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THE SUPREME COURT OF

THE NORTHERN TERRITORY

2022-02673-SC

LEE BAUWENS

Plaintiff

and

THE TERRITORY CORONER

Defendant

KELLY J

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON THURSDAY 24 NOVEMBER 2022 AT 10:02 AM

(Continued from 23/11/2022)

Transcribed by:
EPIQ

HER HONOUR: Yes, now where are we up to? It's Mr Nekvapil, yes?

MR NEKVAPIL SC: Well in fact, earlier this morning, Dr Freckelton and I had a change of heart, and so we're going to go in the other direction.

HER HONOUR: All right.

Dr Freckelton, yes.

MR FRECKELTON AO KC: Good, I was worried by the pause, thank you.

HER HONOUR: All right.

MR FRECKELTON: Your Honour, the – the issue being canvassed in these proceedings is extremely important for the viability of Coronial proceedings in the Northern Territory. The Northern Territory Police Force has a particular interest in Coronial proceedings. And we set that out in our submissions in respect of the appropriateness of being given intervenous status. But integral to the functioning of a Coroner in the Territory, is the involvement of the police, both in so far as they can be directed by the Coroner in a variety of respects, and in relation to the role that they play in investigations in an ongoing way.

It is in those circumstances that we advanced brief submissions to you in respect of how s 38 should be construed, and how you ought to view the ongoing role of penalty privilege in Coronial proceedings. The fundamental underpinning of what the police force says to you, is that it is extremely important for Coronial proceedings in the Territory, that in the particular context of s 38, penalty privilege be regarded as having a comparable status into the privilege against self-incrimination, with the outcome that the Coroner can direct a person in the prescribed circumstances, to answer questions, where it is expedient in the interest of justice, with the very significant that s 38 provides.

HER HONOUR: You're – in other words, you're adopting the construction that was contended for by the Attorney-General.

MR FRECKELTON: Yes, we are.

HER HONOUR: Right, thank you.

MR FRECKELTON: We'd just like to say a few things about how the complex matters in this case can perhaps be analysed in a straight forward way, your Honour.

HER HONOUR: Thank you.

MR FRECKELTON: The privilege against self-incrimination and legal professional privilege are particular rights which are substantive common law rights. Daniels at 31, Frugtniet at 39, say as much. We say that a straight forward analysis of the

situation is provided by Kirby J in Rich, at par 129. Where referring to penalty privilege by contrast, he says:

> "That is of a lower order of priority. It has a more recent and specialised origin and purpose in our law. It should not be blown into an importance that contradicts or diminishes the operation of the Act, and the achievement of its purposes."

That sets a context and establishes a contrast with the other two privileges your Honour. The next question is how you should view the authority of Daniels and Rich. We say that the analysis by the High Court judges ought not to be likely disregarded. At the very least, they are seriously considered dicta, and therefore of powerful authority, as set out in the thorough construction's decision. Now in our respectful submission, there are some things that you do not need to do. One is to determine whether penalty privilege applies in an inquest. The reason why we say that so straight forwardly, is that the Coroner disavowed making such a decision at par 32 of her decision, the ruling.

HER HONOUR: Doctor, is it not so that if you're correct, and the Attorney-General is correct, about the interpretation of s 38, it just doesn't matter.

MR FRECKELTON: That's right.

HER HONOUR: The effect of section – if the effect of – it doesn't matter whether the effect of s 38 is to confer a limited form of penalty privilege, or whether it is to abrogate in part, to a limited extent, an existing privilege. The effect is just the same.

MR FRECKELTON: The outcome is the same, that is so, your Honour.

HER HONOUR: All right.

MR FRECKELTON: Now, pursuing this distinction between legal professional privilege and a privilege against self-incrimination, and penalty privilege on the other, it is significant in terms of any ongoing existence of a common law right of penalty privilege, by reference to the principle of legality, which had its origins in Potter, v Minahan. Certainly while the privilege against self-incrimination, and legal professional privilege can only be abrogated by clear words, or necessary implication, the same requirement does not apply to penalty privilege, given its lessor status.

That – what that means is that if your Honour has any concerns about the specificity of what is stated in s 38, that should not trouble your Honour in terms of abrogation. What we say to your Honour is that you should look to the nature and purpose of Coronial proceedings, and the Coronial legislation in the Territory. Coronial proceedings are unique, under our legal – under our legal system. They are a mechanism by which a judicial officer is able to make findings, and relevantly to the case before you, recommendations and comments as to the circumstances and cause of death. That has the public benefit of clarifying the record, which is

available for the community, about matters which may be causing public consternation and may be the source of ongoing risk to the community.

It is orthodox, of course, to describe Coronial proceedings as inquisitorial rather than adversarial and one of their characteristics, as seen in s 39 is that a Coroner is not bound by the rules of evidence and may be informed and conduct an inquest in a manner as the Coroner reasonably thinks fit.

The straightforward point that we make in this regard is that there is a high public purpose in enabling and ensuring that Coronial proceedings accomplish their objective of finding facts and enabling recommendations and comments in the interest of public safety and the administration of justice.

Now, it is uncontentious that s 38 partly abrogates the privilege against self-incrimination but that abrogation is qualified. The abrogation is by reference to the concept of crimination by virtual of the 2002 amendments. But there remains a major discretionary assessment to be made by the Coroner whether on any given occasion it is expedient for the purposes of justice that a person be compelled to answer a question.

This is a real discretion to be exercised by the Coroner, it may not be expedient where the consequences to the person of whom the question is asked may be of a very high order, for instance if murder charges may be contemplated or whether the evidence can be obtained by an alternative non-coercive means. So the question for your Honour is whether crimination incorporates penalty privilege.

The finding by the learned Coroner at her par 35 is that s 38 also partially abrogates penalty privilege for the relevant purposes, there not being a meaningful distinction between the privilege against self-incrimination and penalty privilege.

At her par 36, the Coroner has tracked through the association between the concept of crimination and penalty privilege by reference to a series of 19th century authorities. We respectfully submit that she was right to do so and correct to find the alignment for the purposes of s 38 between the two privileges.

Now, the proper approach to the issue of statutory construction in order to determine whether crimination incorporates penalty privilege as well as the privilege against self-incrimination is relatively non-controversial, it should be done by reference to the project Blue Sky Principles, particularly those set out at pars 69 to 71 by McHugh, Gummow, Kirby and Hayne. That means that the first focus for your Honour's attention should be on the words "utilised". Relevant in that regard is the uptake of the word "crimination" and the failure to utilise the cessation of utilising the word "incrimination". That suggests that the purpose or that the reach of s 38 is such as to incorporate penalty privilege as well as the privilege against self-incrimination.

But it is appropriate also for your Honour to have regard to the context of the provision, the purposes of it and the general statutory context. So much is said by

Project Blue Sky and many other High Court and other authorities and that is buttressed in terms of the purposive issue by s 62A of the *Interpretation Act* of 1978. In order for your Honour to determine the purpose of s 38, your Honour is entitled first to have close regard to the words of the legislation and how they function within the Act. In other words, to assist the Coroner to obtain as much information as possible by offering particular protection to alleviate the threat to witnesses' rights, in s 38, and also for your Honour to have regard to intrinsic aides.

Now, your Honour has been addressed already and your Honour will hear more from our learned friend Mr Nekvapil about the processes by which s 38 came into being in 2002. But it is already apparent, in our respectful submission, from what has been placed before you that the Northern Territory Law Reform Committee made plan - unsurprisingly - that the purpose of the s 38 amendment was to enable Coroners to get to the truth and to put barriers in the way of obstructions to such an outcome. For the truth to be arrived at by a Coroner they need to be able to receive as much evidence as possible from doctors, from correctional officers, from paramedics, and relevantly, from police officers.

Section 38 enables a wide array of evidence to be received, although it might expose persons to criminal penalty and the compromise adopted by the legislature is to preclude usage of the words "employed" but to preclude the evidence being used against the witness in evidence in criminal or civil proceedings - or in proceedings before a tribunal or person exercising powers and functions in a judicial manner - and that is in s 38(3) of course.

That is a very broad protection in terms of direct usage of the incriminating material. It is a significant encroachment on people's civil liberties but it is provided for in order to achieve a socially desirable objective, namely that Coroners be enabled to assemble as part of their investigation as an inquisitorial court, as much relevant information as possible so as to achieve their objectives.

So in the context of all of that, the question is whether penalty privilege should be treated in the same way, it being a common law right, which is variously described, consistently valued and important for the operation of our court system generally.

What is urged upon you by the plaintiffs is that the privilege against self-incrimination is abrogated but effectively, penalty privilege remains. The consequence of that, as pointed out in Pyneboard, Daniels, Frugtniet and elsewhere, would be quite extraordinary, whether one uses emotive words such as "bizarre" "irrational" or "absurd" doesn't matter. The outcome would be 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 for their interests in civil proceedings or disciplinary proceedings.

Now, the problem there is manifest. 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 are, the same conduct would almost inevitably give rise to disciplinary proceedings. And so if the plaintiffs are correct, the effect of S 38 would be completely undermined and by a lateral application of penalty privilege, they would be able to decline to give evidence altogether.

We say, to use a neutral word, that would be anomalous. It would also appear to be inconsistent with the intention of the 2002 amendments and it would constitute a major impediment to the efficacy of Coronial investigations.

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, we say to your Honour that s 38 should be interpreted in such a way as to enable Coroners to undertaken their important investigative duties in an effective way.

