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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 WEDNESDAY 23 NOVEMBER 2022 AT 10:02 AM

Transcribed by:
EPIQ

HER HONOUR: Yes, so who do we have?

MR BOYLE: May it please the court, your Honour, my name is Boyle, and I appear for Mr Lee Bauwens on the application.

HER HONOUR: Right, thank you, Mr Boyle.

And we have the - - -

MR DOYLE KC: If the court pleases, my name is Doyle with a D - - -

HER HONOUR: Mr Doyle and Mr Boyle.

MR DOYLE: - - - and I'm appearing with Mr Officer, for the applicant to be joined as a second plaintiff, Constable Zachary Rolfe.

HER HONOUR: Right, thank you.

MR COLERIDGE: If the court pleases, your Honour, my name is Coleridge, and I appear for the defendant, The Territory Coroner, who files a submitting appearance.

HER HONOUR: Thank you very much, Mr Coleridge.

MR GAME SC: Since the court pleases, I'm not sure if you can see me, your Honour, I – my name is Game, and I appear with Ms Edwards, for the Attorney General intervening.

HER HONOUR: Yes, thank you, Mr Game.

MR FRECKELTON KC: And may it please, your Honour, my name is Freckelton, and I appear with Ms Bernard, as seeking interveners status, for the Northern Territory Police Force.

HER HONOUR: Thank you.

MR NEKUAPIL: If it please the court Nekuapil, I appear with Ms Wild for the North Australian Aboriginal Justice Agency Limited, applying to intervene.

HER HONOUR: Yes, thank you, Mr Nekvapil.

And we have somebody from the family.

MR BOE: Good morning, your Honour, my name is Boe, spelt B-O-E, and I appear with Ms Boe for Alice Walker, Joseph Lane, and Rakeisha Robertson, seeking to intervene.

HER HONOUR: Yes, thank you. Do you mind if I refer to that group of people as "The families"?

MR BOE: Yes, thank you, your Honour.

HER HONOUR: You don't mind?

MR BOE: No I don't mind, I'm sorry, yes.

HER HONOUR: Thank you.

So we have appearances. Could I just start with the issue of joinder. The Attorney General has indicated no objection to the joinder of the plaintiff, or any of the other interveners. I haven't heard from the plaintiff, but the plaintiff has expressed no opposition, at least, in written submissions. And it does appear to me that both, that Mr Rolfe has established an entitlement to be joined as a plaintiff. And that the other interveners – the interveners, that is – well, the Attorney General appears as of right - NAAJA, the Northern Territory Police, and the families, have likewise established sufficient entitlement, or interest, to be joined, as interveners.

So can we take that as read, and I can simply make those orders joining those – well, joining Mr Rolfe as a plaintiff, and giving leave to the others to be – to intervene?

MR BOYLE: The only issue with that, your Honour, and it's Boyle here for Mr Bauwens - - -

HER HONOUR: Yes.

MR BOYLE: - - - is that in the submissions filed on behalf of the Northern Territory Police Force, there is a claim in the final paragraph of the submissions, that they ought to be entitled to their costs in the event that the application is unsuccessful. And we would say that it should be a condition of any grant of leave, the rest of the interveners in their – or proposed interveners, in their submissions, effectively say they will not seek any costs, and are effectively undertaking to bear their own costs. If it's necessary, I can take your Honour to some authority for the proposition that an intervener, in effect, ought not to be entitled to their costs.

Even where their contentions are ultimately accepted.

HER HONOUR: Yes.

MR BOYLE: But that's the only condition I'd put on that.

MR FRECKELTON: Your Honour, that issue has been superseded by communications laterally. The application for costs, on behalf of the Northern Territory Police Force, should they be successful, in the outcome that they are seeking, has been withdrawn.

HER HONOUR: All right, thank you very much for that.

So Mr Boyle, that takes care of any objection you may have?

MR BOYLE: Yes, I think that's right, subject to anything that – subject to anything that Mr Doyle might have to add for his part. But there's no other issue from my perspective, your Honour.

HER HONOUR: All right.

Mr Doyle.

MR DOYLE: Thank you, your Honour. For my client's part, we would respectfully submit that there is a discretion to be exercised by the court about the status of the intervener. It's not a binary status. The court can impose conditions or can limit the extent of the intervention. There could be debate about whether the matters that give rise to the standing of the interveners in the inquest would suffice for the purpose of this proceeding. But so long as the grant of permission to intervene is limited, at this stage, to making submissions on this application, we wouldn't oppose such an order. I have in mind - - -

HER HONOUR: Well that is what this proceeding is all about.

MR DOYLE: Yes, I have in mind preserving the position about whether they would be joined as parties, having rights of appeal and so forth.

HER HONOUR: As far as – as I understand it, this is an application for judicial review. It is pretty much a single issue.

MR DOYLE: Yes.

HER HONOUR: Application for judicial review. So, a grant of leave to intervene will simply be that. That they intervene, and make submissions on that limited issue in this proceeding. What else could there be?

MR DOYLE: Well your Honour, I was just mindful that an order that joined them formally as parties, might give them some status - - -

HER HONOUR: They're simply getting leave to intervene, in the judicial review proceedings.

MR DOYLE: Very well, your Honour.

HER HONOUR: All right, thank you.

Well I will make those orders. An order joining Constable Rolfe, as a plaintiff. And an order giving leave to NAAJA, the Northern Territory Police and the families,

to – who'll be more particularly described in the order, to intervene on the judicial review proceeding.

All right, and could I just ask, because I can't really see counsel, I can see Mr Boyle, because he's on the screen, but everybody else are tiny little figures at the Bar table. So when you speak, could I just ask, if you announce your name, and party, well, name and who you are appearing for, so that I can follow the conversation more closely. But a couple of things I wanted to say before we begin. So having dealt with the joinder issue, there's a very large volume of material has been filed. But one affidavit in particular goes to 3000 pages. And I'm not minded to accept all that material into evidence.

A lot of it seems irrelevant to the issues on this particular proceeding, namely the judicial review of the Coroner's decision, or ruling, firstly. And secondly, if it's in evidence, I have to read it. And if I have to read all of that material, then you won't get a decision for a year.

So, the proposal I have is this, and that is that I will accept into evidence the body of the affidavits that have been filed, minus the annexures, all of them. And if and when those annexures are referred to in a relevant way by counsel in submissions, we'll simply mark them as being included in the affidavit as part of the evidence. Does anybody have any strenuous objection to that course of action?

MR GAME: Your Honour, could I just be heard on that?

HER HONOUR: Sorry, who was speaking?

MR GAME: It's Mr Game, sorry, your Honour. I'll try and remember to say that each time.

HER HONOUR: Mr Game, yes.

MR GAME: So, yesterday, we communicated with (inaudible) upon Mr Bauwens, and separately the solicitors for Mr Rolfe that we objected to most of the material in their affidavits; in the body of the affidavits and the annexures as being irrelevant to the questions at hand.

HER HONOUR: I tend to agree.

MR GAME: So, one of the affidavits is particularly problematic, which is Ms McNally's affidavit, and it's not just the annexures, the affidavit is quite argumentative about all sorts of things that have got nothing at all to do with the questions.

And Mr Officer's affidavit of 17 November - that is her affidavit, but Mr Officer's affidavit of 17 November is mostly objected to as well, but it's not nearly so argumentative. But it arguably is irrelevant to the issues and Mr Rolfe's question is purely a question about – a question, I'll call it a question of statutory construction

and we're not disputing he has an interest to argue it, nor are we disputing that Mr Bauwens has an interest to argue it.

And in both respects, we simply place – well, we accept the matters that are set out in the submissions prepared by Mr Freckelton in which he explains in which particular respects there may be a relevant exposure of each of those. That's the only – that's really the only question – there's a separate issue raised, it's leave to amend by Mr Bauwens.

That's a separate issue, but again, that issue is described in his submissions as a freestanding question of statutory construction. We will be objecting to that amendment, but again, no material could possibly be relevant for the determination of that question, which is framed as a (inaudible) in that. So, there's that.

We also have an affidavit in which we annex some relevant material and you will have to see some of those annexures. But they're just by way of giving some context and no more than that, your Honour.

HER HONOUR: Yes. Mr Game, as far as your affidavit is concerned, if and when those annexures are referred to, then I obviously will accept them and read them.

MR GAME: Of course.

HER HONOUR: Now, I don't think that that is problematic. That falls within the proposal that I've already outlined. As far as the – Ms McNally's and Mr Officer's affidavits are concerned, I tend to agree to the extent that they were relevant at all. They would have been relevant only to establishing an interest for the purposes of the joinder applications.

MR GAME: Yes.

HER HONOUR: And that's now been done essentially by consent.

MR GAME: Yes.

HER HONOUR: And so – sorry, Mr Doyle, there's no need for those affidavits, is there?

MR DOYLE: Well, your Honour, I was going to suggest this. In light of the position that my learned friend has indicated in his submissions - - -

HER HONOUR: Yes.

MR DOYLE: - - - we accept the objections.

HER HONOUR: Yes.

MR DOYLE: I can hand up a note of the objections. We wonder whether the easier

course will be to simply allow the affidavit, subject to those objections, and that will neatly - - -

HER HONOUR: Yes.

MR DOYLE: - - - demarcate the issues.

HER HONOUR: All right.

MR DOYLE: If I could hand up a note of the objections.

HER HONOUR: Mr Game, are you satisfied with that course of action so we can get on with it?

MR GAME: Sorry, yes, one last thing, your Honour; Ms McNally's affidavit is, shall I say, far more argumentative and it's a very long affidavit and almost all of it is inadmissible.

HER HONOUR: Well, you've notified those objections.

MR GAME: Yes.

HER HONOUR: And those objections are accepted, so let's - - -

MR GAME: No, no, Ms McNally is Mr Bauwens' - - -

HER HONOUR: I'm sorry, Mr - - -

MR GAME: So, you'll have to hear from Mr Boyle on - - -

HER HONOUR: I'll hear from Mr Boyle on that. Mr Boyle?

MR BOYLE: Yes, well insofar as those objections go, I don't read pars 4 to 8 of Ms McNally's affidavit in any event.

HER HONOUR: Yes.

MR BOYLE: And then there's an objection taken to - effectively from par 10 through to the end of the affidavit on the basis of relevance. And I hear everything that's fallen from my learned friend and from your Honour this morning, but in my submission, that material was there having regard to the unique position of Mr Bauwens, whereby he has not yet answered any questions before the Coroner.

He has not effectively had an objection – well, he's had an objection determined, but in the context of Sergeant Kirkby's objection in which he joined, through his counsel at the time and so - - -

HER HONOUR: Well, can I – I'm sorry, Mr Boyle, to stop you because I don't want

for this to go on for very much longer. Firstly, as far as relevance is concerned, I do not need to be taken to any material that was before the Coroner. It can be accept that questions either were asked or will be asked, that either have been objected to or will be objected to and that a ruling was made and that that ruling, if it's not – if it's to stand, is likely to apply to further questions of that nature.

I don't need to decide any question about the relevance of those questions or whether they would give rise to penalty privilege, if that applies, or anything like that. This is simply an application for judicial review of the Coroner's ruling.

So, having said that, that would be the basis on which I would determine the objections as to relevance. Is it an acceptable course of action that the affidavit of – Ms McNally's affidavit be accepted subject to my ruling on objections as to relevance.

MR BOYLE: Yes, your Honour, it would be.

HER HONOUR: Mr Game?

MR GAME: Yes, your Honour.

HER HONOUR: Okay, well we'll deal with it on that basis. Okay, so – well I've already then said what I consider about relevance. Similarly, in the Attorney General's submissions, those submissions contain a lengthy and very helpful, I might say, history of events leading to the Royal Commission into deaths in custody, the introduction of the *Coroners Act*, the background of events leading to the inquest.

And I'm not being critical of that at all, it was extremely helpful to put matters in context. You can – everyone can take it that I've read all of the submissions, but there is no need to go, as far as I'm concerned, into any of that to be repeated in oral submissions, except to the extent that it is directly relevant to the interpretation question. That's just an indication really from me.

The final matter I wanted to talk about this morning before we begin submissions is that I have read all of those submissions; they're helpful. And I will obviously read them again and read them very carefully. However, I query the necessity for oral submissions, comprehensive oral submissions from all counsel.

My proposal would be for one lead counsel, possibly counsel for Mr Rolfe, you can work it out for yourselves, to make oral submissions for the plaintiffs and one lead counsel to make oral submissions for what I could loosely call the contradictors.

And for the other counsel then to simply get up and have their say in relation to anything additional that they want to say, without the need to repeat the primary submissions that have been made by lead counsel for plaintiffs and contradictors.

With this caveat, I should say, Mr Nekuapil, and that is I do note that NAAJA's decision on the construction is different, similar but different, to the Attorney Generals, and you will need, presumably, to develop that position.

MR NEKUAPIL: Yes, your Honour, although I can certainly do that within the framework of what your Honour's just identified.

HER HONOUR: All right.

MR NEKUAPIL: Because a lot of the ground is the same. It's just where we get to.

HER HONOUR: Yes, to the final position, all right.

Well, does anybody have any sort of strenuous objections to that course of action?

MR BOYLE: No, your Honour, and I think Mr Doyle and I had effectively agreed to adopt that kind of a course from our position - - -

HER HONOUR: Good.

MR BOYLE: - - - as counsel for the plaintiffs anyway.

