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

TITLE OF COURT: Coroners Court

JURISDICTION: Alice Springs

FILE NO(s): A51 of 2019

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Coroners Act 1993 (NT), ss 38, 39
Inquest into the death of Kumanjayi Walker (Ruling No 2) [2022] NTLC 016
Inquest into the death of Kumanjayi Walker (Ruling No 3) [2022] NTLC 019
R v Coroner; Ex parte Alexander [1982] VR 731
Sorby v Commonwealth (1983) 152 CLR 281
X7 v ACC (2013) 248 CLR 92
Reid v Hammond (1995) 184 CLR 1
Sorby v Commonwealth (1983) 152 CLR 281
Bell v Deputy Coroner of South Australia [2020] SASC 59
Daniels Corporation International Pty Ltd v ACCC (2002) 213 CLR 543
Naismith v McGovern (1953) 90 CLR 336
Pyneboard Pty Ltd v Trade Practices Act (1983) 152 CLR 328
Rich v ASIC (2004) 220 CLR 129
Migration Agents Regulation Authority v Frugtniet (2018) 259 FCR 219
Attorney-General v Borland [2007] NSWCA 201
Aboriginal Land Council (NSW) v Minister Administering the Crown Lands Act (2015) 303 FLR 87
Decker v State Coroner of New South Wales (1999) 46 NSWLR 415
Domaszewicz v State Coroner (2004) 11 VR 237
Priest v West (2012) 40 VR 521
Villan v The State of Victoria [2021] VSC 354

Short v Mercier (1851) 20 LJ Ch 289
Martin v Treacher (1886) 16 QBD 507
Paxton v Douglas (1809) 16 Ves Jun 239
Rich v ASIC (2003) 203 ALR 671
Dale v Clayton Utz (a firm) (No 2) [2014] VSC 517
R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361
Private R v Cowen (2020) 271 CLR 316
R v IBAC (2016) 256 CLR 459

APPEARANCES:

Counsel assisting:	Dr P Dwyer with Mr P Coleridge Instructed by Maria Walz Legal
For Zachary Rolfe:	Mr D Edwardson KC and Mr F Merenda Instructed by Tindall Gask Bentley Lawyers
For the Brown Family:	Mr G Mullins with Ms P Morreau Instructed by Streeton Lawyers
For the Walker, Lane and Robertson families:	Mr A Boe Instructed by Hearn Legal
For the Northern Territory Police Force:	Dr I Freckelton AO KC with Ms A Burnnard Instructed by PFES Legal
For the Department of Health:	Mr C Zichy-Woinarski Instructed by Hutton McCarthy
For NAAJA:	Mr M Derrig Instructed by NAAJA
For the Parumpurru Committee:	Mr J McMahon SC Instructed by Doogue & George
For the Northern Territory Police Association:	Ms S Ozolins Instructed by Northern Territory Police Association
For Sgt Paul Kirby:	Mr S Robson SC N/A
For Sgt Lee Bauwens:	Ms KM McNally with Mr JM Suttner McNally & Co Litigation

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IN THE CORONERS COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. A51 of 2019

In the matter of an inquest into the death of Kumanjayi Walker

Introduction

1. This inquest examines the death of Kumanjayi Walker, a 19-year-old Warlpiri man fatally shot by Constable Zachary Rolfe at Yuendumu on 9 November 2019.

2. On 24 October 2022 senior counsel assisting, Dr Dwyer, called and examined Sgt Paul Kirkby.[1] Sgt Kirkby was a Sergeant in the Alice Springs Police station and was regularly Constable Rolfe's shift Sergeant before Kumanjayi Walker's death. There is prima facie evidence on the coronial brief that Sgt Kirkby 'expressed or tolerated racism, homophobia, misogyny or contempt for senior police officers and community police in his communications with Constable Rolfe.'[2] In addition, there is prima facie evidence on the coronial brief 'that Sgt Kirkby (whose responsibility it was to review Constable Rolfe's Use of Force incidents) tolerated or encouraged dishonesty by Constable Rolfe in the context of his work as a police officer.'[3] I explained the potential nexus between this evidence and the circumstances of Kumanjayi Walker's death in *Ruling No 3*,[4] which I published to the parties on 14 October 2022.

3. Shortly before court commenced on 25 October 2022, counsel for Sgt Kirkby, Mr Robson SC, advised counsel assisting that he would object to further examination of Sgt Kirkby on, in effect, the evidence canvassed in *Ruling No 3*, because that 'examination potentially exposes Sgt Kirkby to disciplinary action under Part IV of the *Police Administration Act*'.

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1 Transcript of Proceedings, *Inquest into the death of Kumanjayi Walker* (Coroners Court of the Northern Territory, Alice Springs, 24 October 2022), 2361.

2 *Inquest into the death of Kumanjayi Walker (Ruling No 3)* [2022] NTLC 019, [69] (**Ruling No 3**).

