedings are not for recovery of a penalty but to prevent and redress civil injury, a party to litigation ought not to be compelled to provide information or produce documents for inspection by the other party if the result thereof will be to provide evidence against him which may be used to establish his liability to a penalty in other proceedings *(Mayor of the County Borough of Derby v. Derbyshire County Council* [1897] AC. 550, at p. 552).

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13 The cases cited in *Bell* for this proposition at [149] are *Refrigerated Express Lines (Australasia) v Australian Meat and Livestock Corporation* (1979) 42 FLR 204 at 207-208 per Deane J; *Trade Practices Commission v Abbco Iceworks Pty Limited* [1994] FCA 1279; (1994) 52 FCR 96 at 127-129 per Burchett J (with whom Black CJ, Davies and Gummow JJ agreed); *Construction Forestry Mining & Energy Union of Australia v Inspector Alfred* (2004) 135 FCR 459, [2004] FCAFC 36 at [50] per Marshall J (with whom Wilcox J agreed).

14 (1979) 42 FLR 204 at 207 per Deane J.

[30] The next step in the plaintiffs' argument is to apply the principle of legality. They contend that, penalty privilege being a common law right which applies in a coronial inquest, it must be taken not to have been abrogated by statute unless it has been excluded expressly or by necessary intendment.[15]

[31] The plaintiffs contend that the Act does not abrogate penalty privilege either expressly or by necessary intendment. In support of this contention, the plaintiffs contend that it cannot be inferred that the use of the word "criminate" rather than "incriminate" in s 38 was deliberate and that the word was chosen because of its wider or more general connotation, submitting that "criminate" is apt to have a connection to criminal matters.[16] The plaintiffs take issue with the statement in the Coroner's reasons[17] that the expression "criminate oneself" has a long association with the penalty privilege. The plaintiffs contend that the references provided by her Honour do not bear out the proposition advanced that the term "criminate" is generally understood to invoke penalty privilege. The plaintiffs contend that the more natural understanding of the expression "criminate" in a legal context is that given in the Fifth Edition of Black's Law Dictionary (1979):[18]

> Criminate
>
> To charge one with crime; to furnish ground for a criminal prosecution; to implicate, accuse, or expose a person to a criminal charge. A witness cannot be compelled to answer any question which has a tendency to criminate him. See Self-incrimination.

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15 *Daniels* at [16]; *Pyneboard* at 341.

16 Plaintiff's submissions at [12].

17 Ruling No 5 at [36].

18 Constable Rolfe's submissions at [54] and [57].

[32] However, in her reasons for decision, the Coroner did not simply assert that "to criminate oneself" has a long association with the penalty privilege. Her Honour gave specific examples at [35] and [36] of Ruling No 5.

> … I reject the submission that the verb 'to criminate' is inconsistent with an intention to abrogate the penalty privilege. While I accept that one recognised dictionary meaning of the verb 'to criminate' is 'to charge with a *crime*; accuse', a broader meaning is simply 'to condemn or censure (an action, event, etc). That broader meaning is consistent with the etymology of the word – '*criminare'* (Latin), which means 'to accuse, denounce' or to 'censure, hold up to blame' – and the meaning of words that share the same lexical root, such as 'recrimination'. In effect, 'to recriminate' means 'to accuse', but not necessarily of a crime.
>
> More importantly, the expression 'to criminate oneself' has a long association with the penalty privilege. For example, in *Short v Mercer* [(1851) 20 LJ Ch 289, 290], the Lord Chancellor Truro described the penalty privilege as '[t]he principle of the law of England … that a man shall not be driven to give answers to matters that tend to *criminate himself'*. Similarly, in *Marton v Treacher*, [(1886) 16 QBD 507] Lord Esher MR justified the penalty privilege on the basis that it would be monstrous that the plaintiff [in a suit for penalties under the Public Health Act 1875 (UK)] should be allowed to bring such an action on speculation, and, then admitting that he had not evidence to support it, to ask the defendant to supply such evidence out of his own mouth and so to criminate himself …' See also *Paxton v Douglas* [(1809) 16 Ves Jun 239, 240, 241, 243]. These cases continue to be cited in the modern Australian authorities considering the penalty privilege.[19]