HER HONOUR: All right.

And, as far as the contradictors are concerned, will that be – Mr Game, will you be taking the lead on that? Or do you need to discuss it with your colleagues?

MR GAME: I will. Well I think I will be, but I haven't discussed it, but I think I will be, would be the answer to that question.

HER HONOUR: Would you like me to leave the Bench for a few minutes so that counsel - - -

MR GAME: No - - -

HER HONOUR: - - - can talk about it with each other?

MR GAME: No, I think it's fine - - -

MR BOE: We are content your Honour.

MR GAME: Sorry?

MR BOE: Sorry, the families are content for that course, your Honour.

HER HONOUR: Thank you.

MR FRECKELTON: The Northern Territory Police Force also, your Honour.

HER HONOUR: Right, thank you.

Families and the Northern Territory Police Force, and I've already heard from Mr Nekvapil. All right, well then we can get on with it. Thank you.

So we'll call upon Mr Doyle.

MR DOYLE: Thank you, your Honour. Might I just attend to that matter of housekeeping in relation to Mr Officer's affidavit - - -

HER HONOUR: Yes.

MR DOYLE: - - - by handing forward a letter from the Northern Territory Solicitor, dated 22 November 2022, which sets out the extent of the objections.

HER HONOUR: All right, thank you. I won't make that an exhibit. I'll just - - -

MR DOYLE: No.

HER HONOUR: - - - receive that, so that I can rule on the - - -

MR DOYLE: And so that my learned friend, Mr Game, can understand. The letter refers to certain paragraphs. And I've simply hand written next to them, the exhibits that are caught by those paragraphs.

HER HONOUR: Right.

MR DOYLE: So it'll be apparent from the letter with the manuscript markings, which paragraphs, and exhibits, are excluded.

HER HONOUR: So that will just go with the affidavit, and - - -

MR DOYLE: Yes.

HER HONOUR: - - - will inform what is in, and what is not in.

MR DOYLE: Thank you, your Honour, if I might hand that forward.

HER HONOUR: All right, thank you.

MR DOYLE: And so subject to that qualification, I wonder if I might tender the three affidavits of - - -

HER HONOUR: Yes.

MR DOYLE: - - - Mr Officer. The first dated 10 November 2022. The second, which attracts those qualifications, is dated 17 November 2022. And the third is dated 22 November 2022.

HER HONOUR: Well the three affidavits of Mr Officer, minus the annexures, and subject to the I suppose, exclusions, in the letter of 22 November 22, will be exhibit P1.

EXHIBIT P1: Three affidavits of Mr Officer, minus annexures, and subject to the exclusions in the letter of 22 November 2022.

MR DOYLE: Thank you, your Honour. In light of your Honour's intimations, I had intended to address you on the procedural background context, but I'm going to proceed directly to the legal argument.

HER HONOUR: Thank you, I appreciate that.

MR DOYLE: Put shortly, the issue for determination is whether there is – whether penalty privilege is a basis, quite apart from s 38, upon which a witness who is being examined on oath in an inquest, under The *Coroners Act* 1993 Northern Territory, is entitled to refuse to answer a question. If the answer to that question is no, in other words if penalty privilege is not a basis so to decline, there are two possibilities. The first is that the reason for that is because s 38 of the 1993 Act is addressed, both to self-incrimination privilege, and to what I'll be referring to as penalty privilege.

HER HONOUR: Mm mm.

MR DOYLE: In other words, the penalty privilege is only available to the extent that it is engaged by s 38. That, as your Honour has already noted, is the position of the Attorney General for the Northern Territory, intervening as a right. The other alternative, is that s 38 is not addressed to, and is not engaged by a claim of penalty privilege. But that either s 38 abrogates penalty privilege, or the Act construed as a whole, has always abrogated penalty privilege. Or perhaps even put another way, penalty privilege was never capable of being raised in the context of an inquest.

That as we apprehended, is the position of NAAJA intervening.

HER HONOUR: Yes.

MR DOYLE: In our respectful submission, the court should hold that penalty privilege is a distinct ground, separate from s 38, for the refusal to answer a question. But if the court is against us, we obviously urge that your Honour adopt the Attorney General's position, rather than NAAJA's position.

HER HONOUR: Yes.

MR DOYLE: In order to resolve the question of statutory interpretation, that's posed by that issue, in my respectful submission, it's relevant to understand, first, the status

of penalty privilege as a legal concept. Now that will be relevant to the technique that the court should adopt, in determining whether or not it is available in an inquest. In other words, characterising it, or describing the nature of the privilege might affect the process of statutory interpretation from which your Honour should embark.

It will also be necessary, in my respectful submission, to consider separately, the nature of jurisdiction exercised by a Coroner, and your Honour will appreciate that there are Coroners and there are Coroners, in the various states and territories.

HER HONOUR: Mm mm.

MR DOYLE: But there are some broad propositions about the powers of Coroners, which we'll address your Honour on when coming to the - - -

HER HONOUR: In your written submissions, you rely on a number of provisions in the Act - - -

MR DOYLE: Yes.

HER HONOUR: - - - for the proposition that it is a curial process.

MR DOYLE: Yes.

HER HONOUR: And you say that the result of that is that a penalty privilege is independently available, unless abrogated by the statute, is that right?

MR DOYLE: That's so, your Honour. Your Honour's capsulated the argument in a nutshell. But I will take your Honour to some of those authorities.

HER HONOUR: Yes, thank you.

MR DOYLE: Your Honour, I was proposing to address you in this manner. First on the question of the nature of the privilege.

HER HONOUR: Yes.

MR DOYLE: I propose to address you on seven decisions. Four decisions of the High Court, and I'll just give them short names, because the parties will be well familiar with them.

HER HONOUR: Yes.

MR DOYLE: *Pyneboard v Morris*, *Daniels Corporation*, and *Rich v ASIC*, and three decisions of lower courts. First, the Full Federal Court decision in the case of *Abbco*, that's A-B-B-C-O. Second, the Full Federal Court decision in a case of *Frugtmiet,* which is spelt, F-R-U-G-T-M-I-E-T.

HER HONOUR: Yes, but I didn't know how it was pronounced until just - - -

MR DOYLE: Neither do I, but I thought I'd be bold.

HER HONOUR: Okay.

MR DOYLE: I thought if I hesitated it would be a disaster. And finally, a single judge decision of the South Australian Supreme Court, in the case of Bell. Your Honour, there are multiple lists of authorities flying around. All of those cases are on our list, but might I hand you a folder with those seven cases in it, hard copy.

HER HONOUR: All right, thank you very much, that will be handy.

MR DOYLE: Then, your Honour, after addressing those cases, I propose to touch on the body of law concerning the nature of the powers of the Coroner, before turning to the specific context of the – text context and purpose of the 1993 Act, when first introduced into law in this Territory. And then the context text and purpose of the amendment in 2002, which introduced the current form of s 38. Which your Honour might appreciate, replaced a predecessor provision, which expressly preserved a privilege against self-incrimination.

The 2002 Act made some other consequential amendments, but that's the primary amendment. Your Honour, so that your Honour knows where I'm going with those submissions, might I briefly indicate the propositions that we contend for. The first proposition that we'll seek to demonstrate, is that the High Court has recognised penalty privilege to be a distinct privilege, attracting the principle of legality, thus requiring that it be excluded, expressly, or by necessary intendment, in both judicial proceedings, and non-judicial proceedings.

For that, I'll take your Honour to *Pyneboard v Morris*. Next, we'll submit that in respect of the observations in the case of *Daniels Corporation*, which are plainly directed to the ruling in Pyneboard, the proposition in Daniels Corp that there seems little reason why a penalty privilege should be available in non-judicial proceedings and that it is not a substantive rule of law are first obiter propositions.

Secondly, we do not concede and submit that it can be debated whether they are serious considered dicta but, thirdly, even if they have that status of seriously considered dicta, in our respectful submission, what the Daniels Corporation dicta do not do, is cast doubt on the status of penalty privilege as a common law right arising presumptively in judicial proceedings.

HER HONOUR: Sorry, you say they don't cast doubt on the proposition?

MR DOYLE: On the status of penalty privilege.

HER HONOUR: Sorry, the penalty privilege is?

MR DOYLE: A common law right.

HER HONOUR: A common law right.

MR DOYLE: Presumptively arising in curial or judicial - - -

HER HONOUR: Presumptively arising in curial or judicial proceedings.

MR DOYLE: And more than that, Daniels Corporation does not limit the availability of penalty privilege in a curial context to cases where a penalty is sought in that very proceeding.

HER HONOUR: No.

MR DOYLE: We say, that therefore although the effect of the seriously considered dicta, if it be that, is that penalty privilege cannot be regarded as a substantive rule of law that applies in a self-executing fashion even outside of curial context, it nevertheless has a significant status in a curial context and it is more than a mere rule of evidence, it is a - - -

HER HONOUR: Does your argument depend on the acceptance of the proposition that the Coronial proceedings are curial in nature? I mean, is that a fundamental underpinning? If that goes does the whole argument go?

MR DOYLE: Certainly that's our primary basis. I don't shy away from that but we do put a qualified alternative and it is that in Pyneboard - and I will take your Honour to this in a moment, the plurality did point to the particular significance of the context being examination on oath before a judicial officer and we would submit that even if the correct approach is - well, pardon me - even if your Honour weren't persuaded at a general level that Coronial inquests are judicial - whatever that might mean in this context, where there is an examination on oath, we would say that even if the principle of legality isn't attracted, that is a circumstance which, as a matter of implication, brings with it penalty privilege and that - - -

HER HONOUR: Where a person is examined on oath?

MR DOYLE: Yes.

HER HONOUR: That's what you're saying?

MR DOYLE: Yes, before a judicial officer. Now, there are only very subtly different way of putting the argument but it allows for - - -

HER HONOUR: Do you say there could be situations - so even if the Coroner's Court is not a curial process or procedure?

MR DOYLE: Yes.

HER HONOUR: It doesn't matter, if a person is being examined, on oath, which they are in the Coroners court.

MR DOYLE: Yes.

HER HONOUR: Then you say Pyneboard is authority for the proposition that penalty privilege is presumed to apply in those circumstances?

MR DOYLE: We can't put it in precisely those terms because Pyneboard proceeds from a different premise.

HER HONOUR: Yes.

MR DOYLE: But Pyneboard does attach importance to the application of - pardon me - the context of examination on oath before a judicial officer and so if your Honour is ultimately persuaded that after Daniels Corporation really, all bets are off - if I can put it colloquially and one starts with a blank page.

HER HONOUR: Yes.

MR DOYLE: We would say to your Honour that the first thing that goes on the blank page is the oath and that that carries with it by dent of - - -

HER HONOUR: Okay. So that argument comes in if it's necessary for the statute to confer?

MR DOYLE: Yes.

HER HONOUR: All right, thank you/

MR DOYLE: That is so. Now, I accept that is a harder argument for us but we do put that as an alternative.

HER HONOUR: Just let me make a note of that, if you don't mind. Okay.

MR DOYLE: And, can I put one further slight alternative and that is that we do submit that although - if your Honour were to hold that the Coroner's Court is a judicial proceeding or whatever the relevant test might be, we would submit that your Honour won't need to resolve the status of the Daniels Corporation obiter in non-judicial contexts but if your Honour were persuaded that the Coroner's jurisdiction cannot for these purposes be described as a judicial proceeding or a curial context, we do say that the observations in Daniels Corp are obiter. They did proceed without regard to the decision in Morris and whilst there might be limits to what your Honour can do with this submission, we would formally submit that the obiter is wrong and that - - -

HER HONOUR: Well, it's a submission in the Northern Territory.

MR DOYLE: It is, but I make it as a formal submission in case the matter were to ever go further.

HER HONOUR: Yes.

MR DOYLE: And I think I am obliged to do that, albeit I probably - - -

HER HONOUR: Yes, I am sorry, I wasn't - well, I was, being facetious.

MR DOYLE: The next proposition is that Rich doesn't alter any of the propositions that we make about the limits of Daniels Corporation.

The next proposition is that insofar as the Full Court of the Federal Court in Frugtniet did purport to hold - or I shouldn't say "hold" - did purport to observe that in all contexts even including curial contexts, the question is whether penalty privilege is implied rather than abrogated. We submit that must be obiter in the context of Frugtniet and we respectfully submit wrong, if it goes that far and following upon those submissions, we submit that the case of Bell in the Supreme Court of South Australia, signals the correct approach in the context of a Coroner's Court, namely starting presumption that the privilege is available where there is an examination on oath and the search is for express or necessary words - express words or necessary intendment by way of abrogation.

That's a long run up to what we say is the correct approach and I will then submit that applying that approach in 1993, it could not be concluded that penalty privilege was excluded expressly or impliedly and further, that the introduction of an amended s 38 and with it consequential amendments to s 41, did not alter that position. As I say, a fallback proposition, if your Honour is against us generally, is that s 38 should be taken to encompass penalty privilege.

Might I start then, if that is convenient to your Honour, that proposes manner of address, with the decision in Pyneboard.

HER HONOUR: Yes.

MR DOYLE: And for the transcript I will give the citation [1983] 152 CLR 328. So that will be in the folder that I have handed forward to your Honour.

HER HONOUR: Thank you.

MR DOYLE: Can I start by drawing attention to the provision that was in issue which is set out in the decision of Brennan at page 348 and 9. It commences at the bottom of page 348.