3 *Ruling No 3* [2022] NTLC 019, [69].

4 *Ruling No 3* [2022] NTLC 019, [49]-[71]. See also, *Inquest into the death of Kumanjayi Walker (Ruling No 2)* [2022] NTLC 016, [35]-[38].

4. When court commenced, Mr Robson made the objection, invoking what he asserted to be his client's common law privilege against self-exposure to civil or disciplinary penalties (**penalty privilege**).[5] Mr Robson submitted that the penalty privilege applied in coronial proceedings and that, unlike the privilege against self-incrimination, it was not partially abrogated by s 38 of the *Coroners Act 1992* (NT).[6]

5. Section 38 of the *Coroners Act* creates a mechanism for the coroner to compel a witness to give evidence which may 'tend to criminate' the witness, and to provide a direct use immunity certificate in respect of that evidence, when it 'appears to the coroner expedient for the purposes of justice that the person be compelled to answer the question'. If Mr Robson's submission is correct, the effect would be that a witness who fears exposure to a criminal liability could be compelled to answer questions under s 38 of the *Coroners Act*, but a witness who fears exposure to a lesser civil or disciplinary liability could not similarly be compelled.

6. Counsel for Constable Rolfe (Mr Edwardson KC) and Sgt Bauwens (Mr Suttner) supported Sgt Kirkby's objection and flagged that similar objections were likely to be made on behalf of their clients.[7] Each of these counsel relied on the single justice decision of the Supreme Court of South Australia in *Bell v Deputy Coroner of South Australia*,[8] which considered a different statutory scheme.

7. Junior counsel assisting, Mr Coleridge, submitted that I should reject the submission that the penalty privilege provided Sgt Kirkby with an absolute immunity from examination on matters that might expose him to a disciplinary penalty. In effect, Mr Coleridge submitted that:

   (a) The common law penalty privilege did not apply in a coronial inquest under the *Coroners Act*; and, alternatively,

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5 Transcript of Proceedings, *Inquest into the death of Kumanjayi Walker* (Coroners Court of the Northern Territory, Alice Springs, 25 October 2022), 2398.

6 Transcript of Proceedings (25 October 2022), 2410.

7 Transcript of Proceedings (25 October 2022), 2398.

8 [2020] SASC 59.

(b) To the extent that it did apply, the common law penalty privilege is partially abrogated by s 38 of the *Coroners Act*.

8. Mr Coleridge submitted that while Sgt Kirkby was entitled to object to answering questions on the basis that the answers might expose him to liability for a civil or disciplinary penalty, like a claim of the privilege against self-incrimination the objection was to be resolved in accordance with s 38 of the *Coroners Act*. These submissions were largely adopted by the Walker, Lane and Robertson families (**WLR families**), the Brown family, the Parumpurru Committee and the North Australian Aboriginal Justice Agency (**NAAJA**).

9. At the conclusion of oral argument, Mr Boe, who appears for the WLR families, submitted that his clients were,

> content with [me] announcing a ruling and publishing reasons later … because if we hold this up now we are going to lose so much more time, which is really affecting the families in terms of being able to assist your Honour with these witnesses.[9]

10. No interested party submitted against this course. Accordingly, after adjourning briefly to consider the submissions, I ruled on Sgt Kirkby's objection as follows:

> Yes, Mr Robson, for reasons which I'll publish at a later date, to the extent that the penalty privilege applies in these proceedings, in my view, it is modified by s 38 *Coroners Act*.
>
> And in addition, for the reasons set out in *Ruling No 3*, it is expedient, for the purposes of justice, that Sergeant Kirkby be required to continue to answer the questions.
>
> Accordingly, I will grant Sergeant Kirkby a certificate under s 38 *Coroners Act*.[10]

11. Mr Robson requested a brief adjournment to take instructions from Sgt Kirkby. When the inquest resumed, Mr Robson stated,

> 'Thank you for that time, your Honour, we're prepared to press on with the benefit of a certificate'.[11]

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9 Transcript of Proceedings (25 October 2022), 2414.

10 Transcript of Proceedings (25 October 2022), 2415.

11 Transcript of Proceedings (25 October 2022), 2416.

12. I now publish my reasons for my ruling on Sgt Kirkby's objection.

Penalty privilege in inquests under the *Coroners Act 1992* (NT)

13. I reject Sgt Kirkby's submission that the penalty privilege provides him with an absolute immunity from examination in this inquest on matters that may tend to expose him to civil or disciplinary liability in other proceedings.

14. On the authorities as they currently stand, in my view it is likely that, save to the extent that it is conferred by s 38, the penalty privilege would not apply in an inquest under the *Coroners Act*. It is, however, unnecessary for me to determine the objection on that basis because, assuming that the penalty privilege *is* a substantive common law right that is inherently capable of application in these proceedings, I consider that it is clearly abrogated by s 38 of the *Coroners Act*.