[33] The plaintiffs contend that it cannot be inferred from the scope of s 38(3) which restricts the use of evidence the subject of a certificate in very widely drawn terms (ie. "in proceedings before a tribunal or person exercising policies and functions in a judicial manner") that penalty privilege has necessarily been abrogated, as the width of the restrictions on use in s 38(3)

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19 Here, her Honour cited *Rich v ASIC* (2003) 203 ALR 671 at [210], [215], [224] and *Dale v Clayton Utz (a firm) (No 2)* [2014] VSC 517 at [67].

is not determinative of the separate question of which privileges have been abrogated by s 38(1).[20] That is to say, the circumstances in which the immunity may be deployed should not be treated as defining the anterior question of the nature or scope of the privilege which is the occasion for its conferral.[21]

[34] The Attorney-General submitted that it would be absurd to suppose the legislature had abrogated the privilege against self-incrimination in s 38 and had not abrogated the less important penalty privilege and placed reliance on this passage from *Daniels* at [30]:

> The implication that the privilege against exposure to penalties was abrogated by s 155(1) can be supported by reference to the absurdity that would result if that privilege could be claimed and, pursuant to s 155(7), the privilege against self-incrimination could not.

[35] In answer to this contention, the plaintiffs submit that what was stated in *Daniels* at [30] was obiter and that it must also be understood in the context of that decision. In *Daniels*, to have concluded that penalty privilege had not been abrogated would have serious consequences for the statutory scheme of the *Trade Practices Act 1974* (Cth).[22] The plaintiffs contend that the same is not true of the Act.

[36] The plaintiffs contend that coronial proceedings are unlikely to be disrupted or have their purposes derailed by witnesses taking points about the penalty

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20 Plaintiff's submissions at [15]; In this context, the plaintiffs also rely on *Taylor v Owners Strata Plan 11564* (2014) 253 CLR 53 at [6].

21 Constable Rolfe's submissions at [66].

22 Plaintiff's submissions at [14].

privilege, and hence it is not right in the present context to conclude, as the Coroner did in her reasons for decision, that there is some inherent unlikelihood that there would be an abrogation of the privilege against self-incrimination but a preservation of the penalty privilege.

[37] The NTPF (and the Attorney-General) on the other hand submit that the construction contended for by the plaintiffs would have dire consequences for the conduct of Coronial inquests under the Act. Given that most behaviour that could lead to criminal charges would also justify disciplinary proceedings in the case of police and other emergency workers, the plaintiffs' construction would render the abrogation of the privilege against self-incrimination in s 38 almost totally ineffective in the case of such witnesses, making it more difficult for the Coroner to ascertain the truth and so derailing the purpose of coronial proceedings.

The Attorney-General's submissions

[38] The contentions advanced by the plaintiffs are contested by the Attorney-General and the other interveners.

[39] The Attorney-General's primary contention is that, save to the extent that it is conferred by s 38(1) of the Act, penalty privilege would not apply in an inquest under the Act.

- Penalty privilege is not a substantive common law rule that applies unless and until it is abrogated in accordance with the principle of legality.

- An inquest is not a proceeding of a kind to which the privilege would apply 'as a matter of course'.

- Penalty privilege is, in any event, expressly excluded by ss 39 and 41(1)(c) of the Act, which provide, respectively, that: a 'coroner holding an inquest is not bound by the rules of evidence and may be informed, and conduct the inquest, in a manner the coroner reasonably thinks fit'; and a 'coroner may … subject to s 38, order a witness to give evidence on oath'.

- Section 38 is a beneficial provision which expressly confers a qualified penalty privilege on witnesses, subject to the coroner's power to require a witness to answer on the provision of a certificate which enlivens the protective provisions in s 38(3).

[40] The Attorney-General contends that, on the assumption that the penalty privilege would otherwise apply, the privilege is governed by s 38 of the Act. As the Coroner reasoned, that construction is supported by the text, context and purpose of the Act, as well as that of the cl 6 of the *Coroners Amendment Act 2002* (NT) ("Amending Act"), which introduced the amended s 38. The construction achieves a consistency between the scope of the qualified right to claim the penalty and self-incrimination privileges

and the scope of the corresponding immunity in criminal, civil and disciplinary proceedings under s 38(3). In short, it produces coherent outcomes as between the 'similar', though not equal, penalty and self-incrimination privileges.