Now, your Honour will appreciate that what was in issue was a s 155 notice under the old *Trade Practices Act*. It's important to note that subs (1) of that provision was premised on the chairman having reason to believe that a person could furnish information, if I can put it broadly, relating to a matter that may constitute a contravention of the Act, or is relevant to the making of a decision by the commissioner under a particular section. The very reason for and basis for a

s 105(5) notice was to gather evidence that might establish or not, depending on its content, a contravention of the Act.

HER HONOUR: So, you say the reason for the s 155 notice was – I just lost track of that there. My computer went - - -

MR DOYLE: To gather evidence that might establish a contravention of the Act.

HER HONOUR: Okay.

MR DOYLE: Now, plainly enough, the notice is not a curial proceeding, it's simply a notice issued without connection to any court proceeding to a recipient. And the next feature to notice is that subs (5) provided that a person should not refuse or fail to comply with such a notice to the extent that they were capable of complying with it.

Subs (7) then provided that a person was not excused from furnishing information, et cetera, on the ground that the information or document may tend to incriminate the person. But it went on to provide that that material could not be admissible against the person in any criminal proceeding, other than a proceeding under the section. And a proceeding under the section would simply involve the contention that someone hadn't complied with the notice.

HER HONOUR: Yes.

MR DOYLE: Or in the case of the body corporate, in any criminal proceedings other than proceedings under the Act. Now, there's that slightly different treatment of an individual in a company, meaning that, in the case of an individual, even if the material showed a criminal offence under the *Trade Practices Act*, it couldn't be used, although it was slightly broader permitted use if it was a corporation.

But might I just draw attention to the nature of the privilege, if you like, engaged by subs (7), expressed simply by the words, "tends to incriminate the person". It doesn't, for example, say, " by way of the commission of an offence or a criminal offence", it's left unstated.

Now, I mention that because, of course, your Honour has as similar argument to deal with in the context of s 38 because the word that's used there is "criminate" but without describing what it is that is the object of the crimination, if I can put it in that way.

So, having shown your Honour the section, if I could take your Honour to some passages in the joint judgment of Mason ACJ and Wilson and Dawson JJ starting at page 332. And at page 332 in the third substantive paragraph at about point six of the page, their Honours said that - - -

HER HONOUR: Just wait until I find it, if you don't mind. Sorry, third?

MR DOYLE: Third paragraph starting, "The issue"

HER HONOUR: Got it, thank you.

MR DOYLE: Their Honours said that, "The construction of the section presents a particular problem. It's caused by the expressed reference in s 155(7) to the abrogation of the privilege against self-incrimination and the absence of any reference to the privilege against exposure to the imposition of a civil penalty.

Now, that telegraphed their Honours' conclusion that as a matter of construction, it was only addressed to self-incrimination privilege. For completeness, your Honour will see on the next page at 333, that it had been held in a Full Federal Court decision by one of three judges, Smithers J, that the language of the expression "privilege against self-incrimination" was broad enough to capture penalty.

HER HONOUR: Sorry, where's this?

MR DOYLE: At about point six on page 333. There's a reference to a decision of Smithers J.

HER HONOUR: Yes.

MR DOYLE: Now, he was one of three judges in that Melbourne Home of Ford case. He held that the reference to self-incrimination encapsulated penalty privilege as well. But Frankie J and Northrup J didn't proceed on that basis, they held that the penalty privilege only applied when giving answers on oath in juridical proceedings or in procedures relating to such proceedings as, for example, discovery. Does your Honour see that at the bottom of - - -

HER HONOUR: I do. I'm not sure I follow it, but I see it.

MR DOYLE: In any event, that's simply just by way of background.

HER HONOUR: yes.

MR DOYLE: One of the additional issues, apart from whether either of those approaches was correct, was whether penalty privilege could even apply to a corporation. That issue is flagged at page 334. But if your Honour comes then to page 335 about halfway down the page, the plurality said that as will appear, this case is susceptible of determination on other grounds.

In other words, they didn't decide the question of whether a company could ever claim penalty privilege. Just to jump ahead, your Honour might know that in a later decision, *EPA v Caltex*, the High Court held that self-incrimination privilege wasn't available to accompany, and drawing on that, in *Daniels Corporation*, the High Court appears to have held that for that reason or by parity of reasoning, nor could a company ever avail itself of penalty privilege.

So, in a sense, the premise has been pulled out from under the analysis in

Pyneboard, but the analysis remains significant, in my respectful submission. So, at 335 in the passage I've just taken your Honour to, their Honours said they were content to assume, without deciding, that the privilege against exposure to conviction for crime and the privilege against exposure to a civil penalty was available to a corporation.

From here commences the relevant analysis. Their Honours said, "It was well-settled, the party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture or ecclesiastical censure. Now, that was a reference to what Lord Justice Bowen had said in the case of *Redfern v Redfern* which is there cited.

Their Honours, on the next page at 336, referred importantly, in my respectful submission, to a discussion by Deane J when he was sitting on the Federal Court of Australia in a case of *Refrigerated Express Lines Australasia v Australian Meat and Livestock Corporation.*

I won't read to your Honour the whole passage there, but what the plurality are referring to is a passage by Deane J where he said, "There are two different cases. One is where the proceedings are for a penalty and in that context, the court won't order discovery against the defendant."

Another, described as "the second situation" and the last four lines of that long paragraph is where the proceeding is not for a penalty but the parties fears that discovery might tend to expose them to a penalty.

And the plurality said, in that second situation, the order will be made, that is an order for discovery, and the party against whom the order is made may object to the production of particular documents or to the provision of a particular – provision of particular information on the ground that it may tend to exposure him to a penalty.

In my respectful submission, that's very important to see that the High Court has endorsed what Deane J said. And I can take your Honour to numerous authorities of the Federal Court which have never questioned this proposition, save perhaps for the Frugtniet which appears to suggest that if a penalty is not on the – not being sought in the very proceeding, but in a sense, there can by no assumption one way or the other about the availability of privilege.

Now, the next proposition in the very next paragraph is that the plurality unpacked what Bowen LJ had said in Redfern, by saying, "That although the rule is expressed as one which relates to discovery, it's necessarily a reflection of the law of privilege." And the second point they went on to make, is - - -

HER HONOUR: So where's that?

MR DOYLE: About point eight of the page, on 336.

HER HONOUR: "Although the rule is" – okay, "necessarily a reflection of" - - -

MR DOYLE: Your Honour, about five lines down, quite obviously, they are four different aspects for grounds of privilege. In other words, there are - - -

HER HONOUR: Penalties.

MR DOYLE: - - - four distinct privileges, or a privilege of four heads. But they're separate from one another. The next proposition, and your Honour will need to note the very last paragraph on that page, we do not agree, and then if your Honour turns over, that it is a special invention of the courts of equity devised for application in suits for discovery etcetera. And then about 15 lines down, page 337, the better view is that equity looked to the existing model of the common law, and applied the rule which it had established.

Can I come then to the next paragraph, commencing "Accordingly the construction of 155 is to be approached on the footing that the privilege", and I'm paraphrasing, is:

> a) not confined in its application to discovery and interrogatories.
> b) available at common law, as well as inequity.
> c) distinct from, though often associated in discussion with privilege against exposure to conviction.

Then, importantly, their Honours say:

> "Before turning to s 155, we need to deal with one further point. The submission that the privilege against exposure to penalty is confined in its application to testimonial disclosures in judicial proceedings, and is inherently incapable of application in non-judicial proceedings."

Now I emphasise that, because in effect, the court is saying, well at its narrowest, it's a doctrine that appears to apply to testimonial disclosures in judicial proceedings. And we would say that's probably broader than examination on oath. It might extent to an affidavit that's ordered by the court, but certainly, examination on oath is within the heartland of that concept. But what the court was going on to consider is, well is it broader than that. And the court said, in the very next sentence, that there was a body of authority to support the proposition that it was confined to testimonial disclosures.

And the court refers to that authority over the next page or so. Then the court points to the competing line of authority, which is to the effect that it is generally capable of application subject to exclusion.

HER HONOUR: Yes, but – sorry, are you talking about the passage in page 338, talk about *Kempley,* McTiernan J?

MR DOYLE: Yes.

HER HONOUR: Isn't that – doesn't that refer specifically to the privilege against self-incrimination - - -

MR DOYLE: It does.

HER HONOUR: - - - and only that.

MR DOYLE: It does, but the plurality, corrected it as bearing upon the availability of penalty privilege in a non-curial context.

HER HONOUR: Okay.

MR DOYLE: Then if I could take your Honour to the foot of 339.

HER HONOUR: Mm mm.

MR DOYLE: And then onto 340.

HER HONOUR: Mm mm.

MR DOYLE: In fact, probably more relevant to consider what starts in the paragraph that commences "Underlining."

HER HONOUR: Okay.

MR DOYLE: "Underlining the conflict is a controversy regarding the nature of the privilege." Then, if I can ask your Honour to read in due course, the second to last paragraph on the page, which is a reference to the other site. A stream of authority, a privilege against self-incrimination stands apart from other forms of privilege. So adverting to the possibility that self-incrimination privilege might bear the lessor status than other forms of privilege.

And I'm referring to the argument that it is too fundamental a bulwark of liberty to be categorised simply as a rule of evidence applicable to (inaudible) - - -

HER HONOUR: But again, talking specifically about - - -

MR DOYLE: Yes.

HER HONOUR: - - - self-incrimination.

MR DOYLE: That's true. It's correct, your Honour. As part of the reasoning which leads to a proposition on page 341. On page 341, their Honour's say, in the second paragraph:

> "There's a stronger reason for holding that the privilege is available in the case on an examination on oath before a judicial officer, which is a preliminary to a committal for trial or summary prosecution, than there is in the ordinary

case, where a statute imposes an obligation to answer questions, provide information, or produce documents. On the other hand, the object of imposing the obligation is to enable, if the object of imposing the obligation is to enable an authority to ascertain whether an offence has been committed, then it is reasonable to conclude that the privilege, though inherently capable of applying, has been impliedly, if not expressly excluded by a statute."

HER HONOUR: Mm mm.

MR DOYLE: Then their Honour's say, "In light of the competing considerations, we're not prepared to hold that the privilege is inherently incapable of application in non-judicial proceedings. The issue of its availability in these proceedings, therefore falls to be decided by reference to the statute itself." And then their Honour's refer to the common law – pardon me, the principle of statutory interpretation that your Honour would know as the legality principle.

And they refer to it being engaged by taking away a common law right. Now - - -

HER HONOUR: I am sorry to keep harping on this, but we're still in the context of privilege against self-incrimination, at this point, yes?

MR DOYLE: Well, in my submission, their Honours are now dealing with penalty privilege, because that's – that is the very issue under consideration - - -

HER HONOUR: Not privilege there, you say refers back - - -

MR DOYLE: Yes.

HER HONOUR: - - - to the earlier discussion on - - -

MR DOYLE: It has to be read with their description of four aspects of the privilege.

HER HONOUR: Okay.

MR DOYLE: So on the one hand they've recognised that they have a distinct statutes, but they're referring to the privileges collectively in these passages.

HER HONOUR: The privilege, you say, refers back the discussion on four aspects of the privilege, yes?

MR DOYLE: Now they are dealing, I think it's fair to say, perhaps both, with self-incrimination privilege, and penalty privilege. I say that, because as your Honour will see in a moment, they held that subs (7) of 155, was partly surplusage. In other words, this reasoning is directed to holding that both self-incrimination privilege, and penalty privilege, were to be tested by reference to this common law, at this principle of legality, and then by looking at the way in which the statute worked, and what it was designed to achieve.

And the last paragraph of page 341, their Honours said that:

> "In deciding whether a statute impliedly excludes the privilege, much depends on the language and character of the provision on" - - -

HER HONOUR: Sorry, can you just - - -

MR DOYLE: I'm sorry, your Honour, page 341, the last substantive paragraph.

HER HONOUR: Substantive – I've got it, yes.

MR DOYLE:

> "In deciding whether a statute impliedly excludes the privilege, much depends on the language and character of the provision, and the purpose for which it's designed to achieve."

Now, their Honours then say, "The privilege will be impliedly excluded, if the obligation to answer, provide information or produce documents, is expressed in general terms, and it appears from the character and purpose of the provision, that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest, of matters involving the possible commission of offences, which lay peculiarity within the knowledge of persons, who cannot be reasonably be expected to make their knowledge available, otherwise than under a statutory obligation."

HER HONOUR: Well, can I just ask you this. Without – with the exception of that phrase, matters involving the possible commission of offences, doesn't that aptly describe the functions of a Coroner's Court? If you just insert in there, the – the functions of the Coroner, rather than you know, involving the possible commission of offences.

Doesn't that aptly describe the functions of a Coroner's Court? If you just insert in there the functions of the Coroner, rather than you know, involving the possible commission of offences. Doesn't that aptly describe the object of imposing the obligation is to ensure the full investigation in the public interest, of matters - and leave out that little phrase about possible offences - relating to the cause of death and all of the other matters under s 35 of the *Coroners Act?*

MR DOYLE: Yes.

HER HONOUR: Sorry, which lie peculiarly, within the knowledge of person who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. Isn't that an almost perfect description, taking out that one phrase and inserting the objects of the *Coroners Act* under s 35? An almost perfect description of the purpose of those provisions in the *Coroners Act*?