Is the common law penalty privilege a substantive rule, or right, that applies in an inquest under the *Coroners Act*?

15. Subject to statute, it is well-established that the common law privilege against self-incrimination applies in coronial proceedings.[12] That is because the privilege against self-incrimination is not 'merely a rule of evidence' that operates 'as a barrier to the reception of evidence to secure a conviction' but is a *substantive* common law rule.[13] In addition, the privilege against self-incrimination has been described as a 'fundamental bulwark of liberty'[14] and in that sense is a 'basic and substantive common law *right*'[15] protected from legislative modification by the principle of legality.[16] As I note below, similar observations have been made about legal professional privilege.

16. The basic premise of the submission made on behalf of Sgts Kirkby and Bauwens and Constable Rolfe was, to adopt Mr Suttner's expression, that 'penalty privilege

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[12] *R v Coroner; Ex parte Alexander* [1982] VR 731, 736 (Gray J).

[13] *Sorby v Commonwealth* (1983) 152 CLR 281, 309 (Mason CJ, Wilson and Dawson JJ), rejecting that submission noted at 285 (Sir Maurice Byers QC SG, in arguendo). See also, *X7 v ACC* (2013) 248 CLR 92, [104] (Hayne and Bell JJ).

[14] *Reid v Hammond* (1995) 184 CLR 1, 11 (Toohey, Gaudron, McHugh and Gummow JJ)

[15] *Reid v Hammond* (1995) 184 CLR 1, 11 (Toohey, Gaudron, McHugh and Gummow JJ).

[16] *Sorby v Commonwealth* (1983) 152 CLR 281, 309 (Mason CJ, Wilson and Dawson JJ).

is to be viewed *equally* with self-incrimination privilege.'[17] Mr Suttner informed me that this 'was the point of the *Bell* decision'.[18] Mr Robson[19] and Mr Edwardson[20] made submissions to the same effect: in substance, that the penalty privilege is a fundamental and substantive common law right that applies unless and until abrogated by statute in accordance with the principle of legality. However, on review of the decision in *Bell*, it is not clear that Blue J explicitly endorsed this premise.[21]

17. Mr Coleridge submitted that the premise was wrong and that 'a relatively significant body of High Court … and intermediate appellate court authority … has drawn a very significant distinction between the two privileges'.[22] Mr Coleridge submitted that, unlike the privilege against self-incrimination, the penalty privilege is not a substantive common law rule, let alone a fundamental common law right or immunity that is protected by the principle of legality.[23] Instead, Mr Coleridge submitted that the penalty privilege is, in effect, a rule of evidence or procedure that arose in a specific historical context.[24] He submitted that the proper question was not whether the penalty privilege was abrogated by the *Coroners Act* but whether it was *conferred*.[25]

18. Ultimately, Mr Coleridge submitted that save to the extent that it is conferred by s 38, the penalty privilege would not apply in a coronial inquest under the *Coroners Act* because a coronial inquest is not a relevant 'proceeding' for a 'penalty'.[26] And

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[17] Transcript of Proceedings (25 October 2022), 2401.

[18] Transcript of Proceedings (25 October 2022), 2401.

[19] Transcript of Proceedings (25 October 2022), 2399.

[20] Transcript of Proceedings (25 October 2022), 2409.

[21] See, *Bell v Deputy Coroner of South Australia* [2020] SASC 59, [151]-[163], esp [163] (Blue J). Although compare [170] which assumes that the penalty privilege is a 'common law right' that applies unless and until abrogated in accordance with the principle of legality.

[22] Transcript of Proceedings (25 October 2022), 2404.

[23] Transcript of Proceedings (25 October 2022), 2404.

[24] Transcript of Proceedings (25 October 2022), 2404. The context was the reluctance of the Courts of Chancery to allow discovery in aid of the case of a prosecuting party where the proceedings might result in a penalty or forfeiture: *Daniels Corporation* (2002) 213 CLR 543, [31] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), citing *Naismith v McGovern* (1953) 90 CLR 336, 341-342 (Williams, Webb, Kitto and Taylor JJ).

[25] Transcript of Proceedings (25 October 2022), 2404.

[26] Transcript of Proceedings (25 October 2022), 2404, 2405.

further, because the common law penalty privilege is a rule of evidence or procedure, not a substantive common law rule, it is displaced by s 39 of the *Coroners 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.'[27] Mr Coleridge submitted that to the extent that the single justice decision in *Bell* suggested to the contrary, it was wrong and ought not be followed.[28]

19. To substantiate these propositions Mr Coleridge referred me to four decisions. They were the decisions of the High Court in *Daniels Corporation International Pty Ltd v ACCC*[29] and *Rich v ASIC*,[30] the decision of the Full Court of the Federal Court of Australia in *Migration Agents Regulation Authority v Frugtniet*,[31] and the decision of the Court of Appeal of New South Wales in *Attorney-General v Borland*.[32]

20. *Daniels Corporation* concerned s 155 of the *Trade Practices Act 1974* (Cth) (**TPA**) which empowered the ACCC to issue a statutory notice requiring the recipient to furnish information, produce documents or give evidence in certain circumstances. Relevantly, s 155(7) of the TPA abrogated the privilege against self-incrimination by providing that a person was not excused from answering a notice 'on the ground that the information or document may *tend to incriminate* the person' but that any information or document provided in answer to the notice was 'not admissible in evidence against the person' in criminal proceedings.