[41] The Attorney-General submits that the plaintiffs' construction, which is that penalty privilege acts as a complete bar to any questioning:

(a) cannot be explained by any 'sensible legislative policy',[23] and in this sense lacks a 'rational legislative basis';[24]

(b) would undermine a fundamental purpose of the Act, which is to carefully scrutinise the conduct of public authorities, and in particular the police, in order to prevent avoidable deaths in custody;

(c) would allow a Coroner to compel a witness exposed to potential criminal proceedings whilst providing a complete immunity from questions giving rise to relatively minor civil or disciplinary consequences, an outcome the High Court has previously described as 'irrational',[25] 'bizarre'[26] and an 'absurdity';[27]

(d) would largely frustrate, if not render inoperative, the express abrogation by s 38 of the privilege against self-incrimination, because

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23 Ruling No 5 at [42].

24 *R v IBAC* (2016) 256 CLR 459 at [76] (Gageler J).

25 *Pyneboard* at [344-345] (Mason ACJ, Wilson and Dawson JJ).

26 Ibid.

27 *Daniels* at [30] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

of the overlap between questions in which a witness might legitimately claim the privilege against penalty privilege in addition to self-incrimination;

(e) would frustrate the outcome that the Amending Act set out to achieve, which was to ensure that the broader objectives of coronial proceedings were not "frustrated by witnesses refusing to answer questions", including professional witnesses, like medical practitioners, who were identified as being "more concerned about civil [or disciplinary] liability than criminal charges and guilt";[28] and, finally,

(f) would require the Court to put to one side the High Court's conclusion in *Daniels Corporation*, as confirmed in its subsequent decision of *Rich* and the decision of the Full Court of the Federal Court in *Frugniet*, that the penalty privilege is not a substantive common law right that applies unless and until abrogated.

[42] The Attorney-General submits that the preferred construction is to approach s 38 as a broad beneficial provision which provides an entitlement to witnesses under s 38(1) of the Act to claim either the penalty privilege or the privilege against self-incrimination and corresponding direct use immunity under s 38(3). In other words, the penalty privilege is conferred and protected in a qualified way by the certificate provision in s 38.

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28 Ruling No 5 at [40]-[42], [46].

The Northern Territory Police Force submissions

[43] The NTPF supports the construction contended for by the Attorney-General. Counsel for the NTPF submitted that, to construe s 38 in the way contended for by the plaintiffs would lead to the absurd result that a person could be compelled to give evidence although it would incriminate them - albeit that their words could not be used in future against them - but they could not be compelled if their words would be prejudicial to their interests in disciplinary proceedings.

[44] Further, the NTPF contended that, in virtually any situation where a person might be in jeopardy of criminal proceedings, if they are employed as correctional officers or paramedics or police, the same conduct would almost inevitably give rise to disciplinary proceedings. It would follow, if the plaintiffs are correct, that the effect of s 38 would be completely undermined because, by a lateral application of penalty privilege, such witnesses would be able to decline to give evidence altogether. That, it is contended, would be anomalous. It would also be inconsistent with the intention of the 2002 amendments and would constitute a major impediment to the efficacy of coronial investigations.

[45] Therefore, by reference to the words used, the history of the term "criminate", the overall structure of the legislation and the purpose of s 38 as amended, the NTPF submits that s 38 should be interpreted in such a way

as to enable Coroners to undertake their important investigative duties in an effective way.

The Families' submissions

[46] The Families generally supported the position advanced by the Attorney-General and the NTPS.[29]

NAAJA's submissions

[47] NAAJA, on the other hand, while agreeing that penalty privilege does not automatically apply in proceedings before the Coroner, contends that the Act does not confer that privilege, and that s 38 applies only to the privilege against self-incrimination which would otherwise apply to coronial proceedings unless abrogated expressly or by necessary implication. The result is that there is no right to refuse to answer questions in a coronial inquest based on penalty privilege.

[48] NAAJA contends that in order to construe s 38 as it was amended in 2002, the Court must first consider the correct construction of the Act before the amendment. Before the 2002 amendment, s 38 read:

> A person shall not, under this Act, be compelled to answer a question that may tend to incriminate the person.