MR DOYLE: No, your Honour, we would respectfully submit that first of all, the words that your Honour is excising are obviously very important to our argument.

HER HONOUR: Yes.

MR DOYLE: But it is quite a contestable proposition that in an inquest there will be matters which lie peculiarly within the knowledge of persons who can't reasonably be expected to make the knowledge available otherwise than under statutory obligation.

Now, your Honour might appreciate that that is a comment made in the abstract but in the context of restrictive trade practices provisions of the *Trade Practices Act* where these notices are, in effect, designed to uncover the existence of unlawful anti-competitive arrangements, as an end in itself. And that is absolutely critical to our argument that where a statutory scheme is directed per se to the discovery of evidence leading to the proceedings to impose penalties for contraventions of the very law which confers the power, that is quite different from an inquest which his obviously enough, focussed upon, for various reasons and steeped in history. Including parts of history that are no longer relevant, like the fiscal relevance of inquests which was once upon a time a significant feature of why inquests were carried out. But we would respectfully submit, that the purpose of a Coroner's investigation is not to uncover with a view to seeing dealt with criminal offences, much less civil penalties or disciplinary offences, it can be accepted that if - and to the extent that notice of those matters incidentally arises in connection with an inquest - then they might form part of the broad subject matter into which the Coroner is enquiring but not as an end in and of itself, it remains incidental. That is our essential submission.

HER HONOUR: Yes, I think I've got that.

MR DOYLE: And I don't want to repeat myself but s 155 is really the power in the *Trade Practices Act* to discover contraventions of a civil character - a civil penalty character. Its very purpose was to enable the prosecution - and I am using "prosecution" loosely because they were pecuniary penalties - and so that was why the High Court was moved - the plurality were moved to say that really, both incrimination privilege and penalty privilege were abrogated.

Now, the later - there's lots of authority on authority in this case. Ironically, the later decision of Daniels Corporation would seem to pour cold water on the conclusion that self-incrimination privilege was impliedly excluded via that circumstance that I have just pointed to. I will take your Honour to that. But they held it was only expressly done away with by s 155(7) which complicates things but my point is that we would respectfully submit that if and when your Honour is turning to the question of implied abrogation, broadly speaking, the kind of analysis that is engaged in at the bottom of page 341 is logical and really, it can't be disputed that it's - when one is looking at abrogation one looks, as part of that, at the purpose of the powers.

HER HONOUR: Surely that's right though, it is expressly taken away by s 155(7)?

MR DOYLE: Undoubtedly, but - - -

HER HONOUR: So where is the - I don't - - -

MR DOYLE: Well, only that the plurality in Pyneboard held that even without 155(7) self-incrimination privilege was abrogated - and that was - - -

HER HONOUR: So does that make all that obiter?

MR DOYLE: No, because it's part of the reasoning leading to why penalty privilege was impliedly abrogated.

HER HONOUR: Oka.

MR DOYLE: It is quite convoluted, I am sorry, your Honour.

HER HONOUR: No, no, it's all right.

MR DOYLE: Now, can I take your Honour then to the very bottom of 342 and on to 343?

HER HONOUR: Yes.

MR DOYLE: At the bottom of 342 that:

> "The privilege is impliedly excluded in such circumstances is a conclusion which may be more readily drawn where the obligation to answer questions or provide information does not form part of an examination on oath.

HER HONOUR: Right. You rely on that?

MR DOYLE: Now, this is my subtle alternative.

HER HONOUR: You rely on that for its opposite?

MR DOYLE: Yes, yes.

HER HONOUR: Sorry.

MR DOYLE: They go on;

> "The obligation to give an answer not on oath at an executive inquiry provides an illustration. It will be less readily drawn in cases where the obligation to answer questions and produce documents is an element in an examination, on oath, before a judicial officer, -"

And then I emphasise these words:

> "- whether or not an object of that examination is to ascertain whether an offence has been committed with a view to the institution of a prosecution for that offence."

Now, what their Honours are saying there is perhaps qualifying the general point that your Honour was taking up with me at the bottom of 341, that although the purpose of the power is very important to the question of abrogation and if the purpose is to discover the commission of an offence or a penalty provision more likely to be abrogated, at the top of 343 their Honours seem to be saying,

> "We rely upon the proposition that that has to be tempered where the obligation arises as an aspect of an examination on oath before a judicial officer, whether or not an object of that examination is to ascertain whether an offence has been committed with a view to the institution of a prosecution for that offence."

Now, can I just - at the risk of confusing things further - mention at this point that whereas I think it was historically the case that under the *Coroners Act* in this Territory and certainly if not in this Territory, in other territories, a Coroner could, in effect, commit a person for trial, having regard to matters that have come out at an inquest, the Northern Territory 1993 Act doesn't go that far. The furthest it goes - and I think it's s 35(3) which speaks of a referral of a potential matter to the Director, now I want to just briefly emphasise there that it's a referral to either the Commissioner or the Director if it is believed that an offence may have been committed.

Now, this is a little subtle, but my point will be this, that to the extent that the *Coroners Act* is really pursued at - acting as an adjunct to the criminal justice system, it is in that very limited way, there is no - it doesn't seem to be any equivalent provision that says, "Oh, and by the way, if you think a disciplinary proceeding should follow, make a similar referral".

HER HONOUR: No.

MR DOYLE: And your Honour knows from my one other case before you that there are such provisions in other acts, for example the *ICAC Act* where matters can be referred for disciplinary purposes.

Now, that is only a minor matter but I just mention it now because it ties in with the sort of context that the High Court was talking about where they were saying, "Even if the judicial proceeding might result in an institution of a prosecution, it is less likely that the privilege would be abrogated."

The High Court doesn't – the plurality don't spell out why, but our submissions is that what's really being said is that it is an aspect of the operation of judicial officers administering oaths and sitting as courts that these privileges will be respected. We

say it's a common law right, even if it's not a substantive law right that operates outside that context.

Would it be fair to say that the reasoning in Pine Board really, all the way through, hinged on the nature of the privilege against self-incrimination and that penalty privilege kind of went along for the ride. And then the conclusion was drawn in relation to penalty privilege, or is that too broad a brush?

MR DOYLE: If I can put it this way, I can see why your Honour would say that, but we would say it's nevertheless clear that the High Court had, from the outset, considered them to be distinct privileges. So, the court doesn't seem to have blindly assumed that the result for one must be the result for the other.

They seem to have consciously reasoned in that fashion at two levels; one in saying that there's, in effect, a presumption that it applies, unless abrogated, and secondly, that the kind of analysis that you engage in to work out if it has been abrogated is very similar for the two.

But it can diverge. And in my respectful submission, the case for abrogation of penalty privilege was implied abrogation. It was all the stronger in the Pine Board, because the very object of s 155 was not discovering crimes, but discovering pecuniary penalties.

HER HONOUR: To discover civil penalty type.

MR DOYLE: So, I accept what your Honour says as a matter of observation, but we say that doesn't devalue the analysis for the purpose of our argument.

HER HONOUR: Yes, all right.

MR DOYLE: And now, just to round this out, at the bottom of page 343, your Honour will see that having concluded that, in effect, both penalties were inconsistent with the nature of the statutory scheme which wasn't a judicial proceeding, whilst it didn't involve an examination on oath, they said, "It could be said that the first part of subs (7) was unnecessary."

HER HONOUR: I'm sorry, where's this?

MR DOYLE: I'm sorry, at the bottom of page 343.

HER HONOUR: At the bottom of page 343? Is that what you're talking about?

MR DOYLE: Yes.

HER HONOUR: "It's understandable that no similar provision is made in respect of the use of material obtained in proceedings for a civil penalty."

MR DOYLE: And the only proceeding of that kind where it can be taken are

proceedings under part 4 of the Act and proceedings in which the material obtained is intended to be admissible evidence.

HER HONOUR: Yes.

MR DOYLE: That's the point I've been trying to capture.

HER HONOUR: Yes, all right. That makes sense.

MR DOYLE: And they say, "It may be therefore that the first part of subs (7) is redundant." Strictly speaking, that is so. Then the court goes on to say why it might have been seen as a sensible – but with the avoidance (inaudible) of doubt. Now, finally, I should draw attention to a proposition which will be put against us at the bottom of 344.

HER HONOUR: Yes.

MR DOYLE: Attention should be drawn to the bizarre consequences of the appellant's 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 part 4 is very substantial, even so, it's irrational to suppose that parliament contemplated the person could be compelled to admit the commission of a criminal offence, yet be excused from admitting a contravention of the Act sounding in a civil penalty.

Now, that argument is put against us on the question of if s 38 is really just addressed to self-incrimination privilege, it said, well, it's irrational to think that penalty privilege would survive. And I will be developing a submission about that.

HER HONOUR: Irrational, bizarre and I think there was another word, but yes.

MR DOYLE: There may well be. I think in another context, it's been said, (inaudible) coherent about another statutory scheme. The short point I make about that really is that if the starting premise is penalty privilege unless abrogated, we are not in a s 155 type circumstance.

Part of the reason why it would be so bizarre in s 155 for self-incrimination privilege to be done away with but penalty privilege survive is the point already made. But the whole point of this is to discover contraventions that would give rise to penalties, not criminal offences.

But more than that, we say this; s 155(7) was a blanket abrogation of self-incrimination privilege. There was no discretion to be exercised by the commissioner or whoever had issued the notice.

HER HONOUR: So, no certificate provision?

MR DOYLE: Yes, but there's two elements to this. First of all, no option of preserving self-incrimination privilege. It just cannot be availed of at all.

HER HONOUR: Yes.

MR DOYLE: And because of that, a certificate – well not a certificate, but a self-executing direct use immunity.

HER HONOUR: Unlike s 38 and provisions of that nature where it's at the discretion of the Coroner - - -

MR DOYLE: Yes.

HER HONOUR: - - - however, to require the person to answer.

MR DOYLE: And so, to anticipate my ultimate submission on this, it's really this; if you simply cannot rely on self-incrimination privilege at all, one can see why, subject to the context, it might seem bizarre that you can rely on a penalty privilege. But that is not the - - -

HER HONOUR: Really? Does a discretion make all that much difference?

MR DOYLE: Well, yes, because the Coroner may very well decide that self-incrimination privilege should not be overridden and the question will not be ordered to be answered.

So, because it is quite possible that might conclude that the supposed criminality is peripheral to the true heartland of the inquest or that there is other evidence, such that it is just not necessary to have the person accuse themselves out of their own mouth.

HER HONOUR: Yes.

MR DOYLE: And because of the significance of the crime, if it were a serious crime, a certificate should not be offered. That is a very real prospect, we respectfully say. Now, if that's the case, it's not a foregone conclusion, well, it's not bizarre, in my respectful submission, that penalty privilege might simply exist in an untarnished form.

We say that one could debate the wisdom of such a statutory policy, but it is not in the category of bizarre, nor is it irrational. Of course, your Honour, there are criminal offences and there are criminal offences and there might be many minor criminal offences where it wouldn't take much for a Coroner to be persuaded, given the importance of the evidence to the inquest, that a certificate should be given.

But we would respectfully submit that it is wrong to start the analysis of this case by assuming that self-incrimination privilege is more or less out the window. We say it's not. It's a very live question. And where it is out the window, to put it colloquially,

it comes with a suite of protections. And that's the second layer to our argument.

Now, we say if privilege may or may not – if incrimination privilege may or may not disappear, but if it does, it comes with quite a broad immunity, is it to be implied that penalty privilege is out the window all together with no immunity. Now, that might be a reason if your Honour – we say that's a reason why NAAJA's position should be rejected.

Of course, if the Attorney General's position were preferred, then it's not quite so stark. But we say it is - what that argument illustrates is it would be a very large implication to say, there's this tailored potential abrogation of self-incrimination privilege that will invoke the interests of justice, a whole range of considerations. But if the certificate is issued, it will come with all sorts of protections.

To then say, well by implication, you can't rely on penalty privilege at all, no matter how peripheral the issue might seem to the inquest, how serious the penalty, et cetera. So, your Honour, I'm perhaps jumping ahead which will save me time later, but that's the argument I'll be putting.

HER HONOUR: I think I've got that. I'm just making a note, if you don't mind.

MR DOYLE: Thank you.

HER HONOUR: Thank you.

MR DOYLE: Could I just draw your attention, very briefly, to what Brennan J said at 355.

HER HONOUR: I'm sorry, but I think before you do, it's past the time where we normally have the morning break. And I'm happy to go through, if counsel are, but I just want to check with court staff too, if anybody needs a break. You happy to go through?

Are counsel content to simply go through and not take the morning break?

MR DOYLE: I am, your Honour, (inaudible).

HER HONOUR: All right.

MR DOYLE: Thank you.

HER HONOUR: Carry on.

MR DOYLE: Just briefly, at 355, Brennan J, half way down the page, and I should just explain. Brennan J took a different approach to the plurality.

HER HONOUR: Yes.

MR DOYLE: He really asked the question which the Full Court in Frugtniet, say it should be asked in all cases now, is privilege penalty privilege implied. So he put the onus really on the proponent of the privilege. But the reason I take your Honour to - - -

HER HONOUR: Is it to construe?

MR DOYLE: - - - his reasoning is that in considering that question, he thought it was significant that if the context is not a judicial proceeding, well how do you know whether the claim's a good one. And he says, at about the 10th line of that paragraph:

> "In judicial proceedings, the validity of the claim of privilege is judicially decided."