The outcome of our submissions therefore, your Honour, is to join with the Attorney-General to urge your Honour to decline the applications for declarations and to uphold the orders made by – or the ruling made by the learned Coroner.

HER HONOUR: I don't think that that's something I can do. It just stands. It's simply declining to make the declarations, I think, isn't it?

MR FRECKELTON: Yes, it is. Your Honour's orders, with respect, should be simply to decline for declaratory relief sought.

HER HONOUR: Yes, thank you for that. Thank you. Right, Mr Nekvapil?

MR NEKVAPIL: Yes, thank you, your Honour. Now, your Honour, like our learned friends for the second plaintiff, we would start with the *Coroners Act* as enacted in 1993 and the move to the amending Act. I'm very grateful to your associate for what I anticipate he is about to hand to you, which is - - -

HER HONOUR: He's very efficient.

MR NEKVAPIL: He's very efficient. Two tabs from our rather longer bundle, the first being, I hope, tab 3, which is the *Coroners Act* as enacted.

HER HONOUR: Yes.

MR NEKVAPIL: And the second being an English case that I'll come to a bit later in my submissions.

HER HONOUR: All right. So, this – the *Coroners Act* as enacted is an annexure to one of your affidavits?

MR NEKVAPIL: No, it's – we provided a bundle of - - -

HER HONOUR: Just documents, right.

MR NEKVAPIL: - - - cases and extrinsic material.

HER HONOUR: I just wanted to keep - that's good. I just wanted to keep track of what annexures – people annexed all sorts of things to affidavits.

MR NEKVAPIL: Yes.

HER HONOUR: And I just wanted to keep track of which ones were actually going into evidence. That's all right.

MR NEKVAPIL: Well, it's probably just important for me to mention in that regard, your Honour, but in folder four of our folder of authorities.

HER HONOUR: Yes.

MR NEKVAPIL: We did include a number of reports from the Royal Commission, reports of the Northern Territory Office of Aboriginal Affairs and other things, I found them on a very useful Northern Territory parliamentary papers' website as tabled papers.

HER HONOUR: Yes.

MR NEKVAPIL: And I'd taken the view that it may be inapplicable in this jurisdiction that because s 63B of the *Interpretation Act* expressly says that regard may be had to extrinsic materials, including relevant Royal Commission reports, that those would be able to be put in as intrinsic materials without needing to annex them to an affidavit.

HER HONOUR: Yes, I'm not taking issue with that.

MR NEKVAPIL: Yes.

HER HONOUR: I'm more or less taking issue with the - - -

MR NEKVAPIL: The volume.

HER HONOUR: - - - volume of material that was annexed to affidavits. And I have already said, I am not accepting that in evidence unless they have been explicitly referred to. And my associate is keeping track of the ones that are in.

MR NEKVAPIL: Yes.

HER HONOUR: Everything else is out. But I should just say, in relation – this is not – that's not an affidavit, but in relation to that voluminous material, I am not going to read or take into account anything that hasn't been expressly referred to in submissions.

MR NEKVAPIL: Yes. Can I – and exactly what we would ask your Honour to do,

with respect, is to have regard to, I think it's part C of our written submissions where we - - -

HER HONOUR: Yes.

MR NEKVAPIL: - - - set out at some length the quotes and references to those reports to which we invite your Honour to have regard.

HER HONOUR: Yes.

MR NEKVAPIL: And unless a matter is referred to in our written submissions, either in the body or in a footnote, we don't ask your Honour to have regard to anything else.

HER HONOUR: Right, thank you very much for that indication - - -

MR NEKVAPIL: Yes.

HER HONOUR: - - - because that's exactly how I intend to proceed.

MR NEKVAPIL: Yes, thank you. And further to your Honour's indication of yesterday, I don't seek to tediously take your Honour through even our written submissions on that.

HER HONOUR: You can take it I have read those written submissions and – well, yes, I have.

MR NEKVAPIL: Thank you, your Honour. So, it's only those two documents in the folder which I propose to take your Honour to in oral submissions as well as very briefly some of the cases that were already referred to yesterday.

HER HONOUR: Yes.

MR NEKVAPIL: So, could your Honour turn then to s 38 in the Act as enacted.

HER HONOUR: Yes.

MR NEKVAPIL: And conveniently, 38 and 41 are all on the same page, page 16.

HER HONOUR: Not in this version. It's all right, it's on page 17, but I can - - -

MR NEKVAPIL: No, it's coming, your Honour. I think it's - - -

HER HONOUR: I can follow it along in here. Does it have to - - -

MR NEKVAPIL: As long as it's the pre-amended version of ss 38 and 41.

HER HONOUR: No, it's not.

MR NEKVAPIL: I know your Honour knows what's in them, but we do focus heavily on the position at this time, because it's important to our argument.

HER HONOUR: Yes.

MR NEKVAPIL: So, s 38, "A person shall not under this Act be compelled to - - -

HER HONOUR: Yes.

MR NEKVAPIL: - - - answer a question that may tend to incriminate."

Section 41(1)(c), "A Coroner may order a witness to take an oath or affirmation or to answer questions."

And subs (3), "A person shall obey a summons, order or direction under subs (1).

And we say there are relevantly three constructional choices. First, penalty privilege was protected by s 38. If that's the case, it was later abrogated by – or partially abrogated, as we've been saying, by the amending Act, by the certificate regime in the substituted s 38.

The second possible constructional choice is that penalty privilege in 1993 was protected by a presumption or implication; that is, even though the Act was silent, parliament should be taken to have intended that the penalty privilege was protected.

And in that case, we would submit for reasons explained by the Attorney-General and more briefly, Dr Freckelton for the police force, it was later abrogated. Picked up, if you like, expressed and abrogated by s 38 as substituted in the amended Act.

But the third constructional choice and the one for which we contend primarily is that penalty privilege was never protected in the first place. And we submit that in that case, penalty privilege simply wasn't touched by the amending Act.

Now, obviously enough, your Honour, which of those three constructions is to be preferred is a question of statutory construction and we rely on text, context and purpose as well as, relevantly, the principle of consistency with international law.

HER HONOUR: So, on your interpretation - - -

MR NEKVAPIL: Yes.

HER HONOUR: - - - I suppose also, as in the plaintiff's interpretation, the change of wording from incriminate to criminate was just a random accident. It had no real purpose. Just a random choice.

MR NEKVAPIL: If our constructional choice at 1993 is correct, yes. If that third choice is correct, then incriminate to criminate - - -

HER HONOUR: Means nothing.

MR NEKVAPIL: - - - didn't matter. It just meant self-incriminate.

HER HONOUR: Yes.

MR NEKVAPIL: If it's the second choice, then we say the changes both to incriminate to criminate in subs (1) and also subs (3) with its reference to civil proceedings and tribunal proceedings, et cetera, should be taken to pick up and deal with penalty privilege.

HER HONOUR: Yes.

MR NEKVAPIL: But your Honour is quite right.

HER HONOUR: But on your first – your preferred interpretation, it doesn't – it's just an accident. It doesn't mean anything.

MR NEKVAPIL: Yes. It may have been modelled as you were told yesterday on the WA provision, but it didn't relevantly – and where I'll come to is, we say there's no discernible object, purpose, intention by parliament which would explain a decision to move from members of the police force just have to answer questions regardless of whether they might be disciplined, to suddenly, after 2002, members of the police force can obtain a certificate, which means relevantly, that they might give all sorts of evidence under oath, which is then in the public domain, because it's an important principle in the Act that these things are done in public. A report's tabled in parliament. The conduct of the police officers may arise entirely from their oral testimony.

And then you have, what we would submit, is an untenable situation, where the Coroner has made findings and recommendations concerning the conduct of this police officer. The whole function of those recommendations, is to ensure similar things don't happen again. Let's say the Coroner might make a single recommendation, this person should be removed from the police force, and yet the Commissioner can't do anything about it. Because the member just produces a certificate - - -

HER HONOUR: Well that's really not the case is it. It's only direct use that's protected under s 38(3) of the Attorney-General - - -

MR NEKVAPIL: Yes.

HER HONOUR: - - - construction is correct. The whole idea of being able to look at a line of enquiry, getting other evidence, as a result of the answer having been given, that's not precluded is it?

MR NEKVAPIL: No.

HER HONOUR: You know, if it – it's not just that – you don't look at that answer in isolation do you? You look at all of the evidence that will have come out of a Coronial inquest, and you say, well that is not able to be used as an admission against that particular – that particular answer cannot be used as an admission against that particular police officer. But all of this evidence may well lead to you know, a further investigation, or what have you, and exactly the result that you have said can't be arrived at, could be arrived at.

MR NEKVAPIL: It may be in some cases, that the evidence is objective evidence in documents from camera footage, these days, but although in 1993 it would have been a bit different, et cetera. But, there will also be cases which is where this will become most acute(?), where the only person who knows what happened is the police officer - - -

HER HONOUR: Yes.

MR NEKVAPIL: - - - and their oral testimony will be the account of what happened. And your Honour, dealing only - - -

HER HONOUR: But - - -

MR NEKVAPIL: - - - with the third construction, what we're talking about is the lack of any indication with the amending Act, of a move from the police officer just needing to answer the questions, and having no protection, to suddenly having such a protection, which would introduce this in congruity. So if we were starting from a blank slate, that may not be as persuasive. But it's – it's the notion that one would move from no protection, to a protection introducing that incongruity, which we rely on.

HER HONOUR: Yes, I do follow the point.