21. The question in *Daniels Corporation* was whether s 155 abrogated legal professional privilege. The Court held that it did not. The Court reasoned that it was 'now settled that legal professional privilege is a rule of *substantive* law'[33] and that, being 'a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection

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27. Transcript of Proceedings (25 October 2022), 2405.
28. Transcript of Proceedings (25 October 2022), 2411.
29. (2002) 213 CLR 543.
30. (2004) 220 CLR 129.
31. (2018) 259 FCR 219.
32. [2007] NSWCA 201.
33. *Daniels Corporation* (2002) 213 CLR 543, [9] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

and the giving of evidence in judicial proceedings.'[34] The Court also noted that '[l]egal professional privilege is not *merely* a rule of substantive law' but is 'an important common law right or, perhaps, more accurately, an important common law immunity' that is protected by the principle of legality.[35] Ultimately, nothing in the text, context or purpose of s 155 expressly, or by necessary implication, abrogated legal professional privilege.[36]

22. What is relevant for present purposes is the majority's consideration of the earlier High Court decision in *Pyneboard Pty Ltd v Trade Practices Commission*.[37] In *Pyneboard*, the Court had held that s 155 of the TPA, and, in particular, sub-s (7), impliedly abrogated the penalty privilege.[38] The majority in *Daniels Corporation* identified two reasons why the outcome in that case (that legal professional privilege was *not* abrogated by implication) was consistent with the different outcome in *Pyneboard* (that penalty privilege *was* abrogated by implication). The first concerned the inherent unlikelihood that parliament would abrogate the privilege against self-incrimination but preserve the penalty privilege (I return to this at [42]-[44], below).[39] The second concerned the '*nature* of the privilege against exposure to penalties'.[40] Unlike legal professional privilege and the privilege against self-incrimination, the majority in *Daniels Corporation* stated that,

> there seems little, if any, reason why [the penalty] 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*.[41]

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[34] *Daniels Corporation* (2002) 213 CLR 543, [10] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[35] *Daniels Corporation* (2002) 213 CLR 543, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[36] *Daniels Corporation* (2002) 213 CLR 543, [32]-[35] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[37] (1983) 152 CLR 328.

[38] *Pyneboard* (1983) 152 CLR 328, 344-345 (Mason ACJ, Wilson and Dawson JJ).

[39] *Daniels Corporation* (2002) 213 CLR 543, [30] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[40] *Daniels Corporation* (2002) 213 CLR 543, [13], [30] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[41] *Daniels Corporation* (2002) 213 CLR 543, [31] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

23. As Mr Coleridge submitted, these observations were repeated by the High Court in *Rich*. In *Rich*, ASIC had commenced proceedings in the Supreme Court of New South Wales under the *Corporations Act 2001* (Cth) seeking, among other matters, orders for compensation and disqualification against the former directors of One.Tel Ltd. By majority, the High Court held that these proceedings for compensation and disqualification were proceedings for a 'penalty'.[42] The Court upheld a claim of penalty privilege by the directors, which had been asserted in answer to an application for an order that they make discovery of certain documents. Relevantly, the majority (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) stated,

> As was further pointed out in the joint reasons in *Daniels Corporation*, the privilege against exposure to penalty now serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it. *That is not to say that the privileges against exposure to penalties or exposure to forfeitures are substantive rules of law, like legal professional privilege*, having application beyond judicial proceedings.[43]

24. Although Kirby J was in dissent as to the outcome in *Rich*, his judgment contains what the Full Court of the Federal Court has since described as 'a pithy statement of principle which aligns with the majority view on the nature and scope of penalty privilege'.[44] His Honour stated that,

> …the privileges involved in *Daniels* were those against self-incrimination and suggested derogations of legal professional privilege. Those privileges are different from the penalty privilege invoked in this case. Compared to the penalty privilege, each of those privileges has a longer history in the law. Each is more fundamental to its operation. Each is reflected in universal principles of human rights. *The penalty privilege is not. The penalty privilege 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*.[45]

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42 *Rich* (2004) 220 CLR 129, [26]-[38] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

43 *Rich* (2004) 220 CLR 129, [24] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

44 *Frugtniet* (2018) 259 FCR 219, [44] (Siopsis, Robertson and Bromwich JJ).