And then he goes on to say, about five lines down below that:

> "If it were an investigation, how and by whom would the claim be decided."

And then he says at the foot of that paragraph:

> "Neither of these solutions is likely to represent the intention of the legislature. Neither corresponds with the privilege which protects the witness in judicial proceedings, for that depends on the opinion of the judge."

We would – obviously all of these statements are complicated by later authority. But the point is one we would seek to rely upon - - -

HER HONOUR: The distinction.

MR DOYLE: - - - if your Honour's considering the statutory interpretation question, that the Coroner is a local court judge. They can decide the question judicially. There are accepted practises that are applicable. It doesn't have any of the unsatisfactory features that Brennan J, at least was worried about in an extra-curial context. And Brennan J continued in that vein, on the following page. But I won't take your Honour to that.

I won't be as long with the other cases, your Honour will be relieved to hear. But can I go briefly to *Police Service Board v Morris*, which is (1985) 156 CLR 397. In this case, two police officers had refused to obey an order that they answer questions when they'd be ordered by an inspector to do so, contrary to Reg 95A(7) of some police regulations. The relevant provision in due course, your Honour will find at page 402 in the Commonwealth Law Reports.

So again, it was an entirely extra-curial context. At page 403, Gibbs CJ commenced his analysis. At about point three on the page, Gibbs CJ said, "There's an obvious distinction", does your Honour see that?

HER HONOUR: Yes.

MR DOYLE: And he goes on:

> "Nevertheless, although the penalties provided by s 88 are disciplinary penalties, they're none the less penalties, and it's old law, confirmed by modern authority, the person cannot be compelled to answer a question, whenever the answer would tend to expose him to any kind of punishment."

Then about five lines down, Gibbs CJ said:

> "Moreover, it's now accepted that the privilege is capable of application in non-judicial proceedings, see Pyneboard."

HER HONOUR: Yes.

MR DOYLE: Now - - -

HER HONOUR: And (Inaudible).

MR DOYLE: - - - one issue is that in Daniels Corporation, this case is not referred to, which might only bear on whether it could be said to be seriously considered dicta. At the bottom of the page, Gibbs CJ said, in the third line from the bottom, "It is right to start with the assumption that the rule which confers the privilege is capable of applying to a statutory provision which requires members of the police force to answer questions" - - -

HER HONOUR: Capable of applying doesn't necessarily mean will apply unless abrogated, does it?

MR DOYLE: I agree, but the next paragraph seems to suggest that - - -

HER HONOUR: Mm mm.

MR DOYLE: - - - on page 404.

HER HONOUR: Yes.

MR DOYLE: The question that then arises, and then his Honour uses the familiar - - -

HER HONOUR: That the intention - - -

MR DOYLE: - - - express words on necessary application - - -

HER HONOUR: - - - is not available, yes.

MR DOYLE: - - - I agree, it is quite ambiguous, but it does seem to be - - -

HER HONOUR: But it goes on to - - -

MR DOYLE: - - - invoking the principle of legality.

HER HONOUR: Yes.

MR DOYLE: And then, about 15 lines below that, there's a reference to Pyneboard, and the proposition that much depends on the language and character of the provision, and the purpose which its designed to achieve.

Now, about 15 lines from the bottom of that very long paragraph, Gibbs CJ makes a point similar to the point Brennan J made in Pyneboard. That if penalty privilege applied in this police regulation, and he says:

> "If it" – "If it were possible to claim the privilege, a difficulty would arise as to when, and by whom, it should be decided whether the claim was properly made".

Does your Honour see that?

HER HONOUR: No.

MR DOYLE: I think it's eight lines from the bottom. The sentence is starting 10 lines from the bottom, "This view is supported" - - -

HER HONOUR: Yes, I've got it, thank you.

MR DOYLE: And so I just ask your Honour to note that.

HER HONOUR: I see, yes.

MR DOYLE: Now – and at 405, at about point five of the page, he points to the fact that again, if the penalty privilege applied, he says:

> "The determination of the question would be made by an unqualified person."

It's a bit hard to pick up, but it's about 10 lines from the bottom.

HER HONOUR: "There are" – 10 lines from the bottom. In this paragraph that begins "It may be a matter for debate"?

MR DOYLE: It's above that paragraph, about 12 lines from the bottom of that paragraph.

HER HONOUR: I see, "The position will be different if the charge were heard by the board."

MR DOYLE: And a few lines above that:

> "The determination would be made by an unqualified person."

HER HONOUR: I've got it. Yes.

MR DOYLE: Now, all members of the court I think, perhaps with the exception of Murphy J, who I think held that he didn't accept the premise of the argument, held that there was no room for privilege in the context of the disciplinary process.

HER HONOUR: Mm mm.

MR DOYLE: And I just wanted to draw your Honour's attention, briefly, to what Wilson and Dawson JJ said at 407, where, in the second paragraph of their judgement, their Honours said:

> "Two questions of substance now fall for decision. The first is whether -", and I just emphasise, " - the rule of the common law."

HER HONOUR: Yes. I see that.

MR DOYLE: "- is capable of application."

HER HONOUR: "The rule of the common law, that a party which might tend to expose – or the imposition of a penalty." So again, it's not analysed there as two separate privileges at all isn't it? It's "the rule".

MR DOYLE: Well, it could be looked at that way, or it could be looked at from the view point that having recognised distinct privilege as – they're saying, each of – each of the privileges is to be approached in this way. And it's the approach we would contend for.

HER HONOUR: Yes.

MR DOYLE: And then over the page, the paragraph that commences "The second question that arises is whether either the Act or the regulation, revealed clearly either by expressed words, or necessary implication, a legislative intention" etcetera. Now – so I just emphasise those propositions, because although in a sense, this could all be treated as a side show, because it goes to ultimately to this question of whether in non-judicial contexts, you start from a presumption, and then consider whether there's been abrogation. What we would submit is that it is being – however far it travels, it is being referred to as a common law rule.

Which, where it applies, invokes the presumption, or the legality principle. And we say that there is nothing in – there's not a skerrick of doubt in any of these decisions, that in a judicial proceeding, or where there's an examination on oath, that the privilege presumptively applies subject to - - -

HER HONOUR: But the Coroner's ruling sort of went both ways though, didn't it, saying, well, the position is really in her view that that's wrong and that the statute has to impliedly confer the privilege.

MR DOYLE: Yes.

HER HONOUR: But then the rest of her analysis, the rest of the Coroner's analysis was that, well, okay, based on the assumption that what you've said is correct s 38 does by necessary implication abrogate penalty privilege to the extent that is necessary to apply that certificate procedure.

MR DOYLE: I accept that. So I have to deal with the latter in any event.

HER HONOUR: Yes.

MR DOYLE: But I'm just saying that as between the two pathways of analysis we say your Honour should go to the second. And it may be that ultimately no other party disputes that but there are some submissions that are put against us that I do think challenge the premise and so we want to put those submissions.

HER HONOUR: But it won't really be necessary for me to decide which way it should go if it appears that the Coroner was correct to say, well, even on the assumption that the privilege needed to be abrogated and the principle of legality applies and et cetera, well, by necessary implication it did, I don't have to decide which way or which approach, do I? I mean, it's not necessary for this decision which is a judicial review of the Coroner's decision, for me to say, well, it's got to be either this or that.

MR DOYLE: Your Honour, it may be that - it might be debated whether this is strictly a judicial review because we are seeking declaratory relief - - -

HER HONOUR: Yes, all right.

MR DOYLE: - - - the effect of which is that the ruling was wrong but we're not in terms - we might not have standing to quash the ruling and that isn't the way we've proceeded.

HER HONOUR: No, but you're seeking a declaration, yes.

MR DOYLE: So I just - that's a technical perhaps nuance but subject to how your Honour resolves all these issues I can accept that if your Honour was against us - so if your Honour said that even if I suppose that there's a presumption I regard it as clear that it's abrogated then - - -

HER HONOUR: To the extent set out in s 38.

MR DOYLE: Then whilst your Honour could address the premise I agree as a matter of necessitate your Honour wouldn't need to. I think all parties would invite

your Honour, if your Honour is in - has come to that view, to at least say whether it's the Attorney General's position, or NAAJA's position.

HER HONOUR: Well, I think that is necessary.

MR DOYLE: Yes, because that will affect the future conduct.

HER HONOUR: I don't quibble with that.

MR DOYLE: Yes. Thank you, your Honour. We're on the same page, thank you.

Now, can I come then to *Daniels Corporation v ACCC* (2002) 213 CLR 543. The High Court was back in the context of the context of - - -

HER HONOUR: Sorry, before you do, this is probably a convenient time to say so, I need to adjourn about 10 minutes early at 12:30 - so, 12:20 rather than 12:30.

MR DOYLE: Yes, thank you, your Honour.

HER HONOUR: I picked this case at the very last minute because Brownhill J was involved in a trial and I have a prior appointment that I need to keep.

MR DOYLE: Thank you, your Honour, and we're grateful for the court accommodating us.

In *Daniels Corporation* the court had to come back to s 155 but now in the context of legal professional privilege, as your Honour well knows - - -

HER HONOUR: Yes.

MR DOYLE: - - - and it was put by the ACCC that, well, the court in *Pyneboard* held that penalty privilege and self-incrimination privilege were impliedly abrogated even without s 155(7) and what's good for the goose is good for the gander, legal professional privilege is to be taken as impliedly abrogated as well. I mean, there could be no contention that it was expressly abrogated by 155(7). And there didn't seem to be a foothold for privilege within the balance of s 155, at least in express terms.

But the short holding is that legal professional privilege being a substantive rule of law must be expressly excluded and that it wasn't. But incidentally the plurality cast doubt on the proposition in Pyneboard that there was an implied abrogation of self-incrimination privilege apart from s 155(7). In other words, that plank of the ACCC's argument was taken out from under the ACCC by the High Court saying, well, we're not so sure that the earlier court was right to hold that. Yes, it's expressly abrogated but not impliedly abrogated.

That in turn peripherally raised whether penalty privilege was therefore back alive in the context of 155(7) and in what I would respectfully submit is obiter the

High Court said, well, no, the result in Pyneboard is correct, penalty privilege is not available in s 155 but for different reasons.

HER HONOUR: Yes.

MR DOYLE: And one of the reasons alluded to, but necessarily founded upon, was a real question about whether penalty privilege could operate in a non-judicial context. That's the short version of what was held in Daniels Corp. Can I just take your Honour to some of the relevant paragraphs. I'm in the joint judgment. At par 9 the High Court referred to it being settled law that legal professional privilege was a rule of substantive law.

HER HONOUR: Yes.

MR DOYLE: And then at par 11 the High Court went further and said that it's not merely a rule of substantive law, it's an important common law right, or perhaps a common law immunity and the court said that important common law rights, privileges and immunities are not to be taken as abrogated unless the Potter v Minahan test has been passed. So that's in a sense nothing new.

At par 12 their Honours noted that in *Pyneboard* all members of the court had treated as separate and distinct penalty privilege. In other words, separate and distinct form self-incrimination. In par 13 they say that the privilege is one of a trilogy of privileges but bear some similarity with the privilege against self-incrimination, the other two being forfeiture and exposure to ecclesiastical censure.

HER HONOUR: What's that one?

MR DOYLE: Well, I think it was nearly as bad as self-incrimination once upon a time but with one - - -

HER HONOUR: Does that mean you're going to get burned at the stake or something?

MR DOYLE: Well, I don't know about that. Maybe excommunicated or something of that nature.

HER HONOUR: All right.

MR DOYLE: I'm straying outside my direct knowledge but that's what I've been - assumed might be the - there's a matrimonial element to it.

HER HONOUR: I see, yes. In the old - - -

MR DOYLE: Yes. As I say, I'm straying beyond my knowledge there. I suppose the small point - - -

HER HONOUR: It just has a nice ring to it, that's all.

MR DOYLE: Yes, it does. The point we make is that in what follows when the High Court says in effect it's to be doubted whether it applies in a non-judicial context, it's nevertheless still describing this thing as a privilege in noting in par 13 that it was not just a rule of equity relating to discovery and it had long been recognised by the common law. At par 15 - - -

HER HONOUR: Privilege against exposure to penalties is - yes.

MR DOYLE: At par 15 their Honours referred to the passage in Pyneboard where Mason ACJ and Wilson and Dawson JJ had said they were not prepared to hold that the privilege is inherently incapable of application in non-judicial proceedings, and said,

> "However, that statement does not amount to a holding that the privilege is available in non-judicial proceedings."

In the later case, which I will come to, admittedly only a single judge decision, I think Blue J of the Supreme Court has respectfully questioned whether that is correct.

HER HONOUR: Whether that analysis of the joint judgment was correct?

MR DOYLE: Yes. Strictly speaking, because - well, I will come to that judgement but I just note it for the time being. And then in par 16 there's a reference on page 555 of the Commonwealth Law Reports to the rule concerning common law rights - and I emphasise common law rights.

HER HONOUR: Where is this?

MR DOYLE: The third line on page 555 of the CLR.

HER HONOUR: I've got it, thank you.

MR DOYLE: And, somewhat confusingly, the court said that Brennan J's approach, which was to question whether privilege against self-incrimination or any like privilege could be implied into the act, was an approach which failed to give effect to the rule expressed in *Potter v Minehan*.