MR NEKVAPIL: Thank you, your Honour. So your Honour, I think, even though it's dealt with at the end of the – in the structure of our written submission, it's probably best for me to just begin with the principle of legality - - -

HER HONOUR: Yes.

MR NEKVAPIL: - - - because that's really what our learned friend – our learned friends for the plaintiffs, rely on most correctly.

HER HONOUR: Well I think the Attorney-General has made some – has made submissions about that, and taken me to the relevant parts in those particular cases, which would seem to indicate fairly clearly that if, you know one follows Daniels v Rich, that penalty privilege has a lessor status, and does not – the principle of legality simply doesn't apply. It's just normal statutory construction principles.

MR NEKVAPIL: Yes. And I - - -

HER HONOUR: I think that's been pretty well covered, both by counsel for the Attorney-General, and by Dr Freckelton.

MR NEKVAPIL: Yes. And I certainly don't wish to revisit any of that or those cases.

HER HONOUR: Yes.

MR NEKVAPIL: I do just want to make a point about the development of the principle.

HER HONOUR: Yes.

MR NEKVAPIL: Because I think in a sense, explains why there's an apparent incongruity between Daniels and Pyneboard, which in fact is not an incongruity at all.

HER HONOUR: Okay.

MR NEKVAPIL: So – and if I pontificate for 15 minutes, and it's of no assistance, then your Honour - - -

HER HONOUR: No please – I wasn't attempting to cut you off.

MR NEKVAPIL: Now - - -

HER HONOUR: Hang on, you're saying there's no incongruity between Pyneboard and Daniels.

MR NEKVAPIL: When one understands the development of the principle of legality.

HER HONOUR: Okay.

MR NEKVAPIL: Because the point that we wish to make is that when your Honour comes to construe the *Coroners Act* in 1993, you'll apply the common law principles of interpretation, as we understand them today.

HER HONOUR: Mm mm.

MR NEKVAPIL: And as we know, even with the general principles, there's a sort of oscillation from Project Blue Sky, Alcan(?) things move back and forward a bit. But with the principle of legalities, it has distinctly evolved, it's been traced in judgements and learned articles. But I can summarise it by saying that the modern re-emergence of the principle of legality began with the Mason Court in about 1987, in *Re Boulton; ex parte Beane* [1987] 162 CLR 514. And developing over roughly a seven year period to *Coco v The Queen* (1994) 179 CLR 427.

And so the point I want to make is that the earliest of those cases, Re Boulton was decided five years after Pyneboard. And that needs to be borne in mind when your Honour comes to the reference in Pyneboard at page 341. I don't need to take your Honour there, Mr Doyle took your Honour to it yesterday. There's a reference to Professor Pearce's then very recent second edition of Statutory Interpretation in Australia, which discussed a principle concerning common law rights.

But at that stage, the principle of legality had not yet developed, either in the strength of the principle, the irresistible clearness type notion, which took hold from about 1987, by reference to Potter v Minahan.

HER HONOUR: So you say, that the criticism in Daniels that the plurality in Pyneboard didn't, you know, take account of Potter v Minahan was a bit ripe, given that it'd not been decided at the time.

MR NEKVAPIL: That is – that is exactly where I was coming to. It was an anachronism, because what - - -

HER HONOUR: Okay.

MR NEKVAPIL: - - - both plurality and Brennan J was doing, was just applying the normal principles of statutory interpretation, into which mix, text, context, purpose, common law rights, it just went into the mix. But then with the Mason Court, and through to the French Court, you got this monolithic irresistible clearness principle. But the corollary of that, which you see in Daniels, is it's just going to break statutes if you have such a binary principles, and then you include every common law right.

HER HONOUR: Yes.

MR NEKVAPIL: Because there's so many weird, weak - - -

HER HONOUR: So as you say, with the development of the principle of legality, there was a sort of necessary shrinkage of the kinds of rights that it applies to.

MR NEKVAPIL: Exactly. And so then it was confined to the class of fundamental substantive common law rights and freedoms.

HER HONOUR: Yes.

MR NEKVAPIL: Which is what – which is why in Daniels, they reinterpreted Pyneboard. So in fact, even though their Honours, with respect, were critical of Brennan J for not referring to Potter v Minahan. Potter v Minahan hadn't been dug back out of Maxwell's Interpretations of Statutes, until five years later. So – so really, there was never a point, where – where my learned friend Mr Doyle's proposition at page 13 of the transcript, that the High Court has recognised penalty privilege to be a distinct privilege attracting the principle of legality, that's never been the case.

It actually was first of all, the weaker principle, then – and what's happened since, in our submission, if I could just take your Honour to do this in a brief way, to our written submissions. Which - - -

HER HONOUR: Just let me find them - - -

MR NEKVAPIL: - - - I'll just have to find as well. And it's – it's at page 18 of our written submissions, where we deal with the principle of legality and we have quoted here from a decision of Edelman J, *Deputy Commissioner of Taxation v Shi*, which is very recent. And his Honour footnotes a couple of cases including at most three judges, one of which was him.

So I can't say this is a universal position but it does represent, since the zenith of the principal of legality in about 2010/2011/2012 with the French court, a refinement and I'd say a more nuanced approach to it in recent times and what his Honour said, it's not a binary rule of interpretation, it is based upon common expectations of justice that the more that an interpretation would result in impairments of rights or freedoms and the more fundamental those rights or freedoms, the less likely it is that Parliament could have intended such a consequence - it is much more nuanced and in fact, that's the sort of exercise I would submit Brennan J was attempting - and the plurality was attempting in Pyneboard because they hadn't encountered this binary principle yet.

And you see it again in par 63 in R - "R", it was an unfortunate pseudonym v Independent Broad-based Anti-Corruption Commissioner where the plurality in that case - and it was about - there was this attempt to extend what is known as the "companion principle" that you shouldn't be compulsorily examining people when they might be charged, to circumstances where there was no hint of a charge and so, if you like, it was partly the case was dealt with on the basis that you couldn't extent it that far but, if you like, it was an example of a weaker principle, like penalty privilege and what their Honours said is the appellants in that case, Proposed Construction, would deny the IBAC - we say the Coroner - access to precisely the kind of information about matters of grave public interest that may bear upon the discharged of its functions, from the very people who are likely to have that information and who may be the only people who do. This would tend to frustrate the statutory objective.

HER HONOUR: But s 38 doesn't do that, does it? Section 38 enables the Coroner - if it is important in that respect - to obtain that information with a certificate.

MR NEKVAPIL: And s 38 is convenient, if one takes the compilation as at today, but the reason we start in 1993 is we say that your Honour first needs to decide did penalty privilege exist, was it recognised at a time where the certificate didn't provide a convenient answer and if your Honour says, "No, it didn't", which we would urge on your Honour, then - and we will come to this in a moment, when you get to the amending Act, the mischief just doesn't touch it and therefore, all s 38 does is provide a nuance discretionary abrogation of self-incrimination privilege but penalty privilege just goes on being irrelevant.

HER HONOUR: Say that again? Just because I was kind of following the first part of your argument in my head while you were saying the second part. So, if s 38 as originally enacted, did not apply to penalty privilege?

MR NEKVAPIL: Penalty privilege. And, if penalty privilege was not otherwise an excuse - - -

HER HONOUR: And, yes.

MR NEKVAPIL: By presumption/implication, however you want to put it, if it wasn't silently an excuse.

HER HONOUR: Yes.

MR NEKVAPIL: Viably an excuse, then - and I will come to this - when you get to the amending Act it just doesn't touch the position because the mischief, which is the Coroner being prevented from getting at the truth, just never engages with penalty privilege.

HER HONOUR: So the amending Act doesn't address the mischief in the - you know, identified in the second reading speech and the report of the Law Reform Committee?

MR NEKVAPIL: We say it does address the mischief because it changes s 38 and self-incrimination.

HER HONOUR: But it doesn't address the mischief in relation to - well the - at the - - -

MR NEKVAPIL: There is no mischief for penalty privilege.

HER HONOUR: Yes.

MR NEKVAPIL: Because it never got in the way of the truth because it was never available.

HER HONOUR: Wait a minute. Yes.

MR NEKVAPIL: So that if - - -

HER HONOUR: Well, the - and yet the second reading speech and the law reform committee report actually appears to be directed directly to the penalty of privileged situations, you know, people who were refusing to answer, not because of self-incrimination but because they feared consequences in either civil proceedings or disciplinary proceedings.

MR NEKVAPIL: Yes. Now, what we say about that is when your Honour looks at the second reading speech, the example given was the two men with a woman's body in the riverbed who refused on self-incrimination.

HER HONOUR: Yes.

MR NEKVAPIL: That was the example given.

HER HONOUR: Yes.

MR NEKVAPIL: And that, obviously, formed part of the mischief.

HER HONOUR: Yes.

MR NEKVAPIL: Right. But then they refer to medical practitioners.

HER HONOUR: Yes.

MR NEKVAPIL: It may be that Mr Austin, AC KC when he spoke to Mr Cavanagh at the Parap Saturday Market, might have speculated about medical practitioners. It may even be that a clever lawyer had taken a point for a medical practitioner and it had been accepted but as a matter of law, we say, applying the common law as understood now, we would say your Honour would construe the Act from 1993 as not protecting penalty privilege and if Parliament enacts something on a mistaken understanding and the Attorney-general's submissions give your Honour some authorities on this, the mistake can't somehow metamorphosise into the law.

HER HONOUR: No.