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29 Counsel for the Families also asked for a declaration that the plaintiffs were obliged to answer specific questions. However, there was no originating process seeking any such declaration and no evidence on which any entitlement to such a declaration could be established. Those are matters for the Coroner.

[49] There can be little doubt that this refers to the privilege against self-incrimination – ie. where the answer may tend to prove that the person was guilty of a criminal offence. Even the plaintiffs do not contend that it was wide enough to refer to penalty privilege. Their contention is that penalty privilege applied by virtue of the common law and that the Act as originally enacted did not expressly abrogate the privilege, or do so by necessary intendment.

[50] Like the Attorney-General (and the NTPF), NAAJA contends that a coronial inquest is not a curial proceeding which can give rise to a penalty and that, accordingly, penalty privilege did not apply to such proceedings under the Act as originally enacted.

[51] NAAJA contends that there is no discernible object, purpose or intention by the legislature which could explain a decision to move from a situation in which members of the police force have to answer questions regardless of whether they might be disciplined, to their being able, after the 2002 amendment, to refuse to answer questions on the ground of penalty privilege unless granted a protective certificate. The mischief which led to the enactment of the 2002 amendment to s 38 was a perception by the Coroner that the Coroner's ability to get to the truth was being hampered by the fact that witnesses were refusing to answer questions claiming the privilege against self-incrimination. The remedy for that was to enact the amended s 38 which partially abrogated that privilege by giving the Coroner the power to require a witness to answer on the provision of a certificate which

limited the use which could be made of the answers as set out in s 38(3). The object was to partially abrogate the privilege that existed – which did not include penalty privilege. There is nothing in the second reading speech (or any of the extraneous material) to suggest that it was any part of the object of the amendments to extend a privilege where none had previously existed. Quite the reverse: it was intended to make it harder for witnesses to refuse to answer questions (and so easier for the Coroner to ascertain the truth) – not to provide witnesses with an extended ability to refuse.

[52] There is a great deal of force in this submission. In oral argument, counsel for NAAJA contended, in common with the plaintiffs, that the change from the use of the word "incriminate" to "criminate" in the amended s 38 was of no consequence: it was simply a synonym for "incriminate". Also, in common with the plaintiffs, NAAJA contended that the wide ambit of proceedings in which answers would not be admissible against the witness provided with a certificate had no implication for the construction of s 38(1). Counsel for NAAJA pointed out that answers which might suggest the witness had committed a criminal offence might also be used against the person in civil proceedings (for example in civil proceedings claiming damages for deliberately or negligently causing personal injury or property damage) or in disciplinary proceedings. There is no reason to infer from the breadth of the protection in s 38(3), a legislative intention to expand the extent of the available privilege under s 38(1).

[53] Also in oral argument, the possibility was canvassed that, although penalty privilege did not apply under the Act as enacted, the drafters of the amended s 38 may have mistakenly believed it did and so, intending only to partially abrogate the then existing privilege, instead conferred a qualified penalty privilege. Counsel conceded that if the drafters of the legislation had expressly conferred a qualified penalty privilege under the mistaken belief that the existing privilege had extended that far, that would be the end of the matter: the privilege would apply. Counsel also conceded that that would be the case if the amended section had impliedly conferred a qualified penalty privilege, but contended that:

(a) there was no reason to suppose the drafters of the amended s 38 were acting under any such mistaken belief; and

(b) one could not infer any such qualified penalty privilege from the text of the amended s 38.

[54] As for the part of the second reading speech relied on by the Attorney-General and the NTPF, NAAJA contended that it did not, in fact, support a legislative intention to confer a qualified form of penalty privilege. The reference to medical practitioners being more concerned about the use of answers in civil proceedings than criminal prosecution is simply an explanation for the breadth of the protection against direct use in s 38(3). It does not support an intention to extend the range of privilege available under the Act to include penalty privilege: there is no suggestion that the

use of the word "criminate" was intended to permit a person to refuse to answer a question on the ground that it might involve them in civil liability, as distinct from a penalty.

Consideration and conclusion

[55] In my view, NAAJA's preferred construction is the correct one, in particular because it conforms both to the express words used and to the purpose of the amending act.