HER HONOUR: Well, it does, doesn't it? It's the opposite.

MR DOYLE: The reason I say "confusingly" and I don't mean this disrespectfully of course.

HER HONOUR: Because that's what they go on to hold, in a way.

MR DOYLE: In a sense that's what the Full Federal Court in Frugtniet says.

HER HONOUR: Yes.

MR DOYLE: But I think part of the explanation is that, of course, Brennan J was dealing both with (inaudible) privilege and self-incrimination privilege.

HER HONOUR: And self-incrimination privilege, yes.

MR DOYLE: And it might be that the plurality here are saying, "Well, at least where the privilege is engaged and there's no doubt that incrimination privilege was prima facie engaged, if it was engaged then Brennan J didn't give the principal of legality enough work to do and it might be said there "silent as to whether that was a necessary approach in relation to penalty privilege" because as you will see in a minute, they cast doubt upon whether, in a non-judicial context there was even an occasion to (inaudible) legality principle.

HER HONOUR: Yes, gracious.

MR DOYLE: Yes. Then at the bottom of that page, in par 18, about seven or eight lines in, the joint judgment turned to what was said by the joint judgment in Pyneboard, noting that the effect of it was that the first part of subs (7) was redundant. Now, I mention that because that is later, the separate basis for criticising the finding in Pyneboard.

If your Honour would then please come to par 23, it was argued by the ACCC, as I have already told your Honour, that s 155 should be construed using the same process as was adopted in Pyneboard and to recapitulate, if penalty and self-incrimination privilege are impliedly abrogated, even without 155(7), then so too legal professional privilege. And essentially the High Court said, "No, we're not going to proceed by parity of reasoning and there are numerous reasons why we are not going to and one of them - perhaps the most obvious in par 24, is that there just doesn't seem to be such a difficulty with privilege being able to be claimed in response to a 155 notice because if the legal advice or communication relates to something unlawful or illegal, the privilege won't be available anyway. So in a sense that could have been the short answer but the High Court go on and express other criticisms of the reasoning in Pyneboard.

And so at 25, when they say there's a number of difficulties with applying Pyneboard, one of which has already been mentioned, namely that the approach adopted by Brennan J was inconsistent with Potter v Minehan. There are also difficulties with the approach adopted by Mason ACJ, Wilson and Dawson JJ. The chief difficulty, their Honours said at par 26 was that they'd overlooked some other provisions of the telecommunications legislation that were engaged by s 155. We don't need to worry about that.

The next matter in par 27 was that it had been held in the later case of Baker v Campbell that legal professional privilege attached to a provision of the Crimes Act that was very similar to 155 and then at 28 we come to the point that is relevant to your Honour's determination. It was said that the other difficulty with the

approach was that as already noted, it rendered the express abrogation in 155(7) privilege otiose and that that was contrary to a general maximum statutory construction.

Then as 29 their Honours said,

> "Given the difficulties that the approach of, in effect, applying by parity of reasoning, Pyneboard should not be followed."

Their Honours then said: "'So to say' is not to say that Pyneboard was wrongly decided."

And then we would respectfully submit that what follows here is obiter. Now, I don't think anyone disputes that. The only question is, is it seriously considered dicta. The court said, at 30:

> "The implication that the privilege against exposure to penalties was abrogated can be supported by reference to the absurdity that would result."

So in effect, the very last reason given in Pyneboard would be a sufficient reason to reason that because the self-incrimination privilege was expressly abrogated, penalty privilege should have been impliedly abrogated and again, that passage is relied upon against us and our response is the response I gave your Honour earlier, that it's a very different case where there is not a complete abrogation and there is a qualified application coupled with a protection.

Then at par 31 there's a further passage that is relevant and after the quote from *Naismith v McGovern*, the High Court said:

> "Today the privilege against expose to penalties serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove that.

I will come back to this, but can I ask your Honour to note the footnote, to Abbco, a decision I am going to take you to in a minute. However, there seems little, if any, reason why that privilege should be recognised outside judicial proceedings. Certainly no decision of this court says it should be so recognised, much less that it is a substantive rule of law. Just pausing there, it might be debated whether Morris says it should be recognised, but against what I have just said, in the end Morris held that penalty provision was not available but had arguably started from a premise of it needed to be abrogated. But it may be that Morris wasn't cited or it might be that the High Court accepted Morris but said, "Well, nevertheless, it's not a holding that the privilege does apply, it's a holding that it doesn't and how the court got there is neither here nor there."

But further, their Honours said, "It should not be accepted that as the privilege against self-incrimination is not available to the corporations, nor is the penalty

privilege, so the decision in *EPA v Caltex* was a further reason why Pyneboard was correct but maybe not, their Honours said, for the reasons given.

Now this passage is very important, because in Frugtniet, the Full Federal Court, and (inaudible), and a later decision of Rich. And on one reading of some paragraphs of Frugtniet, suggests that even in a judicial proceeding, that privilege is only available where there is a penalty being sought in the very proceeding.

HER HONOUR: And that's a reference back to the origin of the privilege being in proceedings or a penalty where discovery and interrogatories are not available.

MR DOYLE: Your Honour's quite right. Respectfully, we say that hits the nail on the head. It might be a reference back to the origin, but it's not a description of its scope. And the reason that's clear, well we say, we respectfully submit, is that one of the cases cited is Abbco and Abbco couldn't be clearer, than that the privilege is available, in a context where the penalty is not being sought in a proceeding.

HER HONOUR: Mm mm.

MR DOYLE: But the procedure that's adopted differs. And that takes us back to Dean J, in Refrigerated Australia. Where the penalty's being sought in the proceeding, there's an absolute embargo on discovery. There won't be an order for discovery - - -

HER HONOUR: No.

MR DOYLE: - - - and nor could there be a compulsion to give oral evidence. But where the penalty is not sought in the proceeding, it's a document by document, or whether it's a question by question, approach to the availability of the privilege. And can I just take your Honour to Abbco to make that plain.

HER HONOUR: Okay, that makes perfect sense.

MR DOYLE: Thank you.

HER HONOUR: So, Abbco, you say.

MR DOYLE: And I – just before your Honour goes there, please note that the passage from Abbco that's being referred to is 129. For the transcript, I'll give the reference of the case. *Trade Practices Commission v Abbco*, that's with a double b, *Ice Works Proprietary Limited* (1994) 52 FCR 96 at page 129. If I can say so with respect, Burchett J's decision is a masterpiece of legal history and analysis. But attention can be confined to pages 127 to 129 of Abbco.

This was actually a decision of five Federal Court justices. But at 127, at about par F, does your Honour see that?

HER HONOUR: Yes.

MR DOYLE:

> "The true rule is not based on a categorisation of the action, as an action bought by a common informer, or even as an action bought solely to recover penalty, although it does apply in such cases. It is a false syllogism to see the rule as therefore restricted to these cases."

HER HONOUR: Mm mm.

MR DOYLE: Reference is made to Naismith, which is the very case the High Court had cited in Daniels Corp. And then at G, "That was not put" –

> "That was not to put the matter on the basis of some narrow principle applicable to actions for penalties or forfeitures, but on the broad principle of equity, which Hardwicke LC applied in *Smith v Read* when he said there's no more established rule"

Et cetera. And I won't - - -

HER HONOUR: Yes.

MR DOYLE: - - - read it verbatim.

HER HONOUR: Got it.

MR DOYLE: But then on page 128 at letter B, the point was put very clearly by Lindley LJ in *Martin v Treacher*, where his judgement proceeds, not on the basis of a rule peculiar to actions for penalties, but upon a consideration of how the well-established principles of law, with regard to discovery, apply to such a case. Now, in other words, it's not dependent on there being a penalty in issue. Then at letter D, there's a reference to a judgement of Isaac J's, in the High Court, in Associated Northern Collieries where, in the very last part of the passage of Isaac J's, something very similar to what Deane J said is set out.

And I'll just read the last sentence.

> "In the former case, there is no such necessary consequence, and whether the objectionable tendency exists or not, has to be otherwise ascertained in claiming immunity upon oath in the course of making discovery as the most usual, but not the only means of establishing it."

In other words, Isaac J's is saying, if the proceedings not seeking a penalty, and that's the former case, it's not necessarily the fact that there'll be an exposure to penalty. You'll have to establish it - - -

HER HONOUR: On a - - -

MR DOYLE: - - - on an item by item basis.

HER HONOUR: - - - item by item, or case by case, question by question.

MR DOYLE: And so at letter G, Birch J, says:

> "In this passage, Isaac J's assumes there's a single principle."

And he refers to the objectionable tendency in the quotes. Then coming over the page, to page 129, the page cited by the High Court in Daniels Corporation. The second line:

> "There's no suggestion here, nor is there elsewhere in the detailed judgement delivered by Isaacs J, that the exclusion of discovery and actions for a penalty rests upon some principle peculiar to such actions, and not upon the principle applicable to any discovery that has the tendency to self-incrimination, or self-exposure to a penalty."

And then the reference is made to Deane J's judgement in *Refrigerated Express* lines, and letters C, D and E, the Birch J(?) in effect, emphasises the importance of the principle.

And says, that whilst it's distinct from self-incrimination privilege, and he says at letter D:

> "The principle may evoke may less feeling, but it remains the same principle. It's wrong to regard the two grounds, or aspects of privileges, depending on unrelated or different considerations, should not be seen as separate props in the structure of justice. Rather as interlocking parts of a single column."

Now, I should have said, the whole point of Abbco is to consider whether penalty privilege was available to companies.

And part of Birch J's analysis, was to tie it back to, in effect, the fundamental principle of a person having to accuse themselves. And after analysing all these matters of the scope, his Honour found that penalty privilege was not available to companies. But the point we would wish to emphasise, respectfully, is that it's very clear, in the judicial context, that it's not limited to proceedings for the imposition of a penalty. And the High Court should not be taken in Daniels Corporation, to be impliedly disapproving of the very passages that - - -

HER HONOUR: (Inaudible).

MR DOYLE: - - - in fact cite. Now, I'm getting there, your Honour. If I can come to Rich. *Rich v ASIC* (2004) 220 CLR 129. This was obviously enough an action - - -

HER HONOUR: I'm trying to find it in your – got it.

MR DOYLE: - - - an action by the – by ASIC against company directors. And the real question was whether, because the disqualification was one of the grounds of relief sought, and that followed upon breach of something called a civil penalty provision, as distinct from a pecuniary penalty provision. Whether that was a penalty that invoked the concept of penalty privilege.

In my respectful submission, that context is important because with respect to the Full Federal Court in Frugtniet, we would respectfully submit, that in some overture passages in Frugtniet, the Full Court misapprehended what was really in issue in Rich.

Now this was a case where the question was whether the parties should be relieved from basic rules, like discovery, in limine. And the only suggestion, so far as I can see from my reading of the case, of any penalty that the parties could be exposed to, was the very relief being sought in the action. Namely, disqualification. And so the reason why the High Court was considering whether civil penalty provisions leading to disqualification invoked the privilege, was not because it had to be a penalty sought in the very proceeding, but rather, that was the only penalty that was on the cards and the question was simply, is it a penalty?

HER HONOUR: Yes.

MR DOYLE: And very briefly, that's apart from pars 19 and 20 of the joint judgment where it is assumed that because it's a curial – well, my submission is, it's assumed that because it's a curial proceeding, the penalty privilege will be engaged, if there is a penalty on the cards.

Indeed, s 1317L positively required the evidence and procedure for civil matters to be applied. And the High Court said that that positively required the relevant doctrine to be applied. And the court said at the bottom of 19:

> "In the course of oral argument in this court, its counsel affirms that it was not argued that such privilege as there may be has been abrogated."

HER HONOUR: It was simply a question of whether the privilege applied to that particular penalty?

MR DOYLE: Yes.

HER HONOUR: Whether it was a penalty.

MR DOYLE: That's our submission and that's - then if your Honour comes to 23, the court dealt with Daniels Corporation and what it had said about penalty privilege being one of the recognised privileges.

At par 24, reference to what was said in Daniels Corp, in effect that – then at the end of 24, in the present matter however, the only issue is about the application of these privileges to discovery and judicial proceedings. No wider question arises.

So, in effect, harking back to what Daniels Corporation had said in the nonjudicial context, the High Court was really saying, well we don't have to worry about any of that.

And then at 25, there's no question of abrogation. And then at the very end of 25, which is on page 143, there's a sentence that starts:

> "Thus the question in the present matter becomes whether the privilege is against exposure to penalties or forfeitures are engaged through the proceedings exposed the appellants to penalties or forfeitures".

Now, my - - -

HER HONOUR: Sorry.

MR DOYLE: Sorry, it's the last part of 25 and it's - - -

HER HONOUR: 25, got it.

MR DOYLE: Now, in my respectful submission, it may be that with great respect for the Full Federal Court has elevated that passage into meaning that the starting point, even in judicial proceedings, is to see whether penalty privilege is engaged instead of, is this a penalty?

HER HONOUR: This one, yes.

MR DOYLE: And we say that Rich therefore doesn't really add to or change the submissions we've put to this point. That brings me to the Full Federal Court in Frugtniet, that's [2018] 259 FCR 219.