MR NEKVAPIL: And so we would say that the object of the amending Act was still achieved because the - - -

HER HONOUR: It's in relation to self-incrimination.

MR NEKVAPIL: In relation to every legally available excuse, which was self-incrimination because penalty privilege was never available at all. So it got rid of self-incrimination which was available. Penalty privilege never was available and therefore it achieved its object.

HER HONOUR: But, if the mistake was an assumption that penalty privilege was available when it wasn't, then it still may have been the legislative intention to abrogate that to a limited extent in s 38, in which case the actual effect, given that, you know, the mistake can't metamorphose into the law, the actual effect would have been to both confer and abrogate, if you like, so confer a qualified penalty privilege.

They might have thought that they were abrogating, partially, an existing privilege that wasn't there but the effect then may have been, "Well, to confer a qualified penalty provision.

MR NEKVAPIL: We say the conferral would be exactly picking up the mistake, so that the conferral, if there was one, was on the mistaken assumption that it existed.

HER HONOUR: Yes.

MR NEKVAPIL: And we say that that - because of course, we are not looking at the subjective intention of the drafter where you have there - - -

HER HONOUR: No.

MR NEKVAPIL: And so, looking at it objectively, one has to, in a sense, perhaps wrongly assume that Parliament understood the effect of the law and one can't look - and this is in Bell, but I don't need to take your Honour there because your Honour knows it, is the - one can't look at the second reading speech and extrinsic material to detect the text of the Act - - -

HER HONOUR: No.

MR NEKVAPIL: - - - but only for the mischief.

HER HONOUR: Yes?

MR NEKVAPIL: Now, the mischief was to remove every legally available - - -

HER HONOUR: Yes.

MR NEKVAPIL: - - - and we say it wasn't legally available, and therefore it wasn't engaged.

HER HONOUR: Yes, but that - I'm not sure that actually follow. If the mischief was to remove - if the mischief was legally available privileges that they wished to partially abrogate and they thought that, you know, there was a mistake and assumption on the part of whoever, that penalty privilege was one of them.

If they enacted a provision which, on its proper construction, did refer to penalty privilege then that's what it says. It doesn't matter that there – that it was based on a mistaken assumption as to the state of the existing law, does it? If it – supposing it explicitly referred to penalty privilege, then - - -

MR NEKVAPIL: Yes, I accept that.

HER HONOUR: - - - that's what it means.

MR NEKVAPIL: I accept that.

HER HONOUR: Okay, then you go to the next step. If it impliedly refers to penalty privilege on its proper construction, same thing.

MR NEKVAPIL: I accept that as well, your Honour. But what we say is the only way of moving from a pre-amendment s 38, which only dealt with self-incrimination to a post-amendment s 38, which impliedly conferred penalty.

HER HONOUR: A limited form of - - -

MR NEKVAPIL: A limited form.

HER HONOUR: Well, qualified form - - -

MR NEKVAPIL: Qualified.

HER HONOUR: - - - of penalty privilege.

MR NEKVAPIL: With a certificate - - -

HER HONOUR: Yes.

MR NEKVAPIL: - - - form a penalty privilege, is to do what's impermissible, which is to look into the second reading speech and say, they mistakenly thought that there was a legally available penalty privilege.

HER HONOUR: Is that the only way or should – can't you – I mean, because if you're construing the words of s 38 in the whole context of the – well, just talk about the context of the whole section, then the use of the word "criminate" instead of "incriminate" and the extended range of bodies in which the protection applies in s 38(3) are textual indicators, are they not, from which you could imply an intention to include penalty privilege within s 38(1) without going to the second reading speech.

MR NEKVAPIL: We would say, and here in a funny sort of way, we join a bit with Constable Rolfe.

HER HONOUR: Yes.

MR NEKVAPIL: We would say that, without some purpose, without some identifiable object, you wouldn't read the shift from incriminate to criminate as, in effect, providing additional protection to police officers. You wouldn't read – because it's not an obvious textual indication, you wouldn't – the subs (3) doesn't, for reasons identified by Mr Doyle yesterday, precisely correspond.

HER HONOUR: No, it doesn't, but they're textual indicators, are they not?

MR NEKVAPIL: Well, only because your Honour knows about the second reading speech and the Law Reform Commission, and therefore one is tempted to say, well I know what they thought and I'm trying to find it in the text.

But if your Honour looks at what parliament should be taken to have understood,

it should be taken to have understood, if I construction pre-then is accepted, that penalty privilege didn't apply and there's no ascertainable object as to why they would want to protect police officers who may have done the wrong thing, who it may be in the public interest as manifestly in the *Police Administration Act*, for those persons to be sanctioned to have some protection that they didn't have before.

HER HONOUR: Well, isn't there – I mean, firstly, it doesn't just apply to police officers, does it? It applies to everybody. And secondly, if you're looking at the position of police officers only - - -

MR NEKVAPIL: Yes.

HER HONOUR: - - - then there may well be a thought that, look the police officers are pretty much obliged to answer everything under the *Police Administration Act*, so what – you know, you don't need to preserve that position in the *Coroners Act* in order to have police officers subject to discipline, because there it is, you know.

All of those provisions that are in, I think, the Attorney-General's written submissions. They're in somebody's written submissions anyway that point out that, really, police officers have very little protection against self-incrimination, if you like because of those provisions *Police Administration Act.*

MR NEKVAPIL: That's true once one gets to the *Police Administration Act.* The difficulty is the step. I understand there's no derivative use immunity, but if – I'm sorry, if I can come back one step. They referred in the second reading speech which we say your Honour should look at, in effect, if our third construction is correct, to medical practitioners.

There is no indication that police officers were actually taking such a privilege. It is different for police officers because, coming out of the Royal Commission, the fundamental recommendations concerned a dead in the custody or control of a police officer or from injury in the custody or control of a police officer.

And when one looks at s 76, which was in – had equivalently very broad matters at the time the *Coroners Act* was enacted in 1993, the proposition at that time that a police officer could simply refuse to answer a question on the basis that, for example, it might show negligence or any of those very broad matters in 76 - - -

HER HONOUR: Yes.

MR NEKVAPIL: - - - would have fundamentally undermined the duty of the Coroner under s 15(1)(a) and (b) and s 26(1) and (2).

HER HONOUR: Yes.

MR NEKVAPIL: So, that at that time, we say the (inaudible) purpose speak powerfully against recognising it.

HER HONOUR: Yes.

MR NEKVAPIL: And we say that then, if that's the position, then one really can't identify any purpose that is consistent, either with the articulated mischief for the amending Act, or the overall purpose and object of the *Coroners Act* for introducing a protection whereby a police officer can even claim a certificate.

HER HONOUR: That makes some logical sense if this provision were directed specifically to police officers, but it's not. It's directed to witnesses and obviously, the second reading speech that I'm not supposed to look at includes, as direct reference, to medical practitioners and that sort of thing. And then it may be that there was at least a perceived mischief.

MR NEKVAPIL: When one looks at the second reading speech one shouldn't look at, one sees that the only reason for referring to that was an understanding that that was a legally available claim, so that the only object, even on the subjective intent of the drafter, is to get at the truth. There is no clue anywhere of an object of providing an additional protection which wasn't currently available. It is necessary now - - -

HER HONOUR: So, okay. So, there's no indication of an additional object to provide protection that was not then available.

MR NEKVAPIL: That was not previously available. And it's important to look at police officers - - -

HER HONOUR: Well, that's right, isn't it.

MR NEKVAPIL: - - - because it's a convenient argument to say, look it's got to be everyone. But police officers are engaged in a very different way because of the primary object of the 1993 Act, which is to get to the truth of why people were dying in custody.

HER HONOUR: Yes.

MR NEKVAPIL: And so, to adopt a construction on the basis of medical practitioners which then has the effect of excluding police officers, is really the tail wagging the dog. In our respectful submission, as at 1993, and applying that more nuanced approach stated by Edelman J, one would say a claim that I don't have to answer this question because I'm a police member, and it will fall in s 76, does fall within the general rubric. See Morris, which is also two years before the development of the principle of legality.

It does raise that sort of common law privilege spectre. And I can have regard to the fact that it's on oath, but the fact that the Coroner's not entirely juridical, it's not adversarial. All those things can go in the mix. But then when I look at the object, which is to have a brand new act, which will get at the truth, make recommendations, and these are express recommendations of the Royal Commission, which as we've set out in our written submissions, are the precise and primary object of s 26, make

recommendations to the executive, to the responsible minister, who will then take action, to ensure these things don't happen again.

The proposition that a police officer could just refuse to answer on the basis that this will fall in s 76, just doesn't work. And when one comes to the amending Act, it's just, in our submission, not at all clear, why – not that it's not clear. It might have said so. It might have said we think police officers need more protection. But it's not – it – without that, and having regard to the objects of both the *Coroners Act* and the *Police Administration Act*, both of which surely would want the Coroner to be able to get to the bottom of things, and the police officer to be, in the exercise of the protective jurisdictions, not a penal jurisdiction, it's a protective jurisdiction under Pt IV *Police Administration Act.*

It's coherent to the objects of both acts, that you would continue with there being no penalty privilege. That the police officers answer the questions in the Coronial inquest, so the Coroner can get to the bottom of it, and make recommendations. And then, if as a result of those recommendations, or if just because the Commissioner looks at the evidence in the inquest and says, we can't have this person continue in the police force, they can then use that material. That – so perhaps if I can – I've become quite excitable there, your Honour. And perhaps if I can go back to my speaking notes, and just see where I'm up to.