45 *Rich* (2004) 220 CLR 129, [129] (Kirby J).

25. Mr Coleridge also took me to the decision of the Court of Appeal of New South Wales in *Borland*. Much like this case, *Borland* concerned an application by a police officer to be excused from giving evidence in an inquest on the ground that his answers might expose him to a civil penalty. Again, much like this case, it was argued by the police officer that the penalty privilege applied in coronial proceedings and, unlike the privilege against self-incrimination, was not abrogated by the *Coroners Act 1980* (NSW). Significantly, the Attorney-General for New South Wales had contended 'that civil penalty privilege … was not a substantive right, but a rule of evidence which did not apply in an inquest because s 33 provided that the Coroner was not bound to observe the rules of evidence.'[46]

26. Ultimately, it was unnecessary for the Court of Appeal to rule on the Attorney-General's principal contention because it held that another provision, s 33AA,[47] positively 'confer[red] the privilege in the clearest terms.'[48] The result was that the police officer *could* be compelled to give evidence, upon the grant of a direct use immunity certificate under s 33AA. Despite the narrow basis upon which it decided the case, the Court of Appeal quoted from the High Court's decisions in *Daniels Corporation* and *Rich* and observed that these 'most recent dicta *reject* the view that [the penalty privilege] is a substantive right.'[49]

27. The final decision to which Mr Coleridge referred me was the decision of the Full Court of the Federal Court in *Frugtniet*. There, the Full Court considered whether the penalty privilege was available in proceedings for a disciplinary penalty in the Administrative Appeals Tribunal (**AAT**). This required the Full Court to 'reconcil[e]'[50] the more recent High Court decisions in *Daniels Corporation* and

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46 *Borland* [2007] NSWCA 201, [10] (Handley JA, Ipp and McColl JJA agreeing).

47 Section 33AA provided a scheme for the giving of direct use immunity certificates.

48 *Borland* [2007] NSWCA 201, [17] (Handley JA, Ipp and McColl JJA agreeing).

49 The Court of Appeal recognised that the 'juridical status of the privilege awaits authoritative determination by the High Court': *Borland* [2007] NSWCA 201, [10] (Handley JA, Ipp and McColl JJA agreeing).

50 *Frugtniet* (2018) 259 FCR 219, 16 (Siopsis, Robertson and Bromwich JJ).

Rich with the earlier decisions in *Sorby v Commonwealth,*[51] *Pyneboard*,[52] and *Police Service Board v Morris*.[53]

28. Having reviewed and reconciled those authorities, the Full Court concluded as follows:

> 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 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.[54]

29. Accordingly, the Full Court proceeded on the basis that 'the necessary exercise of statutory construction was one of finding a basis for penalty privilege to apply to the AAT proceedings, not of finding the abrogation or curtailment of such a privilege that was otherwise applicable'.[55] The Full Court concluded that 'for penalty privilege to apply *as a matter of course*, three factors will ordinarily be present': namely, that the proceedings are 'curial proceedings'; that the 'proceedings expose the claimant to penalties or forfeitures'; and that requiring disclosure by the claimant would require a defendant party to 'provide proof against him or herself' in the proceedings.[56] The absence of any one or more of these factors rendered it 'inherently less likely that penalty privilege applies', although a statute might still positively confer it.[57] Applying that interpretive principle to the

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[51] (1983) 152 CLR 281.

[52] (1983) 152 CLR 328.

[53] (1985) 156 CLR 397.

[54] *Frugtniet* (2018) 259 FCR 219, [72] (Siopsis, Robertson and Bromwich JJ); see also, [39], [42] and [51].

[55] *Frugtniet* (2018) 259 FCR 219, [76] (Siopsis, Robertson and Bromwich JJ).

[56] *Frugtniet* (2018) 259 FCR 219, [79] (Siopsis, Robertson and Bromwich JJ).

[57] *Frugtniet* (2018) 259 FCR 219, [81] (Siopsis, Robertson and Bromwich JJ).

proceedings under the *Administrative Appeals Tribunal Act*, the Full Court held that the penalty privilege did not apply.[58]

30. Applying the reasoning[59] identified in *Frugtniet* to the present case, in my view it is likely that Mr Coleridge's contention is correct. While the Coroners Court is a court of record,[60] it is doubtful that an inquest could be characterised as a relevant curial 'proceeding' for a 'penalty'. As Ashley J noted in *Domaszewicz v State Coroner*[61] an inquest,

> …is of an investigative nature, quite unlike that which a court undertakes in the ordinary course of things. Coroners do not adjudicate upon proceedings inter partes. Any findings which they make do not determine legal rights. The purpose of a coroner's investigation is to determine what happened.[62]

31. In any event, *Frugtniet* stands for the proposition that the penalty privilege is not a substantive common law rule. If the penalty privilege is a rule of evidence or procedure, it is unlikely it could apply in the face of s 39 of the *Coroners Act*, which provides that '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.' As the Court of Appeal of the Supreme Court of Victoria noted in *Priest v West,*[63] together with the obligatory terms of s 34, provisions such as s 39 of the *Coroners Act*,

> emphasise Parliament's intention that the coroner should not be constrained in carrying … out [the coronial function]. It is precisely because the coroner must do everything possible to determine the cause and circumstances of the death that Parliament has removed all

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58 *Frugtniet* (2018) 259 FCR 219, [82]-[83] (Siopsis, Robertson and Bromwich JJ).