The question here was whether in proceedings in the Administrative Appeals Tribunal penalty privilege could be relied upon to, in effect, defer certainly procedural obligations such as pleadings or witness statements. The Full Federal Court were quite explicit in saying at par 7, in the fourth line:

> "While this court has been invited by MARA to determine the wider question of whether penalty privilege applies at all outside purely judicial proceedings. As a pathway to determining whether the primary judge had erred, it's best that this appeal is not determined on any basis wider than it needs to be.
>
> That limited approach avoids traversing decisions by non-federal intermediate appeal courts dealing with this issue in the context of non-federal tribunals which have a very different legislative and constitutional context and may have a judicial character of a kind that cannot exist in the federal arena."

And then in the last sentence

> "This court does not need to go beyond determining the application of penalty

privilege to these particular AAT proceedings, and accordingly should not do so."

We say that is important in understanding the ratio, as distinct from the obiter in Frugtniet.

In effect, their Honours were saying, we're not even deciding generally what the position is in executive-type nonjudicial proceedings, much less are they dealing with judicial proceedings. Nevertheless, and I say this with great respect, there are passages that do go outside of that area and as a result give rise to obiter observations that other parties are – pardon me, other interveners are urging that your Honour should follow.

Now, I'll just give your Honour perhaps the references. At par 9, there's a reference to the concept of a seriously considered dicta, par 10, the court says therefore, we might need to determine whether Daniels Corp is seriously considered.

But then, on about the sixth line, the court says:

"Even if such a comment cannot be regarded as seriously considered dicta. So as to fall directly within Farah, the safest and soundest approach is to take it at face value and endeavour to give effect to it."

Now, it then commences a very detailed analysis of all of the cases that I've just taken your Honour through, and I won't repeat the task. But if I could come to 32, at par 32, the court says, "The later decisions of the High Court of Daniels and Rich, which are discussed below, go further in casting doubt on the correctness of the implicit assumption in Morris that penalty privilege is akin to the privilege against self-incrimination and is capable to apply to an non-curial proceeding, unless statutory construction leads to a different conclusion.

While the view taken in Pyneboard has been accepted to the extent that penalty privilege, like the privilege against self-incrimination, was considered to be a common law right, both Daniel and Rich contain clear indications, albeit obiter, that the scope for the application and their essential nature is not the same.

Now, we respectfully say that even if that is accepted in total, it is acknowledged that it remains a common law right, but just that it is different and doesn't apply as widely, and it doesn't presumptively apply as widely as self-incrimination privilege.

Now, their Honours then deal with Daniels Corp and at 39, again I emphasise in about the eighth or nineth line, while penalty privilege and the privilege against self-incrimination are both rules of the common law, penalty privilege is to a substantive rule of law. So, again, we say it's at least accepted that it is a common law rule.

Then in Rich, the analysis of Rich, I don't want to labour this but at par 42, the court said that the joint judgment in Rich confirmed that the relevant approach is not one of determining whether there's been a statutory abrogation. Rather, the

question is whether such privilege is engaged in the first place.

HER HONOUR: You say that's wrong because the issue in Rich was simply whether this was in fact a penalty.

MR DOYLE: Respectfully, that's our submission. Now, it doesn't infect – I'm not for a minute suggesting that the outcome in Frugtniet is wrong, but we say that too much status has been given to what was dealt with in Rich. And then there's reference to – at 44 to observations by Kirby J in dissent. Then there is a section headed "Reconciling Pyneboard and Sorby, Morris, Daniels and Rich" that starts at 45 and it really culminates in a proposition at paragraph - perhaps if - I will invite your Honour to read all of this in due course, but perhaps at 51, if I can focus there.

HER HONOUR: I have read this case, just to let you know that I am carefully marking the parts that you particularly want to rely on.

MR DOYLE: Yes, thank you, I will be a bit more selective in what I take your Honour to.

HER HONOUR: I am not trying to stop you in any way.

MR DOYLE: No. At 51, "Morris reasoning must now give way to Daniels and Rich reasoning".

HER HONOUR: Yes.

MR DOYLE: And then in the FCR it is at the top of page 235.

> "Penalty privilege ordinarily applies only in a curial setting, to protect a party from having to assist in the process of seeking to have a penalty imposed upon them but may be found to have a broader application as a matter of statutory construction."

Now, to the extent that that is saying - - -

HER HONOUR: Do you quibble with that?

MR DOYLE: It just depends whether it is - - -

HER HONOUR: "May be found to have a broader application as a matter of statutory construction, including by reference to curial features of an otherwise non-curial setting".

Well, you have been saying something similar, really, when you are pointing to the importance of it being - that there being, for example, examination on oath before a judicial officer as being curial features of an otherwise perhaps non-curial setting.

MR DOYLE: Yes. We do embrace that aspect of it and it's perhaps unclear how far the sentence goes, but if it is suggesting that in the curial setting, unless there is a penalty on the cards, in that particular proceeding, you need to look for a basis for implication as opposed to a basis for abrogation where we would respectfully submit we would quibble with that and 51 is a bit ambiguous, and it's - - -

HER HONOUR: It's not really necessarily saying that.

MR DOYLE: No. I agree with your Honour, but then when we come to par 77 the court does seem to go a little further by saying that "Following Sorby, the starting point for the privilege is that it exists and applies unless abrogated but that's not the starting point for penalty privilege following Daniels and Rich" and then in each setting where penalty privilege is claimed, the opening question is whether the privilege applies in the first place, not whether it has been abrogated. That would appear - if it doesn't mean what I am worried about then so much the better, but it appears to - - -

HER HONOUR: It doesn't appear to be confined to non-curial proceedings.

MR DOYLE: Yes, that's the point.

HER HONOUR: On its face.

MR DOYLE: And then at 79 there seems to be more open-textured test which is that really, it's never presumptively available, it's - you've got to look at whether it's a curial proceeding, whether the proceedings exposed the claimant to penalties of forfeiture and whether it has been - well, I won't read out 3. We really just say that those observations aren't necessary, they may well be absolutely apposite in the context of the AAT but we say shouldn't guide your Honour, if your Honour accepts one of our premises, which is that the Coronial inquest isn't a purely executive inquiry and it has significant curial features to it.

So I won't read 81 but that is in the same vein. Now, lastly, I want to go to - and I hope to be able to conclude this before 12:20 but please stop me - I waffle.

The decision of Blue J in *Bell v Deputy Coroner* [2020] 138 SASR at 467 and your Honour can see in the headnote on the second page of the report, (inaudible) of the *South Australian Coroners Act* as it stood at the time and relevantly the Coroner could require someone to answer a question at an inquest under subs (5) they were not required to answer the question or produce a document if (a) incrimination (b) legal professional privilege.

Now, in some respects therefore non-abrogation and in some respects - - -

HER HONOUR: Yes. It's an absolute preservation, it's not a partial abrogation.

MR DOYLE: Yes. It's - and the question was, is it only a partial preservation, therefore is it implicitly a partial abrogation. In a sense it is a bit similar to the

position that applied under our Act before 2002 because before 2002 you had s 38 preserving incrimination privilege, you didn't have the legal professional privilege provision but we would obviously submit that following Daniels Corp, it just lives there unless the plainest language excludes it and say that legal professional privilege must be available in an inquest.

So this is the closest we get to a decision that ties all of this complexity together and we rely on it in various ways. The argument, just putting it very briefly, was the Coroner ruled that penalty privilege couldn't be relied upon, in effect saying, "Well look, the Act is quite clear, it preserves legal professional privilege, self-incrimination privilege but impliedly by not mentioning penalty privilege that's gone - or it was never there.

Now, Bellew J rejected that argument. The holding is that penalty privilege remained available. We respectfully urge upon your Honour the technique that he deployed to get there because we suggest that it is applicable here.

Can I take your Honour to par 103?

HER HONOUR: Yes.

MR DOYLE: Just to point out some similarities and some differences with the current Act that we are dealing with. First you will note, your Honour, that the South Australian Act actually established a court and said it was a court of record. That is not the case in the Territory but I will take your Honour to authority that we would respectfully submit has the result that there is a court of record.

HER HONOUR: Mr Doyle, I am sorry, I am going to - firstly, I don't want to hurry you up so that if you are going to take, you know, time to do this you should be able to do it without racing the clock to 12:20 and secondly, it's 12:19.

MR DOYLE: Yes, your Honour.

HER HONOUR: I will adjourn now, if that is - whether or not it is convenient.

MR DOYLE: Thank you.

HER HONOUR: Please adjourn the court.

ADJOURNED

RESUMED

HER HONOUR: Yes, Mr Doyle?

MR DOYLE: If the court pleases. Before we adjourned I was addressing your Honour on the decision of Bell at par 103.

HER HONOUR: Can I just ask, before we start, for a quick estimate about how long you think you will be so that we can - - -

MR DOYLE: I think I will be about an hour and a quarter. I have spoken to Mr Boyle and he doesn't expect to be terribly long at all.

HER HONOUR: All right, thank you. That gives us - - -

MR DOYLE: I might be able to come in under that, your Honour.

HER HONOUR: Okay. I am just thinking of the time we have got allotted, but you go ahead.

MR DOYLE: Yes, yes, I am certainly mindful of that.

At par 103 and following Blue J described the South Australian scheme. He mentioned that the court is a court of record. I will come back to that in a moment in the Northern Territory context. At par 109 - pardon me - at 107, his Honour set out s 21. Could I draw to your Honour's attention that in South Australia the Coroner must hold an inquest where there is a death in custody, which is one of the features as well of the Northern Territory scheme, that emphasis is placed upon by the intervenors so that was also the case in this decision.

Section 22 contains the compulsive powers, they are set out at par 108. At par 109, the critical section, s 23 is set out and I have already addressed your Honour on the basic structure of that section, preserving expressly, as it did, incrimination and legal professional privilege.

At 111 his Honour set out s 24, Courts not bound by the Rules of Evidence. That is a direct analogue of s 39. At par 102 his Honour set out s 25 which deals with findings on inquest and is broadly similar to the Northern Territory provisions, although not precisely so.

Now, then if I could ask your Honour to come forward to par 132 where his Honour commences to consider the availability of penalty privilege. His Honour dealt with the authorities that I have already addressed you on in a series of paragraphs through to about par 149 and at par 149 his Honour indicated that;

> "It was common ground in the present case that penalty privilege can be claimed in a curial proceeding, not withstanding that the penalty could not be imposed in those proceedings but might be imposed in different proceedings."

That was the point I was labouring earlier today but I wanted to lay the foundation for that. Your Honour will see footnote 47 includes the Refrigerated Express case and the Abbco decision, amongst others. In our written submissions we have provided further authorities for that proposition in our footnote 41, but I won't take your Honour to that now.

At par 150 his Honour described the principles applicable in a curial context and I don't need to go to those given that all parties are accepting the issue is live and not moot in the present case.

Then at par 151 his Honour referred to the question whether penalty privilege was available in a non-curial context, noting that the parties had made submissions about that.

But at 154 his Honour said it was ultimately accepted that it wasn't necessary for him to decide the question of the availability of penalty privilege in, for example, disciplinary proceedings and he did not do so.

But because the parties had made submissions about it, he did make some observations between par 156 through to 160 where he dealt with the cases that I've addressed your Honour on. He then came to Frugtniet at 161 and set out one of the passages I read to your Honour earlier today.

And then at 162 said, "The passage extracted above constituted obiter because the Full Court had earlier said that its decision was to be regarded as confined", and we respectfully adopt and urge that approach upon you. At par 163, he referred to an obvious tension between Pyneboard, Sorby, Morris on the one hand and Daniels on the other, but said he didn't need to decide the issue.

But he nevertheless went on to apply the principle of legality as to the availability of penalty privilege in curial context at the Coroners Court. And we say that that is the approach that your Honour can and should take in this case. In considering that question, at par 164, Blue J set out how the Coroner had approached the matter.

And the Coroner had much in the manner of the Frugtniet decision said, "One does not look to see whether what personal privileges have been excluded. One looks to see what excuses have been made available for non-compliance."

Blue J said at 165 that – and this is on page 498 of the report, I consider that it is erroneous because it takes the approach adopted by Brennan J rather than the approach adopted by the plurality in Pyneboard. His Honour then approached the question of abrogation by reference to the familiar statutory interpretation principles of text, context and purpose.

So, at 167, he looked at the text and he said, "It's not expressed to include it." At 168, he averted to the argument that I've already addressed with your Honour that comes from Pyneboard and Daniels, but if s 23 had abrogated self-incrimination and

legal/profession privilege, he says an argument would be available, but it was implicit that penalty and forfeiture privilege were also abrogated.

He didn't need to resolve how that argument would play out. But what he was contemplating was seemingly a complete abrogation in the nature of the abrogation in Pyneboard. We accept, obviously, that that's a relevant consideration for your Honour, but we say Blue J isn't to be taken as suggesting that that would be decisive.

At 169, his Honour said that really, the argument for the Attorney General in Bell was that when the statute preserved legal professional and self-incrimination privileges covering the field, and at 170, his Honour said, "Covering the field park arguments are good enough for the purposes of the principle of legality and it would need to be done expressly", is effectively what he said at 171.

He also pointed at par 172 to the difficulty that arose from the state's contention in that case that, whilst they were submitting that penalty privilege was abrogated. It was being suggested that other privileges and immunities such as public interest immunity might continue to apply.

And Blue J said, really you're urging upon me a mish-mash of preservation and abrogation and in light of the principle of legality, I'm not prepared to proceed on that basis. And so, we would adopt and seek to apply that sort of rationale to the present case.