But I've probably covered most of it.

HER HONOUR: That's your strongest point though, isn't it, and that is, that the object, with the Second Reading Speeches, and what have you, the extrinsic material available for both – well for the 1993 Act, very clear. Get at the truth, particularly in relation to Deaths in Custody, and then the 19 – it's in the 2002 amendments, the extrinsic material, you know, pointing to a need to get at the truth to remove impediments to obtaining evidence. And not a hint of an indication of that there being an additional objective to provide a protection that was not previously there, to – well, police officers, or any witnesses really, who might be subject to disciplinary proceedings.

Like a doctor being struck off, or whatever.

MR NEKVAPIL: Exactly. Yes. But perhaps I'd better just address the last part of my speaking notes, your Honour, because I - - -

HER HONOUR: Yes, of course.

MR NEKVAPIL: - - - do just want to go through, in a sense, revisiting those constructional choices - - -

HER HONOUR: Yes.

MR NEKVAPIL: - - - of the enacting Act, as enacted. If your Honour accepts that the *Coroners Act* never did excuse a member of the police force from compliance with s 41(3), and your Honour focuses on s 41(3) - - -

HER HONOUR: Except for to the extent conferred by - - -

MR NEKVAPIL: - - - by s 38, yes.

HER HONOUR: - - - s 38, as originally enacted.

MR NEKVAPIL: Yes. There was no implied - - -

HER HONOUR: No.

MR NEKVAPIL: - - - carve out for the penalty privilege. There's no basis, in the rules of statutory interpretation, for – by the addition of subject to s 38 in 41(1)(c), to construe it as now providing the additional protection that's the one I've just (inaudible) - - -

HER HONOUR: No, it – that wouldn't go to – no. But it's the words of section – the Attorney-General relies on the words, or the text of s 38 itself - - -

MR NEKVAPIL: Yes.

HER HONOUR: - - - for that.

MR NEKVAPIL: The Attorney-General, with respect to our learned friends, starts from the Act, as of today - - -

HER HONOUR: Mm mm.

MR NEKVAPIL: - - - and says, well you know, look at this, it all makes sense - - -

HER HONOUR: Which it does.

MR NEKVAPIL: - - - and he looks at the amending act, yes, but we say that really, I suppose our argument points out that unless you've worked out what existed beforehand, you may not get there.

HER HONOUR: Mm mm.

MR NEKVAPIL: And so what we say is that – excuse me, your Honour. So yes, just returning to where I started. If the court were to conclude that before the amendment, penalty privilege was, by implication, silently excluded, then one would - - -

HER HONOUR: You mean by implication in s 38, as it was originally enacted, in other words, that tend to incriminate should – would be construed so broadly as to include penalty privilege as well?

MR NEKVAPIL: Yes. Either that, or even silently, by the operation of – your Honour's heard this debate about does one have to start with the Act and imply it in, or – but on – in our submission, because of once one understands the development, it's really the same exercise. It's just semantics. Because once the common law right's just in the mix, you're doing an exercise of construction.

HER HONOUR: Yes.

MR NEKVAPIL: You just look at the text context and purpose, with the common law right in the mix, and it doesn't really matter whether you start with the right, or start with the text, you're doing the same exercise. If, on that exercise, you would say either it's in s 38, then it's obviously been amended. But even if you said, somewhere else in the Act, by an implication, and implication from this common law right into 41(3), for example. Which is in effect what our learned friends for Constable Rolfe contend for, that it was in there by operation of the principle of legality, then we say the amendments in 2002 would pick it up and abrogate – partially abrogate it by the certificate.

Because then it does form part of the mischief. It is as a matter of law, getting in the way. So that whether it's expressly in s 38 beforehand, or whether it's implied into the fabric of the Act by reference to the common law right, the mischief to which the amending Act is directed, picks it up into s 38.

HER HONOUR: Yes.

MR NEKVAPIL: It's only on our third construction, if it doesn't do that, that there's a mistake, and it never gets engaged. So that's the critical point where we depart from our learned friends for the second plaintiff.

HER HONOUR: Yes.

MR NEKVAPIL: Is – is that we say their construction must fail for the reasons the Attorney-General has pointed out.

HER HONOUR: Yes.

MR NEKVAPIL: But on ours, you never get there.

HER HONOUR: Yes. I'm still trying to exercise my mind around the concept that – of – well, assuming there was a mistake, if the text, by implication, if you can imply into the text without – if in context, the text of s 38 appears to pick up penalty privilege, then it does. And the fact that it might have been enacted on a mistaken assumption that penalty privilege was available beforehand, well is neither here nor there, is it?

MR NEKVAPIL: We would agree with what your Honour said a bit earlier that – and starting at the easiest proposition, if it's expressed - - -

HER HONOUR: Yes.

MR NEKVAPIL: - - - if it says, this includes incrimination and - - -

HER HONOUR: Penalty privilege, then we're in, yes.

MR NEKVAPIL: - - - civil penalty, we're in. I suppose really the only – it's not that I quibble with your Honour's proposition, but it's what your Honour means by "If it appears", and we say that there's no purpose, your Honour's understood that point?

HER HONOUR: I have understood that point.

MR NEKVAPIL: We say the text is not clear. The use of criminate as opposed to incriminate hardly - - -

HER HONOUR: No.

MR NEKVAPIL: - - - expresses it clearly. Subsection (3) - - -

HER HONOUR: Section 3 is a bit more of a problem, isn't it?

MR NEKVAPIL: Well, we say it's actually – and our learned friend for Constable Rolfe pointed this out to your Honour, it is actually a not uncommon drafting technique to provide a certificate for self-incrimination which then means the evidence can't be used in civil proceedings or other tribunals.

And there are at least two ways you can understand that. One is that, in effect, the evidence which is incriminating just should be cordoned off and can't be used against you in any of those forums.

The second is that if it could be used, it could in effect be recycled into a direct use; that is, let's say one makes a confession in the Coronial inquest and then you're sued – say it's a doctor.

HER HONOUR: Yes.

MR NEKVAPIL: They say, yes, actually I wasn't paying attention.

HER HONOUR: Yes.

MR NEKVAPIL: And then they're sued in a civil proceeding.

HER HONOUR: Yes.

MR NEKVAPIL: And the evidence comes out again, then the DPP can just pick up the evidence as used in the civil proceeding and prosecute on it.

HER HONOUR: So, it has a purpose.

MR NEKVAPIL: It has a purpose, yes.

HER HONOUR: Even if it only refers to criminal matters.

MR NEKVAPIL: Yes. It, in effect, provides a protection that's not so fragile that the moment you get out and someone sues you, you lose it.

HER HONOUR: Yes, I see.

MR NEKVAPIL: And that's, I think, the effect of the submissions that Mr Doyle was making, showing your Honour some of those other ones in appendix B, I think it was. So, if subs (1) said something more express and if subs (3) was tailored to, for example, disciplinary proceedings or somehow a clearer indication wasn't proving too much to pick up our learned friend's submission.

Then your Honour might say, even though I can't see any purpose for it, perhaps the – yes, that's it. Yes, it may have been discussions with the Police Association and they said – I mean, these things can happen. They said, well actually while you're at it, why don't you provide us a protection and parliament can do that.

There's no indication. That's working out what should parliament be taken to have intended. It's just – there's a sole object which is getting at the truth and that's - - -

HER HONOUR: I follow that, yes.

MR NEKVAPIL: Your Honour, I do also have, and I just want to take your Honour to it, that one case that's still in the folder. This is on the international law file.

HER HONOUR: I don't think I have it. It's not in – no.

MR NEKVAPIL: Perhaps I could just give your Honour some references.

HER HONOUR: Yes, please.

MR NEKVAPIL: If your Honour - - -

HER HONOUR: Just if you can give me the citation and then the references.

MR NEKVAPIL: I'll just it in context with our written submissions, if I could.

HER HONOUR: Yes, where am I looking?

MR NEKVAPIL: It's in – it's at page 15 and at par 49, we set out that the purpose which we derive from the Royal Commission into Aboriginal deaths in custody is also supported by the principle that a statute should be construed, so far as its language permits, to be consistent with established rules of international law.

HER HONOUR: Yes.

MR NEKVAPIL: And we've given your Honour at par 40 the reference to the final report by Commissioner Johnston where the reference where he refers to a paper that the Royal Commission had done which showed a deep coherence between what he was recommending Coroners should do and the principle of international law to which I'm about to refer your Honour.

HER HONOUR: Yes.

MR NEKVAPIL: Which was quite, with respect, purposicious (sic), if that's a word.

HER HONOUR: Perspicacious.

MR NEKVAPIL: Perspicacious for the Commissioner in 1991 because it was very much a developing area.

HER HONOUR: Yes.

MR NEKVAPIL: But it's now very well developed and it's the principle – if your Honour looks at pars 51 and 52 of our written submissions, these are articles 6 and 2 of the ICCPR, article 6 is the protection of the right to life.

It requires Australia, which because it's a confederation includes the states and territories to protect the right to life, which includes through its agents, including police officers, that international law is not either directly harming people, or when people are in the care of police, looking after them.

And then, article 2 which imposes obligations on Australia, those two read together impose on Australia an obligation where a person dies in police custody, to have – to hold an effective investigation. And that's set out quite recently, only four years ago, in a general comment by the Human Rights Committee, which we've given your Honour.