59 Although the *outcome* in *Frugtniet* does not dictate the outcome in others cases, the Full Court's conclusion regarding the nature of the penalty privilege were 'expressly or impliedly treated by [the Court] as a necessary step in reaching [its] conclusion' and, accordingly, form a part of the ratio of the decision: see eg, *Frugniet* (2018) 259 FCR 219, [76] (Siopsis, Robertson and Bromwich JJ); *Aboriginal Land Council (NSW) v Minister Administering the Crown Lands Act* (2015) 303 FLR 87 (NSWCA), [71] (Leeming JA, Beazley P and Macfarlan JA agreeing). Cf, *Bell* [2020] SASC 59, [162] (Blue J).

60 *Decker v State Coroner of New South Wales* (1999) 46 NSWLR 415, [7] (Adams J).

61 (2004) 11 VR 237.

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

63 (2012) 40 VR 521

> inhibitions on the collection and consideration of material which may assist in that task.[64]

32. For those reasons, in my view it is likely that, save to the extent that it is conferred by s 38, the penalty privilege would not apply in an inquest under the *Coroners Act*. However, for the reasons that follow, it is unnecessary for me to determine the objection on that basis.

To the extent that it applies, the penalty privilege is abrogated by s 38 of the *Coroners Act*

33. Section 38 of the *Coroners Act* 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 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.

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[64] *Priest v West* (2012) 40 VR 521, [6] (Maxwell P and Harper JA).

34. There is no dispute that s 38 of the *Coroners Act* partially abrogates the privilege against self-incrimination.[65] by permitting a coroner, in effect, to 'sustain or overrule'[66] a claim of the privilege upon the offer of a certificate where 'it appears to the coroner expedient for the purposes of justice that the person be compelled to answer the question'. For the reasons that follow, I accept Mr Coleridge's submission that, to the extent that it would otherwise apply, the text of s 38 of the *Coroners Act*, read in context and by reference to its purpose, also clearly abrogates the penalty privilege.

35. To the extent that it was made,[67] 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 dictionary 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'.[68] In effect, 'to criminate' means 'to accuse', but not necessarily of a crime.

36. More importantly, the expression 'to criminate oneself' has a long association with the penalty privilege. For example, in *Short v Mercier*,[69] 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*'.[70] Similarly, in *Martin v Treacher*,[71] 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

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[65] See, by analogy, *Villan v The State of Victoria* [2021] VSC 354, [11].

[66] See, *Borland* [2007] NSWCA 201, [17] (Handley JA, Ipp and McColl JJA agreeing).

[67] See, eg, the submissions of Mr Suttner, which appeared to suggest that the verb 'to criminate' unambiguously, and exclusively, refers to the privilege against self-incrimination: Transcript of Proceedings (25 October 2022), 2411.

[68] The Collins Dictionary defines 'recriminations' to be 'accusations that two people or groups make about each other.'

[69] (1851) 20 LJ Ch 289.

[70] *Short v Mercier* (1851) 20 LJ Ch 289, 290.

[71] (1886) 16 QBD 507.

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...'[72] See also, *Paxton v Douglas*.[73] These cases continue to be cited in the modern Australian authorities considering the penalty privilege.[74]

37. That s 38(1) deals with the penalty privilege is also consistent with the scope of the immunity conferred by s 38(3). Section 38(3) provides a direct use immunity not just in 'in criminal … proceedings' but also in 'civil proceedings, or in proceedings before a tribunal or person exercising powers and functions in a judicial manner'. It is hard to see why the Legislative Assembly would confer an immunity of that breadth if had intended s 38(1) to deal only with the privilege against self-incrimination. Indeed, if Mr Robson is correct, any witness who feared that an examination might tend to expose them to civil or disciplinary liability would have no need for a certificate under s 38(3) because they would not have to answer the relevant questions at all.

38. Against this, Mr Robson submitted that ss 38(1) and (3) cannot be taken to have abrogated the penalty privilege because s 38(3) only provided a direct use immunity in respect of 'proceedings which essentially are of a judicial character'[75] and because '[p]roceedings under Pt 4 of the *Police Administration Act* are not proceedings of a judicial character.' There are problems with that submission because, as Mr Coleridge submitted, it involves a subtle, but significant, misreading of the statutory text.[76] There is a difference between a requirement that a power be exercised by a 'tribunal or person' in 'a judicial manner'[77] and a requirement that

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72. *Martin v Treacher* (1886) 16 QBD 507, 511-512.