The Coroners Act

[56] Part 6 of the Act confers a number of broad coercive powers on the Coroner. They include the power to direct a person to give information that is relevant to an investigation (s 36); the powers to summons persons, inspect, copy and keep things produced at an inquest;[30] the power, 'subject to section 38' [to] order a witness to give evidence on oath;[31] and 'the power to give directions and do anything as the Coroner thinks fit'.[32] Non-compliance with such a summons or direction is a criminal offence.[33] In the case of a summons or direction issued or made under s 41, there is no defence of 'reasonable excuse'.[34]

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30 The Act, s 41(a) and (b).

31 Ibid at s 41(c).

32 Ibid at s 41(d).

33 Ibid at ss 36(2) and 41(3).

34 Compare s 36(2) and the offence of non-compliance is punishable by a term of imprisonment per s 41(3).

[57] The power in s 41(c) to order a witness to give evidence on oath is "subject to section 38".

[58] Section 39 of the Act provides that the a 'coroner holding an inquest is not bound by the rules of evidence and may be informed, and conduct the inquest, in a manner the coroner reasonably thinks fit'.

Legislative history

[59] The *Coroners Act* was enacted by the Coroners Bill 1993 (NT) ("the Bill"). During the second reading of the Bill, the Attorney-General explained that the purposes of the Act were, 'firstly, to implement various recommendations of the Royal Commission into Aboriginal Deaths in Custody ("Royal Commission"); and, secondly, to generally improve and modernise the coronial process'.[35]

[60] The Act confers broad, and in some cases coercive, powers on a Coroner to facilitate the investigation of reportable deaths, and it confers additional powers and duties in the case of 'deaths in custody' which occupy a special place in the scheme of the Act.[36] That is to say, the expressed purpose of the Act was to increase the breadth and intensity of coronial inquiries for all reportable deaths, but particularly 'deaths in custody', and in that way 'to identify systemic failures' by police, corrections and other public

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35 Northern Territory, Parliamentary Debates, Legislative Assembly, 3 March 1993, 7897-7899.

36 For example, ss 15(1A) and (2) of the Act *permit* a coroner with jurisdiction to investigate a death to hold an inquest if he or she sees fit, s 15(1) *obliges* the coroner to do so where the death occurred in custody. This implemented Recommendation 11 of the Royal Commission into Aboriginal Deaths in Custody.

institutions 'which may, if acted on, prevent future deaths in similar circumstances'. Its purpose was to 'save lives'.[37]

[61] In the second reading speech on the Bill which introduced the amendments to s 38, the Attorney-General said:

> The objective of the coronial inquest is to find the truth about all circumstances of the death. In recent cases in the Territory this objective has been frustrated by witnesses refusing to answer questions.
>
> …
>
> The making of sensible recommendations in relation to public health or safety, or the administration of justice, may also be frustrated where medical practitioners refuse to answer questions on the basis of self-incrimination. It may be that in these cases, the concern for these witnesses may not be that he or she may be charged with a criminal offence, but that civil or disciplinary proceedings may result from the giving of the evidence. It is important to emphasise that the effect of the amendment is not to provide an indemnity from prosecution or protection against civil action or disciplinary action. The witness could still be charged with a criminal offence following the inquest, or investigations taken with regard to civil or disciplinary action. It is just that the actual evidence given to the coroner cannot be used in subsequent proceedings.
>
> The policy behind the amendment is to get to the truth.

Nature and purpose of coronial jurisdiction

[62] I agree with the Attorney-General's submission that a coronial inquest is not a "curial" proceeding in the sense contended for by the plaintiffs. As the Attorney-General pointed out in written submissions, a Coroners Court fulfils the 'important public function' of investigating the cause and

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37 The Attorney General's submissions referenced *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) vol 1, [4.7.4], contending that, as the second reading speech referred extensively to this report and the recommendations it contained, it was legitimate to do so.

circumstances of reportable deaths.[38] A coronial investigation is directed toward two ends. The first is to make findings and in that way to 'set the public mind at rest where there are unanswered questions about a reportable death'.[39] The second is to make comments and recommendations in an attempt to prevent avoidable deaths from occurring in the future.[40]