I won't take your Honour – it's summarised in pars 53 and 54 of the written submissions, and it explains by reference to a whole lot of decisions by the Human Rights Committee, the content of the obligation and it coheres in many respects with the recommendations made by Commissioner Johnston, although of course, this is not concerned with Aboriginal deaths in custody, this is any death in custody.

And in that sense, it aligns with the scope of the *Coroners Act.* Then, your Honour, the case is the one in footnote 39, *Morahan v West London Assistant Coroner* [2021] Queen's Bench 1205.

HER HONOUR: Yes.

MR NEKVAPIL: And it think it's Popplewell LJ gave this summary which has since been said to be a very good one of the different principles which arise, but in subpar (3) as there set out, there is an investigative duty to enquire into and explain the circumstances of a death.

I'm sorry, I should start at subpar (1):

> "There is a negative duty to refrain from taking life without justification. This arises not only at a state level, but more commonly in practice, at an operational level and includes cases where an individual dies at the hands of an agent of the state, such as a police shooting."

So, that's a sort of more direct duty not to take life and then subpar (3), there is an investigative duty to enquire into and explain the circumstances of a death. As I explained below, there are two different investigative duties which have a different scope and different juridical basis.

One is a substantive duty to investigate every death as an aspect of the framework duty and that's that the general obligation of police to go around and investigate and charge people with appropriate crimes and so on.

The other is a procedural obligation which arises only in some cases and is parasitic on the possibility of a breach by a state agent of one of the substantive operational or systems duties. When the latter arises, it is a duty of enhanced investigation to initial an effective public investigation by an independent official body.

And if I could just give your Honour then some key references in – there's quite a lengthy but very learned discussion in that decision. At par 70, her Honour summarised some of the key cases in the UK which show that a Coroner's investigation is the key mechanism by which that enhanced investigative duty is carried out.

Paragraph 74, I'll just refer your Honour to par 74, par 77 and I think they're the key ones, but there's a discussion for about 100 paragraphs. So, we say that that is a very important obligation of Australia and therefore of the Territory, that it is carried out or implemented by the enactment of the *Coroners Act*.

But the construction of the Act as enacted in 1993, which would allow police officers who are the very people who have the information to refuse to give answers would be inconsistent with that duty and therefore that supports that first constructional part of our case.

HER HONOUR: Thank you.

MR NEKVAPIL: If the court pleases, those are out submissions.

HER HONOUR: Yes, thank you Mr Nekvapil. And now I think that Mr Boe, is that?

MR BOE: I think I am on mut still am I? Can your Honour hear me now?

HER HONOUR: Yes, I can now.

MR BOE: Thank you, your Honour. We will be about five minutes, your Honour.

We expect that any oral submissions in relation to substantive matter before your Honour will not be of much use, so we are not going to expand on our written submissions on the substantive points.

I do want to remove a distraction and withdraw our faulty reliant on Herron at par 12 of our submissions, for the reasons indicated by Mr Doyle yesterday. The fault was entirely mine, I had mis-read it and despite prompts from at least one of my juniors, didn't correct it, so I apologise for that.

The one point that we wish to take up, your Honour, is one that just fell for discussion just when Mr Nekvapil was submitting as to the relevance of s 79A. I am mindful that when Mr Game raised that section with your Honour yesterday, your Honour correctly pointed out that that issue is mor relevant to the Coroner's job in the event that the intervener's interpretation of s 38 estopped it but May I just persist with one aspect of it, and it is a practical one, and I make it because the families' interest is to get on with the process of assembling the evidence because it has been quite a long time since the events in question, and we raise it on this point.

The two plaintiffs who are seeking the particular declarations are, in fact, people who are subject to the *Police Administration Act* and the s 79A procedure.

Our contention is this, that these declarations are completely hypothetical unless there is a real prospect that the privilege against exposure to a disciplinary penalty would actually be available to the plaintiffs. In our submission the privilege is not available unless the witness' answer would increase their risk of being exposed to such a penalty and we've got a reference in our submissions to what Ashley JA wrote in *Gemmell,* and our Honour will see that in par 14 of our submissions.

In the case of the present plaintiffs, as I said, are members of the Northern Territory Police Force and requires consideration now as to whether the declaration sought should be made. That section - that is s 79A - requires a member of the Northern Territory Police Force to answer questions et cetera, as your Honour knows, from how and how that provision works.

Now, any answers or information provided can be used against a member in those proceedings. In those circumstances, answering a question before the Coroner cannot increase a member's jeopardy of a disciplinary penalty, in the case of Bauwens - Sergeant Bauwens, he has already been discipline and he has not

sought, yet, and bearing in mind s 41 directions have not been given, et cetera, and Constable Rolfe, as your Honour knows from Dr Freckelton's material, has already been through many disciplinary investigations on various topics. So, in our submission, your Honour could take into account that the state of the material before your Honour is such that the declarations being sought by these plaintiffs are completely hypothetical.

Alternatively, and that is why, in par 18 of our written submission we suggested an alternative declaration because in circumstances where the plaintiffs appear to be proceeding on the basis that they are entitled to claim the privilege, it is appropriate for this court to address a s 79 issue and make - consider making - the declaration we seek. We are concerned - very concerned - that if the Attorney-General and other interveners' position is, in fact, accepted by your Honour, that we are likely to be back before the court because of a disagreement about whether or not these two members can, in fact, claim the privilege. So that is why to make sure that we were not wasting more time in this inquest, that your Honour consider making the declaration that we have drafted in par 18.

HER HONOUR: The difficulty with that, Mr Boe, is that there has not been a full - so the evidence in relation to whether or not these officers would be entitled to claim the privilege in the circumstances, simply isn't before me and really, there is no originating process from your clients, seeking any such a declaration. It is really - this is really a matter for the Coroner to consider, is it not?

MR BOE: It is, of course, and I take into account the procedural difficulties as we mentioned but if your Honour is willing to at least make some comment about that it may assist the parties to consider the position so that these disruptions, they are entitled to make these applications, don't result in this inquest going off the rails, as it were, with its current timetable - which it already has.

HER HONOUR: Yes. Yes, thank you for that.

MR BOE: Thank you, your Honour.

HER HONOUR: And then are you going to take a reply, Mr Doyle?

MR DOYLE KC: If I may, your Honour.

HER HONOUR: Yes.

MR DOYLE: Might I just deal with first with the very last set of submissions. We would submit that the parties for whom my learned friend, Mr Boe, appears, have not filed any originating process.

HER HONOUR: No. I don't think I need to hear you further on that.

MR DOYLE: I just was going to say I haven't tendered a whole range of materials that could be relevant to that matter and - - -

HER HONOUR: Well, it's not really a matter that is properly before this court on this application.

MR DOYLE: Thank you, your Honour. Might I make some submissions in response to the Attorney-General's submissions?

HER HONOUR: Yes.

MR DOYLE: My learned friend, Mr Game, said at transcript 67 that Coronial proceedings aren't relevantly curial proceedings and he said in the context of having pleadings discovery et cetera, even though a Coroner has to act judicially, the authorities in this area don't, it's true, identify with precision what the defining feature of judicial proceedings is or what is relevantly a curial context for the purposes of this distinction.

We would submit it's not really to do with having pleadings or discovery. Pleadings or discovery are processes that give occasion for a claim of privilege - compulsory processes, but they are not the reason for it and they are really a manifestation of the privilege or the right. Indeed, the examiner - the analysis in cases such as Pyneboard talks about examination on oath as the paradigm case of compulsion and that is, of course, a feature of an inquest.

We would submit that what marks out a proceeding is relevantly curial for these purposes, is the involvement of an independent judicial officer who is involved in the administration of justice not conducting a purely executive function directed towards an executive outcome. As I submitted in-chief, the Coroner exercises judicial power, is engaged in the administration of justice - - -

HER HONOUR: You don't need to repeat those submissions I think, Mr Doyle.

MR DOYLE: My learned friend said at transcript 67 that in the case of Bell it appeared to have been assumed that the proceedings were not curial for the purpose of Bellew J resolving the case. Respectfully, the opposite is so and that is clear from pars 149, 150 and 179 of Bellow J's judgment.

HER HONOUR: 149 to 150 and what was the next one?

MR DOYLE: And 179 and the fact that he said he did not need to resolve whether the privilege was available in a non-curial context. He could hardly have said that but then proceeded to decide the case on the basis that it was non-curial.

HER HONOUR: Yes. All right, thank you.

MR DOYLE: My learned friend referred to s 39 and said it was obviously important because if one lands on the point that these are not substantial rights but at most rules of evidence, then s 39 does away with it.

HER HONOUR: Yes.

MR DOYLE: On no view is penalty privilege merely a rule of evidence. It operates, for example as a bar to discovery and production. Those are not principles of evidence, they are principles about compulsory process.

HER HONOUR: Yes.

MR DOYLE: I would just give your Honour a reference to what Gummow J said in *Propend* (1997) 188 CLR 501.

HER HONOUR: Was his on a list of authorities or do I need to write down the - - -

MR DOYLE: It is on our list at case 20.

HER HONOUR: Okay.

MR DOYLE: At page 566 and 570 where Gummow J said;

> "A privilege is to be characterised as a bar to a compulsory process rather than a rule of inadmissibility."

My learned friend, Ms Edwards, said at transcript 77, that Daniels goes as far as unambiguously stating that the principle of legality does not apply to penalty privilege. Respectfully, that takes par 31 of Daniels Corporation too far. What was said there was simply that no decision of the court holds the penalty privilege operates outside judicial proceedings, much less that it's a substantive rule of law. But the mere fact that the court said there was no authority that it was a substantive rule of law, doesn't mean the principle of legality isn't engaged, particularly within the context of judicial proceedings.