73. (1809) 16 Ves Jun 239, 240, 241, 243.

74. See, eg, *Rich v ASIC* (2003) 203 ALR 671, [210], [215], [224] (McColl JA). See also, the extract from *Powell's Principles* in *Dale v Clayton Utz (a firm) (No 2)* [2014] VSC 517, [67] (Croft J), citing, Cutler and Griffin, *Powell's Principles and Practice of the Law of Evidence* (5th ed, Butterworths, London, 1885), 116.

75. Transcript of Proceedings (25 October 2022), 2399.

76. Transcript of Proceedings (25 October 2022), 2406-2407.

77. Which is concerned with the *manner* of exercise of the function or power, whether by a court, tribunal or person. Mr Coleridge submitted that for a power to be exercised in a 'judicial manner' there 'need[ed] to be some obligation, for example, of procedural fairness … reasonableness, and rationality.' Although that use of the expression 'judicial manner' is dated, it is consistent with the authorities. For example, in *R v Trade Practices*

'proceedings [be] of a judicial character'.[78] Further, the premise of the submission (that penalty privilege would otherwise be available in non-curial proceedings) is open to doubt.[79] And importantly, the fact that the certificate might confer a direct use immunity in most, but not *all* disciplinary contexts, is better understood as a discretionary consideration relevant to the exercise of s 38 than a matter that goes to its construction.[80]

39. The strongest support for the proposition that s 38 of the *Coroners Act* abrogates the penalty privilege is, however, found in the relevant legislative context and purpose of s 38. Section 38 was inserted into the *Coroners Act* by cl 6 of the *Coroners Amendment Act 2002* (NT) (**Amending Act**). Until that time, the *Coroners Act* had recognised the privilege against self-incrimination.[81] The purpose of the amendment was expressed clearly during the second reading of the Coroners Act Amendment Bill 2001 (NT) (**Amending Bill**):

> 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 policy behind the amendment is to get to the truth.[82]

40. The extrinsic materials suggest that claims of the penalty privilege were a part of the mischief that s 38 was intended to remedy. In its Report on an early draft of the Amending Bill, the Northern Territory Law Reform Committee (**NTLR Committee**) stated that the 'policy behind the amendment is to get to the truth', and that, because

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Tribunal; Ex parte Tasmanian Breweries Pty Ltd, Kitto J stated that although 'the powers entrusted to the [Trade Practices] Tribunal are essentially non-judicial … *[t]he powers must, of course, be performed in a judicial manner*, *that is to say with judicial fairness and detachment*, but the same is true of many administrative powers': (1970) 123 CLR 361, [4]. See also, *Private R v Cowen* (2020) 271 CLR 316, [172] (Edelman J).

[78] Which appears to suggest that the power may only be exercised by a Court.

[79] For the reasons set out in the preceding section of these reasons.

[80] See, eg, *Borland* [2007] NSWCA 201, [18]-[19] (Handley JA, Ipp and McColl JJA agreeing).

[81] Northern Territory, Parliamentary Debates, Legislative Assembly, 28 November 2001, 454.

[82] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 28 November 2001, 454.

'many witnesses at inquests are more concerned about civil liability than criminal charges and guilt, *the policy may be more likely fulfilled if the certificate were extended to include "any criminal, civil or other proceedings*"'.[83]

41. These sentiments were reiterated during the second reading of the Amending Bill by the Attorney-General, who highlighted that the Coronial process 'may also be frustrated where medical practitioners refuse to answer questions on the basis of self-incrimination'[84] and justified the adoption of the NTLR Committee's proposal on the basis that,

> … 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*.[85]

42. Whatever the import of these statements, the Legislative Assembly's clearly expressed concern was that the coronial objectives of 'get[ting] to the truth' and 'making sensible recommendations' were being 'frustrated by witnesses refusing to answer questions'. Claims of the penalty privilege and privilege against self-incrimination are equally capable of frustrating those objectives. That being the case, it is hard to think of a sensible legislative policy that would explain a decision to abrogate a common law immunity as fundamental as the privilege against self-incrimination, but nevertheless preserve the penalty privilege.

43. In *Pyneboard* and *Daniels Corporation* the High Court described an outcome of that kind as 'bizarre', 'irrational' and 'absurd'. As I have noted, s 155(7) of the TPA provided that a person was not excused from answering a notice for production 'on the ground that the information or document may *tend to incriminate* the person'. In *Pyneboard*, the appellants made the very argument now advanced by Sgt Kirkby: namely, that in the absence of express words dealing with it, the express abrogation of the privilege against self-incrimination in a provision such as s 155(7) was

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83 Northern Territory Law Reform Committee, *Privilege against Self-Incrimination*, (Report No 23, October 2002), 9.