[63] It has been said that a Coroner exercises an 'anomalous … jurisdiction[41].' Coroners Courts are courts of record, and, generally, as in the Territory, a Coroner is a 'judge'. However, although a coronial inquest involves a hearing an inquest is an investigation; its function is very different to the function ordinarily undertaken by a Court. The procedure is inquisitorial, not adversarial, and Coroners do not adjudicate upon proceedings inter pares. Findings made by a Coroner do not determine legal rights. A Coroner has no power to determine the rights, duties and liabilities of any person.[42] Under the Act, a Coroner is expressly prohibited from making a 'statement that a person is or may be guilty of an offence[43]'. The purpose of a Coroner's investigation is to determine what happened.[44]

[64] Further, although provisions such as ss 26, 34 and 35 of the Act identify the 'subject matters' of coronial inquiry, those subject matters have been held to

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38 *Domaszewicz v State Coroner* (2004) 11 VR 237, [37] ("*Domaszewicz*").

39 Ibid at [28].

40 Ibid at [25].

41 *Decker v State Coroner of New South Wales* (1999) 46 NSWLR 415 at [20] ("*Decker*").

42 *Domaszewicz* at [37].

43 The Act, s 34(3).

44 *Domaszewicz* at, [37]; *Decker* at [6].

be "broad … with indefinite boundaries".[45] As a result, it is "generally … inappropriate to interfere with the gathering of evidence by a coroner" or "to seek from a coroner a ruling that one piece of evidence or another is inadmissible or irrelevant as if the coroner were conducting a civil or criminal trial".[46]

[65] In light of the "anomalous" nature of the coronial jurisdiction, and because of the "important public function" it serves, it has been observed that in an inquest there is an "obvious … need for [a] departure from … the rules of procedure and evidence applicable to proceedings before a court of law".[47] In most Australian jurisdictions, the result is a provision such as s 39 of the Act, which provides that a "coroner holding an inquest is not bound by the rules of evidence and may be informed, and conduct the inquest, in a manner the coroner reasonably thinks fit". The Victorian Court of Appeal has said that provisions such as s 39 of the Act, emphasise Parliament's intention that the Coroner should not be constrained in carrying out the coronial function. Because the Coroner must do everything possible to determine the cause and circumstances of death, Parliament has removed all inhibitions on the collection and consideration of material which may assist in that task.[48]

[66] I agree with the Attorney-General's contention that the Northern Territory Parliament's intention that the Coroner should not be constrained in carrying

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45 *Doomadgee v Clements* (2006) 2 Qd R 352 at [32].

46 Ibid at [36].

47 *Decker* at [21].

48 *Priest v West* (2012) 40 VR 521 at [6] per Maxwell P, Harper J.

out the coronial function is supported by other features of the Act including the broad facilitative powers conferred by ss 19-21, 24 and 25; the powers to give binding directions under ss 46 and 41, non-compliance with which constitutes a criminal offence; and, the provisions of s 38.

The nature of penalty privilege

[67] The privilege against self-incrimination (i.e. the privilege not to answer a question or give evidence which may tend to prove that the person has committed a criminal offence) is a fundamental common law right which provides the basis for such fundamental rules of the criminal law as the right to remain silent. Penalty privilege had a different origin in the rules of equity relating to discovery and interrogatories.[49] On the basis that a person making an accusation should prove it, equity would not order discovery or interrogatories (ie. compulsory court procedures for the provision of documents and the answering of questions in aid of the opposing party's case) when the proceedings were of a nature that might result in a penalty or forfeiture being imposed by a court. The origin of the privilege was described in *Naismith v McGovern*[50] in the following terms:

> Originally orders for discovery were not obtainable at common law, except to a limited extent, and a party to a common law action who desired general discovery had to proceed by bill in equity. But the Court of Equity would not make an order for discovery or for the administration of interrogatories in favour of the prosecutor whether

49 *Daniels* at [13] although a contrary view was expressed by the plurality in *Pyneboard* at 335-337 to the effect that equity adopted the principle from the common law. The precise origin of the principle is not important. The cases are discussed in *Bell* at [135]-[150].

50 [1953] HCA 59; (1953) 90 CLR 336 at [341-342] per Williams, Webb, Kitto and Taylor JJ.