In relation to that, and if I could jump for a moment to my learned friend for NAAJA's submissions. My learned friend gave your Honour a reference to an observation of Edelman J in a recent case of *Shi* [2021] HCA 22 at 98. Could I give your Honour one authority which is one that was referred to by Edelman J in Shi. I'll just show my learned friend. I don't have copies for all of the parties, but it's a decision of the High Court, *Mann v Paterson Constructions* Pty Ltd [2019] 267 CLR 560.

HER HONOUR: Thank you.

MR BOYLE: Your Honour, the context is that the very proposition that my learned friend cites of Edelman J, at par 98 of Shi, in the footnote refers to – to par 159 of the joint judgement in Mann v Patterson. So if I - - -

HER HONOUR: To paragraph what?

MR BOYLE: 159.

HER HONOUR: 159.

MR BOYLE: And if I could ask your Honour to open that up.

HER HONOUR: Yes.

MR BOYLE: Now this is in the joint judgement of three judges who were in the majority. The court said, or the judges said, "It, namely the principle of legality, requires a clear indication of intent to conclude that legislation abrogates common law rights with the required clarity increasing, the more that the rights are fundamental or important."

HER HONOUR: Yes.

MR BOYLE: Now that is, as my learned friend cites, authority for the notion that it is not a purely monolithical binary concept, but it is engaged by the abrogation of a common law right. It's not necessary that there first be a substantive rule of law, or a fundamental common law right before it is engaged. In fact, your Honour will see the footnote that's given for common law rights 243, in fact includes a reference to what the plurality said in Pyneboard at page 341.

HER HONOUR: Yes.

MR BOYLE: It is sufficient then, for our purposes, to characterise penalty privilege, where it operates, as a common law right. And as I put in chief, even the Full Court in Frugtniet, accepted that it had involved – evolved into a common law right, at pars 32, 39 and 47. So - - -

HER HONOUR: Say that again, wait a minute. So that – say that - - -

MR BOYLE: Frugtniet 32, 39, 47. It is enough that it is a common law right, applicable in judicial proceedings. It is true that were it more fundamental, there might be even more clarity required for its abrogation. But we say it is required to be abrogated, and is not required to be implied. And that we say, is exactly the approach that Blue J took in Bell, and for that reason, we respectfully disagree with the submission put by Ms Edwards, at transcript 84, which was to the effect that Blue J wholly applied the reasoning in Pyneboard, which had been disapproved in Daniels and Rich.

Quite the opposite. He said, "I put to one side non-judicial proceedings, but is a common law right and I have to see whether it's abrogated." And that is not touched by Daniels or Rich, in our respectful submission. Could I turn then to my learned friend's submissions on behalf of NAAJA. If your Honour will just give me one moment. My learned friend adopted an approach, as you know, of starting with 1993 and then moving to 2002. And my learned friend said it was the same approach that my client takes. With great respect, we don't suggest that your Honour must proceed in that fashion.

The burden of our submissions was to show that neither, as at 1993, nor at as at 2002, if one starts with a presumption of a common law right, could it be said to have been abrogated. But we - - -

HER HONOUR: You say, sorry, if you start with the presumption of a common law right.

MR DOYLE: Neither, read in the Act - - -

HER HONOUR: I've got that. The common law right then neither the 1993 Act or - - -

MR DOYLE: Nor the Act as - - -

HER HONOUR: - - - the amending Act - - -

MR DOYLE: - - - amended.

HER HONOUR: - - - abrogates the right. Not even s 41?

MR DOYLE: No. And your Honour, because s 41 is picking up the very concept of the juridical examination on oath, which carries with it, we say, an implication of the penalty being available. But I just want to address the very subtle question of the technique of statutory interpretation that my learned friend sought to contend for. Which is a purely sequential approach, albeit, but it was an unusual sequential approach, because it involves taking concepts that we understand now, back to 1993, even though they weren't the understanding of the law in 1993, and then testing what the position was in 2002.

Some of the difficulties that can arise from that kind of approach were referred to be bench of five judges in a South Australian Supreme Court – Full Court decision of *Martin v Electoral Commission* [2017] 127 SASR 362 at pars 218 and 219. It was in a joint judgement of four justices of the Supreme Court. The court deprecated an approach of testing whether an assumption was present at different points, and looking at the marginal effect of statutes through time. And the court did so by reference to what the High Court had said in *Commissioner of Stamps v Telegraph Investment* (1995) 184 CLR 453, at 463. And at 479.

I won't read the full extract to your Honour. But I would invite your Honour to have close regard to it. The proposition is that an amending act is taken to be a re-enactment of the whole act, and one construes the whole act as though it is then enacted. One doesn't construe the act incrementally, albeit, that history is a relevant contextual factor. And par 219 of this decision in Martin, reference is made to a decision of Kourakis CJ in a case of *The Palace Gallery*. And I'll just read your Honour a brief statement from it.

> "The legislative history of a statute is an important aid to its construction, but it's an important principle of statutory construction that the meaning of legislation, as enforced from time to time, must be ascertained from the words of its provisions, in their current statutory context, and so that the statute operates as a coherent whole. The principle of statutory construction, would be subverted if a peace meal, isolated historical construction were given to each provision. Indeed at a practical level, the process of construction would become a herculean task requiring the clearing of moulds of discarded and superseded legislation, accumulated over many years."

This principle might assist your Honour, if your Honour rejects submissions entirely, that is choosing between the Attorney-General's approach - - -

HER HONOUR: Backing up the Attorney-General at this point.

MR DOYLE: Well it also supports our submissions in this way. We simply say, if one asks the question, looking at the Act now, knowing nothing of the history, one starts with the proposition that there is a common law right available in an inquest of penalty privilege, and one asks whether it's been abrogated. We say, s 38 doesn't, because it's concerned with incrimination of privilege survives.

But if your Honour rejected that, it would be very open to your Honour to say, well in deciding whether it's abrogated now, looking at the Act, as it stands today, I can take an intermediate course, consistent with the principle of legality. I can hold that it is only abrogated to the extent that s 38 overrides and a certificate comes with it. It is not as complex as my learned friend makes out that process. One can simply say, I need to find that penalty privilege is displaced, and we say your Honour won't find that, but if your Honour does, you would find it displaced - - -

HER HONOUR: Subject to the certificate.

MR DOYLE: - - - by 38, and consistent with the principle of legality, one would do the least damage to the privilege, and that would be, in that case, to treat criminates capturing the privilege. Your Honour, the other propositions that my learned friend largely turned, as your Honour has observed on viewing this whole question, through the prism of conduct of police, we respectfully submit, that is the wrong prism through which to look at it. And one should, in so far as one's having regards to the provisions of the *Police Administration Act,* we would respectfully submit they have their own mischief and purpose, and they operate on their own terms.

And true it is, that there are broad powers to direct police to answer questions in connection with discipline. And true it is, that various inroads are made in that context and to the privilege. But they're made in a designed and careful way, for example, s 70A, as your Honour has been taken to, is premised upon there being an allegation or a relevant suspicion of a breach of discipline. It is not a holus-bolus removal of the penalty – pardon me, the privilege, either self-incrimination or penalty privilege, it is a calibrated response, where someone within the police force has formed the view that there is a matter warranting investigation.

What one doesn't work from that to say, well we need to make sure we can get to that stage, so we must read the *Coroners Act* as allowing the uncovering of the evidence, so as to facilitate the police discipline. With – in my respectful submission, that is to expand on the careful limits of the *Police Administration Act*, and then throw them into another act, and allow them to drive the meaning of it, we say, illegitimately. Your Honour, I just want to – my learned friend mentioned the case of *R v IBAC*. I just want to very briefly say something about that.

It was a very different case, because the legislation that established the forum in which the question of whether someone could be examined on oath was taken, had as one of its own purposes, dealing with the probity of the conduct of police, that emerges from par 51 of the judgement in IBAC. In other words, a little bit like my submission about the *Trade Practices Act*. The very purpose of the legislation in Ivac involved investigating into corrupt conduct by police. It was hardly surprising, and I say with respect to those who argued otherwise, unsuccessfully, that not only – that in those circumstances, the High Court didn't extend the companion principle in *X7*.

And that's really the ground upon which the appellant lost in *R v IBAC,* because what was being contended for was not the X7 rule, that you can't be examined on oath once you've been charged, but rather an extension, that you can't be examined on oath, once it's suspected that you've committed an offence, or that it's on the cards that you're going to be charged. So the short ground of the disposition of that case, was that X7 should not be extended in that way, and the icing on the cake was, well if it was, then that would render the whole scheme incoherent.

Because the whole question is, has there been misconduct by parties, including police, and police are specifically mentioned in the Act. That would – that would be frustrated if the X7 companion principle were to reach back further in time.

Your Honour, I might just make one further submission about the stultification argument put by my learned friend. And also put by Dr Freckelton. The argument being, and this has been put I think also by the Attorney, that if my client's construction is right, you can be compelled to incriminate yourself, but you cannot be compelled to expose yourself to a penalty.

HER HONOUR: Yes.