84 Northern Territory, *Parliamentary Debates,* Legislative Assembly, 28 November 2001, 454.

85 Northern Territory, *Parliamentary Debates,* Legislative Assembly, 28 November 2001, 454.

insufficient to abrogate the penalty privilege. The majority rejected this argument, highlighting,

> … the *bizarre consequences* of the appellants' construction. The privilege against self-incrimination would be excluded, but not the privilege against exposure to a civil penalty. True it is that the amount of a civil penalty under Pt IV is very substantial. Even so, *it is irrational to suppose that Parliament contemplated that a person could be compelled to admit commission of a criminal offence yet be excused from admitting a contravention of the Act sounding in a civil penalty*.[86]

44. Although the majority in *Daniels Corporation* were critical of some aspects of the reasoning in *Pyneboard*, their Honours approved of this passage. They restated it in their own terms, as follows:

> 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*.[87]

45. As for the decision in *Bell,* I agree with Mr Coleridge that, on the question of whether the *Coroners Act* has abrogated the penalty privilege, it is distinguishable. Unlike s 38 of the *Coroners Act,* at the time of the decision in *Bell* the *Coroners Act 2003* (SA) (**South Australian Act**) did not partially abrogate the privilege against self-incrimination by providing a regime for the giving of direct use immunity certificates. Instead, s 23(5) of the South Australian Act *codified* an unqualified privilege against self-incrimination. Blue J recognised that had the South Australian Coroners Act expressly abrogated the privilege against self-incrimination, this might have been sufficient to abrogate the penalty privilege by implication.[88]

46. The outcome in this case does not depend on whether the principle of legality protects the penalty privilege from legislative modification.[89] Counsel assisting's

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86 *Pyneboard* (1983) 152 CLR 328, 344-345 (Mason ACJ, Wilson and Dawson JJ).

87 *Daniels Corporation* (2002) 213 CLR 543, [30] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

88 *Bell* [2020] SASC 59, [168] (Blue J).

89 See and compare, *Rich* (2004) 220 CLR 129, [128]-129] (Kirby J); *Frugtniet* (2018) 259 FCR 219, [44], [51]-[52], [77] (Siopsis, Robertson and Bromwich JJ); *Bell* [2020] SASC 59, [170] (Blue J).

construction of s 38(1) is consistent with the ordinary meaning and legal use of the verb 'to criminate', the scope of the immunity conferred by s 38(3), and the legislative context and purpose of s 38. That purpose 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'. On the other hand, the construction advanced by Mr Robson, Mr Suttner and Mr Edwardson would frustrate the purpose of s 38 and produce results that the High Court has described as 'bizarre', 'irrational' or 'absurd'. Accordingly, even if s 38 does not expressly abrogate the penalty privilege, I am comfortably satisfied that it does so by necessary implication.[90]

<u>It is expedient for the purposes of justice that Sgt Kirkby be compelled to answer the questions</u>

47. The questions from 24 October 2022 to which Sgt Kirkby objected included:

    (a) 'examination on matters relating to the use or misuse of body-worn video cameras';

    (b) 'allegations that have been put to him concerning officers acting up on body-worn video, and attempting to falsify the evidence and so on'; and,

    (c) 'suggestions … that [officers, including Sgt Kirkby] are racist.'

48. I accept that there is a real possibility that disciplinary action could be taken against Sgt Kirkby under Pt 4 of the *Police Administration Act* if he is compelled to answer the questions.

49. However, I consider that there is a real public interest in Sgt Kirkby being compelled to answer the questions. I explained the nexus between this evidence and the circumstances of Kumanjayi Walker's death in *Ruling No 3*.[91] Considering the importance of this evidence, and the importance of these coronial proceedings, it appears to me to be 'expedient for the purposes of justice' that Sgt Kirkby 'be compelled to answer the questions'. In saying this, I acknowledge that a certificate

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[90] See, by analogy, *R v IBAC* (2016) 256 CLR 459, [52], [77] (Gageler J).

[91] *Ruling No 3* [2022] NTLC 019, [49]-[71]. See also, *Inquest into the death of Kumanjayi Walker (Ruling No 2)* [2022] NTLC 016, [35]-[38].

under s 38 of the *Coroners Act* might not provide a derivative use immunity. In addition, while I consider that s 38(3) would provide a very broad immunity, I also acknowledge Mr Robson's submission[92] that there *may* be some disciplinary contexts in which Sgt Kirkby's evidence could still be used as 'evidence' against him.

Conclusion

50. Accordingly, I offered Sgt Kirkby a certificate under s 38 of the *Coroners Act* and ordered that he be compelled to answer the questions.

Dated this 8th day of November 2022.

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ELISABETH ARMITAGE
TERRITORY CORONER

[92] Transcript of Proceedings (25 October 2022), 2413.