> the prosecutor was the Crown or a common informer or any other person where the proceeding was of such a nature that it might result in a penalty or forfeiture: '*nemo tenetur seipsum prodere*'.[51] When discovery and interrogatories were provided for under the rules made under the *Judicature Act* the same principle was applied.

[68] Although the original application of the privilege was in proceedings which might result in a penalty or forfeiture being imposed by the court, it came to be applied, in appropriate cases, when the proceeding in which it was claimed was not the same proceeding in which the penalty or forfeiture might occur.[52]

[69] However, penalty privilege is not a fundamental common law right of the same nature as the privilege against self-incrimination or legal professional privilege. In my view, on this issue, this Court is obliged to follow the reasoning of the plurality in *Daniels* as expounded in *Frugniet.* *Frugniet* itself, being a decision of the Full Court of the Federal Court, is highly persuasive and should be followed unless this Court considers it to be plainly wrong. In *Daniels* and *Rich* the dicta of two majorities of the High Court have "reject[ed] the view that [the penalty privilege] is a substantive right".[53] As the plurality said in *Daniels*:[54]

> Today the privilege against exposure to penalties serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it. However, there seems little, if any, reason why that privilege should be recognised outside judicial proceedings. Certainly,

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51 "No one is obliged to betray himself".

52 *Refrigerated Express Lines (Australasia) v Australian Meat and Livestock Corporation* (supra).

53 *Attorney General v Borland* [2007] NSWCA 201 at [10] ("*Borland*").

54 *Daniels* at [30].

no decision of this Court says it should be so recognised, much less that it is a substantive rule of law.

[70] The relevant reasoning in *Daniels* must be considered to be "seriously considered" dicta. So much has been properly accepted by the plaintiffs.[55] That reasoning was followed by the Full Federal Court in *Frugniet*. In *Rich* the NSW Court of Appeal said that the discussion of the penalty privilege in *Daniels*, though not 'technically' binding, should be given 'a high level of persuasive force'. Similarly, at first instance in *Borland* the NSW Supreme Court observed that 'the recent statement by four judges (in *Daniels*) conveyed a high level of persuasive force which is now fortified by the five judges of the High Court in *Rich*.

[71] On that reasoning, unlike the privilege against self-incrimination, penalty privilege does not apply as a matter of course unless abrogated by statute. Nor does the legality principle apply to construction of statutes which affect the operation of penalty privilege. Rather, the statute must be construed to determine whether in context, the legislature intended that there should be an entitlement to penalty privilege.

[72] If I am wrong in finding that penalty privilege is not available in a coronial inquest under the Act, in my view, the Coroner was correct to hold that, on the assumption that penalty privilege did apply, it was abrogated by s 38 to the extent that the Coroner was empowered to require a person to answer,

55 Constable Rolfe's submissions at [30]. This was resiled from to a degree in oral submissions.

notwithstanding a valid claim to penalty privilege, on provision of a certificate under that section that had the protective effect set out in s 38(3).

[73] That is to say, if I am wrong to prefer the construction contended for by NAAJA, it seems to me that the alternative construction contended for by the Attorney-General and the NTPF must be correct. The purpose and effect of s 38 is to abrogate the privilege against self-incrimination and to apply the same procedure to penalty privilege.

[74] The one construction I consider to be untenable is the one advocated by the plaintiffs. One cannot discern a legislative intention to partly abrogate the important and fundamental privilege and to leave intact the less important, but related, penalty privilege. That would be an absurd result. Further, as submitted by the NTPF, it would subvert the whole purpose of s 38 since, in the case of police officers and other public officials, almost all criminal acts would also have potential disciplinary consequences with the result that the Coroner could almost never require police officers (and others) to answer such questions on the provision of a certificate under s 38(2). Given the expressed object of the Act to implement recommendations of the Royal Commission into Aboriginal Deaths in Custody, and the key role of police officers in such proceedings – and others under the Act – and given the expressed object of the 2002 amendment to make it easier for the Coroner to ascertain the truth by limiting the ability of witnesses to refuse to answer questions, such an interpretation would not advance the objects of either the original Act or the 2002 amendment; rather it would subvert those objects.

Order

[75] The plaintiffs' application for declarations is refused.