MR DOYLE: That's a particularly stark way of putting a proposition. But a more nuanced way of putting the proposition, is to recognise that you very well may not be compelled to incriminate yourself, depending on how s 38 plays out in practise, and in cases where there is a factual overlap between incrimination and penalty, there may be an issue about whether – because it's likely that the criminal offence will have gone first, for – in being dealt with, for *McMahon v Gould* type reasons, there may be a very live question about whether there is – there remains an appreciable risk of the penalty. Having regard for example, to time limits that might attend those issues.

And that might mean that a claim of penalty privilege is in fact not available, or it might – or it might be that the claim isn't taken.

HER HONOUR: All that – all that submission amounts to, is that it isn't – or wouldn't always be - - -

MR DOYLE: Yes.

HER HONOUR: - - - absurd, isn't it?

MR DOYLE: Well my point is, because it isn't that black and white, the position is not absurd.

HER HONOUR: Okay.

MR DOYLE: And it is not sufficient for even allowing that the principle of legality is not binary or monolithic, when it's engaged, it's not sufficient to say well, for many of the reasons that there's been an inroad into penalty privilege, it would work better, or as Mr Game put, work really well, if it also covered penalty privilege, maybe. That's a perhaps contextual policy question. But the question is has - has that been done? Nor should it be done.

HER HONOUR: Yes.

MR DOYLE: Your Honour, I think I don't need to say anything specific in response to Dr Freckelton's submissions, except to say two things. One, he referred to penalty privilege as an accepted common law right, consistently valued. And we very much rely on that, in light of what's said in *Mann v Paterson*. But we do differ from my learned friend in his submission that what Kirby J said in Rich at 129, can be taken to be a current statement of the law on the question of penalty privilege. He descanted in Rich. And it's – that's sufficient to show that he took a very different view of the operation of the privilege.

Your Honour, without wishing to suggest that Mr Boyle will comment on the question of international law, I've arranged with him, that if any reply's to be made on that topic, he would make that reply. So unless your Honour has further questions, those are my submissions.

HER HONOUR: Thank you, Mr Doyle.

Mr Boyle, are you – do you have anything to say in reply in relation to the international law aspect of it?

MR BOYLE: I do, your Honour. But before I come to that, the first thing I just wanted to say is that we would obviously embrace what's already borne from Mr Doyle in terms of reply more generally. And I think it's already been remarked upon by others, including your Honour, that in our submission, s 79A is irrelevant to

the construction of the *Coroners Act*. And if you were to have any regard to that, it would be to really let the tail wag the dog. Coming to the international law submissions made on behalf of NAAJA.

The first point to be made is that insofar as one constructs this notion of effectiveness, and the need for an effective response to deaths, and their investigation, well it's a bit like the submission I put to your Honour yesterday, which is effectively that effectiveness doesn't entail the pursuit at all costs of this investigation process.

And so we say that in effect, the constructional principle isn't engaged, because it's not inconsistent with international law to construe the Act, as we're contending. And in effect, one can readily say and – whether penalty privilege is available to be invoked or not, the system which is otherwise put in place by the Act, is effective, and discharges the obligation insofar as Australian international obligations go.

The next point to be made in response to the submission on behalf of NAAJA is that, in any event, there's a contest here between competing rights. Indeed, effectively, the right to silence is, itself, recognised in article 14.3(g) of the ICCPR, which is the same document Frugtniet which gives rise to this right to life on which alliance is placed.

And in that regard, I don't think your Honour has a copy, as far as I'm aware, but I can read to your Honour what that provides. It says, "In determination of any criminal charges against him, everyone shall be entitled to the following minimum guarantees in full equality." And it says, "(g) not to be compelled to testify against himself or to confess guilt."

So, we say that there is, in fact, some competing right which otherwise arises here. And then the question becomes how do you reconcile those competing rights. The cases indicate that, obviously, international treaty obligations have to yield to the statutory text and we say that, effectively, the attempt to invoke article 2 here doesn't assist our friends in their contended construction of the *Coroners Act.*

The final point to be made is that there's a contention made at par 57 of NAAJA's submissions about the need for the Territory and other (inaudible) to comply with treaty obligations. And I wanted to give your Honour a reference to what was said by McHugh J in *Al-Kateb v Godwin* and this is not on anyone's list, so I'll give your Honour the reference.

HER HONOUR: Yes, please. If you could spell it for me too, please.

MR BOYLE: Yes, it's *Al-Kateb*, A-L - K-A-T-E-B - - -

HER HONOUR: Yes.

MR BOYLE: - - - *v Godwin* and it's [2004] 219 CLR 562 and the paragraphs that I wanted to take your Honour to are at 63 to 65. And what is said there by

his Honour, McHugh J, is that the rule of construction in question is based on a fiction.

He says in par 63:

> "Gone are the days when the rules of international law were to be found in the writings of a few well-known jurists. And then going onto par 65, his Honour notes that the Minister for Immigration and Ethic Affairs and TO, counsel for the minister told this court that Australia was party to about 900 treaties."

And his Honour says:

> "When one adds to the rules contained in those treaties, the general principles of law recognised by civilised nations and the rules derived from international custom, it becomes obvious that the rationale for the rule that the statute contains an implication that it should be construed to conform with international law bears no relationship to the reality of the modern legislative process."

And so, whilst we accept that it is a rule, we say in circumstances where, in effect, we say nothing actually turns upon it, it's – there's an air of unreality to the submission that your Honour would construe the *Coroners Act* as those penalty privilege never applied by reason of Australia's obligations under the ICCPR in respect of the right to life.

We just say that's a very long bow that's been drawn on behalf of NAAJA and there is no need for your Honour to adopt such a construction by reason of that principle of statutory construction.

HER HONOUR: That's not the only reason that they say there was never a - - -

MR BOYLE: Right.

HER HONOUR: - - - penalty privilege available under the *Coroners Act* though, is it?

MR BOYLE: I appreciate that, your Honour, and that's already been responded to by Mr Doyle.

HER HONOUR: Yes.

MR BOYLE: And so, I'm simply saying that it doesn't add anything to the picture, in my submission, to seek to invoke international law.

HER HONOUR: Yes, I follow that.

MR BOYLE: And then the – sorry, I think I said that was the final point, but I've overlooked – so, there was one other point that I wanted to make which was simply

that the case that's referred to in their submissions in the Court of Appeal in the United Kingdom was a case that was obviously concerned with the European convention.

It may be that, as I said, that it's effectively the same provisions in that convention which NAAJA relies on under the international convention on civil and political rights in this case.

However, the observations which are being made there and everything that effectively underpins the reasoning in that decision is really a reflection of that context that exists in the United Kingdom where, up until relatively recently, they were bound by the European convention and the obligations that flowed from that. And that jurisprudence is necessarily coloured by that context.

HER HONOUR: Yes.

MR BOYLE: And it wouldn't assist your Honour to effectively pick up and apply those principles here holus-bolus.

HER HONOUR: Point well taken.

MR BOYLE: And unless there's anything further, those are my submissions in reply.

HER HONOUR: Thank you very much, Mr Boyle. Now, I need to – there's an ongoing inquest, so there's some urgency for a decision.

MR BOYLE: Well, I think in that regard, your Honour - - -

HER HONOUR: Yes?

MR BOYLE: - - - there is also – and I'm not – I don't have the precise terms in front of me, but I think that there was an injunction that had been granted by her Honour, Brownhill J previously, which I'm not sure whether that's now, on its terms, expired - - -

HER HONOUR: I think it was extended until - - -

MR BOYLE: - - - in respect, at least - - -

HER HONOUR: - - - close of business today, my recollection is. Is that right?

MR OFFICER: Your Honour, I wonder if you would be assisted by Mr Officer who appears in the inquest, just telling your Honour where things are at.

HER HONOUR: Yes, please.

MR OFFICER: Yes, your Honour. At the moment, there is an injunction in relation to the first plaintiff, Mr Bauwens. Constable Rolfe has been stood down from any further evidence until this court decides the issues before it. In terms of scheduling, the inquest is due to wrap up by next Friday for this year, and then resume 23 February next year for two weeks, but it could possibly be longer, in fact, most likely longer if that assists.

HER HONOUR: Okay. So, that cuts down on the urgency. I mean, I will endeavour to – the reason I was asking is that it may be that I can announce a decision before the written reasons are finalised, if that would assist. I should be able to have written reasons prepared by – within a fortnight.

MR NEKVAPIL: Thank you, your Honour.

MR OFFICER: Your Honour, we would ask that your Honour take that course, even though it would only take you a fortnight, that you do announce your ruling first and provide the reasons later.

HER HONOUR: Well, I might not – I'm not sure that there is a great deal of utility in that, if the inquest is not resuming until 23 February.

MR NEKVAPIL: And we would prefer written reasons, your Honour.

HER HONOUR: Yes.

MR BOE: May I raise this, the - - -

HER HONOUR: Yes, Mr Boe.

MR BOE: Mr Rolfe was to give evidence a week or so ago. I know that – and counsel assisting who is appearing at the Bar table may well be able to confirm this, it was hoped that if your Honour were able to give a ruling this week, that Constable Rolfe would be expedited and brought on next week. So, that's still a possibility for the inquest in order to achieve what it had programmed.

HER HONOUR: I don't think I will be in a position to do that this week.

MR BOE: I understand.

HER HONOUR: Thank you. I think what I'll do is reserve my decision and I will endeavour to have that decision and the written reasons therefore delivered within two weeks. And I do thank all counsel for your invaluable assistance in this matter.

MR NEKVAPIL: Thank you, your Honour.

HER HONOUR: Please adjourn the court.

ADJOURNED 12:00 ACCORDINGLY