When I make these submissions, I'm really addressing two different things. One is the position before 2002, which we say is very similar to Bell. And then when we step forward to 2002, the same interpretative techniques apply, but obviously, we have the new s 38 to contend with.

Can I come then to context at par 178. At par 178, his Honour said that there was nothing in the context that pointed to abrogation of common law privileges apart from two. His Honour pointed out that s 23 didn't create an offence of failing to answer a question or produce a document and said:

"The fact that the section adopts the common law procedure and sanction of contempt, it is consistent with a lack of intention on the part of parliament to abrogate common law privileges."

HER HONOUR: That's a bit tenuous, isn't it?

MR DOYLE: Pardon me?

HER HONOUR: That's a bit tenuous, isn't it?

MR DOYLE: Well, it's probably marginal, but I think his Honour's dealing with contextual matters.

HER HONOUR: All right.

MR DOYLE: At par 179, however, we would place greater reliance on, where you have a court, it's a common law concept and the fact that Parliament chose to create the court as a court and that courts traditionally recognise common law privileges is consistent with a lack of intention to abrogate.

Can I just ask your Honour to note in this context that we rely in particular on s 6(2) of the 1993 Act which preserves the common law powers and duties of a Coroner. At par 180 and so on, his Honour dealt with matters of legislative history. At 183, his Honour referred to a predecessor provision that had just referred to the concept of "tending to incriminate" without specifying more than that.

But his Honour said that that sort of language was indicative of the self-incrimination privilege rather than the penalty privilege. That might have some marginal relevance to your Honour in relation to s 38.

Then his Honour dealt with mischief in par 186, noting that although the second reading speech had only referred to the preservation of the right against self-incrimination. At 187, his Honour said that although no reference was made to any other privilege, including legal/professional privilege, that is at best neutral for the state.

Then at par 190, his Honour said that the state contended that penalty privilege had a lower status and his Honour rejected that proposition; at least rejected it in the way it was put saying that a penalty subject penalty privilege may have a far greater consequence, depending on the facts, such as a dismissal from office and a penalty imposed for an offence protected by self-incrimination.

And par 191, his Honour rejected the proposition that simply because the court is not adjudicating rights and liabilities, that tended towards abrogation of privileges. Again, we would - - -

HER HONOUR: You can take it, I have read this case.

MR DOYLE: Thank you, your Honour.

HER HONOUR: But if there are important points that you want to draw out of it, don't feel constrained.

MR DOYLE: The last point I make is simply that in 193 and 194, we're turning to questions of policy, if you like. His Honour said, "In some ways, it's more likely that self-incrimination would be an obstacle to getting to the truth than would penalty privilege".

And he rejected the Coroner's submission – pardon me, not submission, but proposition at 194 that the work of the court would "grind to a halt" if penalty privilege were available. So, we adopt that.

Now, that of course was dealing with a court – a statute that specifically made the Coroner's Court a court of record.

Your Honour knows that the 1993 Act doesn't in terms do that, but the Coroner referred to a New South Wales decision of Decker and we respectfully say that the Coroner was right to draw upon that case where the New South Wales court held that even though the legislation that was being considered in that case wasn't even explicit about the existence of a court, never the less, having regard to matters of history, it should be concluded that the court was a court of record. The decision of Decker itself refers to a number of cases. I'm not going to take your Honour to them. But can I mention the names of the cases, and invite your Honour to have regard to them.

Because we have included them in our list of authorities. The first case is *Attorney General v Mirror Newspapers*, which is number 17 on our list. The proposition we take from that is the Supreme Court said Coroner's are involved in the administration of justice. And as a result, superior courts can visit contempt upon people who bring the work of a Coroner into disrepute. The second case is the case of *Mirror v Waller*, which is number 32 on our list. In which it was held that although of course Coroner's Courts are not bound by the rules of evidence, they are still exercising judicial power.

The third case is to a similar effect*, Musumeci v Attorney General*, number 33 on our list. In which it was held that the Coroner exercises juridical power, and reference was made to what Toohey J said in the case of *Annetts v McCann*, where his Honour said that the Coroner's Courts were courts of record.

And finally, although not referred to in Decker, we invite your Honour's attention to a very old South Australian case of *Comyn v Willshire*, which is number 24 on our list, in which Stow J, S-T-O-W, dealt with the contention that the 1858 didn't the court, and his Honour said, well the court could be sitting under a gum tree. The Coroner's office is an action jurisdiction, and that the powers included powers to commit for contempt.

Now we says 62, by preserving those common law powers and jurisdiction, picks up the capacity to deal with contempt. And for that and reason, the approach taken in the Victorian Supreme Court, in the case of Harmsworth, which is on the list of authorities of the family interveners, is distinguishable, because in that context, the Victorian Act, had a provision almost to the opposite effect of s 62, saying - - -

HER HONOUR: So what case do you say is distinguishable?

MR DOYLE: *Harmsworth v State Coroner* [1989] VR 989, where there was a s 4 that in effect did away with the common law elements of the Coroner's office, as a part and parcel of creating a purely statutory scheme.

Finally, can I mention a decision in which your Honour participated. Skidman and Co v Lowndes [2016] NTCA 5, in which in a joint judgement, your Honour and the Chief Justice, and Hiley J said, at par 38, that a Coroner may be exercise – is acting judiciously, and may be exercising judicial power.

We say that's consistent with the New South Wales cases. And at 39, dealt with the concept of a proceeding, noting that it could have a range of meanings, but middle course, which was adopted in the context of that case, was to refer to a method permitted by law, in which a judicial officer undertakes an authorised act. And we we say that aptly describes the nature of the Coroner's jurisdiction under the present Act. We've set out a number of sections in our written submissions that we say emphasise peculiar - - -

HER HONOUR: Yes I've read those.

MR DOYLE: - - - nature. I think I've – there's only one or two I want to supplement. I don't think I had mentioned s 62, although Mr Boyle – Boyle's submissions picked that up. There are also provisions which invoke a test of the purposes of justice, or the interests of justice. And according to the New South Wales decisions that I have mentioned a moment ago, and in particular the case of *Attorney General v Mirror Newspapers*, it was thought to be indicative of a curial process that the body is tasked with ascertaining the interest of justice. The logic obviously being that's only for courts to be concerned with.

So we rely on the combined effect of those provisions and the sort of judicial immunity type provisions, the protection from the Coroner being called as a witness and so forth to emphasise. But although of course, we're not suggesting it's an exclusively judicial function. And it's not a typical judicial function. It is, never the less, curial, we would respectfully submit. And I turn then to – after that very long run up, if the – if the premise is then made out, and we're dealing with a question of abrogation, can I just make some brief submissions, at two levels, about abrogation.

First, addressing the position as at 1993. In our respectful submission, the Act, as introduced, much the same form as the current Act, with one or two exceptions, but relevantly, s 38 used to provide for the preservation of a privilege against questions that would tend to incriminate the person. And we would submit that for essentially the reasons Blue J gave in Bell, that preservation shouldn't be taken to be a covering of the field. Nor should it be taken to be an implied abrogation of other privileges. For example, the 1993 Act didn't say anything about legal professional privilege, and still doesn't.

But no one would doubt that legal professional privilege subsists within the context of the *Coroners Act*. Can I mention that s 41, in its original form, was expressed in an unqualified manner. Section 41 is the provision that effectively obliges, or gives the Coroner compulsive powers. And although you had s 38 preserving the self-incrimination privilege, s 41 didn't say subject to s 38. What we draw from that respectfully, is that s 41 wasn't purporting to – to be an unconditional

obligation, because it must necessarily have been subject to, for example, s 38 and also we would say, legal professional privilege.

And we say, once that is recognised then it, consistent with the principle of legality, one can't hold that s 41 is a source of an implication that penalty privilege was done away with. In relation to the intrinsic materials, various of the interveners have emphasised the background to the 1993 Act. And it's true that the relevant parliamentary debates, which appear in the Attorney General's list of authorities at item 10, reference recommendations from the Royal Commission into Aboriginal Deaths in Custody.

In our respectful submission however, the submissions that are made really elevate the status of background beyond a legitimate status from the stand point of statutory interpretation. It's clear from the Second Reading Speech, that the Royal Commission had – had made recommendations which were adopted. And it's clear that they included, for example, making an inquest compulsory in the case of a death in custody. And it's also true that no doubt, a view that inquests hither to, had been inadequate, led to the statutory formula that extends to the circumstances of death, and not just the essential details, or basic details of the death.

Both of those were also features of the South Australian regime that Blue J considered. And we, for essentially for the reasons Blue J gives, we would respectfully submit that the mere fact that the scope of the inquest is broader, circumstances, and that in certain cases, an inquest is compulsory, can't dictate that in all cases, including where the death is not in custody, penalty privilege is abrogated. And to the extent that the intervener's submissions focus on that context of deaths in custody, carrying with them as they do, the greater likelihood that police would be involved, or would have relevant evidence to give, that is a point to be made, I accept.

But we're dealing here with the construction of the Act, as a whole. And it's not, as I apprehend it, being suggested that there's a partial abrogation of penalty privilege for police, for example, or that there's a partial abrogation but only where it's an inquest arising from a death in custody.

HER HONOUR: No, there are no submissions of that nature.

MR DOYLE: So we say in effect you can't treat an aspect of the legislation as more than that, a policy consideration leading to an aspect of the legislation as driving the meaning of all of the legislation.

HER HONOUR: I didn't understand the Attorney-General's or the other intervener's submissions to go that far at all, they were just pointing to that historical context as one of the, I guess, mischiefs that - to be addressed by the amendments to the legislation and that that pointed towards there was one aspect that supported the - that's all they were saying. As far as I understood it.

MR DOYLE: Yes. And I accept that, your Honour, and I am really just making the point that one, we would submit, ought not - even as a factor, allow an aspect of the Coronial scheme to drive a question of construction that necessarily would govern all inquests - would govern the exposure of doctors and correctional services officers - - -

HER HONOUR: Well, doctors were another one mentioned in the second reading speech.

MR DOYLE: Yes, in the 2002 amendments.

HER HONOUR: To the amendments, yes.

MR DOYLE: Which I am coming to in a moment. But ultimate, of course, it is relevant to remember that in the 1993 act whatever might be said about these background policy matters that led to reform, of course s 38 expressly preserved self-incrimination privilege so that immediately gainsays the notion that the whole Act is to be read through the lens of getting to the truth because one very substantial obstacle to getting to the truth is self-incrimination privilege, at least potentially and it was preserved.

HER HONOUR: I know, but the argument that is put is that in the 2002 - this is as I understand it - 2002 amendments including the amendment to s 38 were driven with that object in mind, of getting to the truth because in the second reading speech they said things to the - or words to the effect of "That is being hampered by too many people refusing to answer questions" and they specifically pointed - or the speech specifically pointed to not criminal liability but doctors and the like, being more concerned about their civil liabilities.

MR DOYLE: Yes. Quite so, your Honour, and I don't mean to - - -

HER HONOUR: And that that was the mischief at which the amendments to s 38 were aimed. In other words, squarely at including the - well, abrogation, if you look at it that way.

MR DOYLE: Yes.

HER HONOUR: Or partial inclusion if you look at it that way, of penalty privilege in s 38.

MR DOYLE: I certainly understand that to be the argument concerning 2002.

HER HONOUR: Yes.

MR DOYLE: I was addressing - my learned friend who appears for NAAJA, I think - I've only had a chance to quickly read the submissions but I think, invites your Honour to wind back the clock to 1993 and say that even at that stage you

could find abrogation and if you start from that premise then you wouldn't read 38 - - -

HER HONOUR: And you say really on the reasoning in Bell it's not the case?

MR DOYLE: That is precisely so, your Honour. I will come directly now to 2002 and just answer the proposition that your Honour just put to me. The starting point again is text, context, purpose. Dealing with the text first, we have the question of what the word "criminate" means in s 38(1)(a). It is silent as to the object of the crimination. We have set out in our written submissions - and I don't intend to repeat - various illustrations of it being used in the narrower sense. We don't suggest it's been uniformly used in the narrower sense. There are, it is true, some historical examples where, whether loosely or decidedly, there have been references - - -

HER HONOUR: It has been used in many different contexts.

MR DOYLE: It has.

HER HONOUR: And different both ways.

MR DOYLE: Can I just say in response to the families' submissions on this topic, there is a reference in those submissions to a decision which is said to be recent authority for the proposition that "criminate" means - keynotes penalty privilege. The case that is cited for that proposition is a very recent decision of the Full Federal Court*, Herron v Harper Collins Publishers Australia Pty Ltd* [2022] FCAFC 68 which concerned s 17 of the *Royal Commission Act.*

In our respectful submission it is not authority for that proposition. Section 17 of the *Royal Commission Act* referred to "crimination" and then said, "All privilege or on any other ground" and in the paragraph that the families' submissions cite, par 135, where the court said that "The point of the provision was to ensure that it covered all types of privilege including privilege against self-incrimination." We say that can't be pinned back on the word "criminate" because the section referred to other privileges or any other basis whatsoever.

The next aspect of the text that I respectfully emphasise is this question of what to make of s 38(3) and the fact that when a certificate is granted, the immunity - if I can give it that label - against the evidence being admitted, is not limited to criminal proceedings.

HER HONOUR: Right.

MR DOYLE: As to that, we respectfully submit that there's a danger in working back from the forum in which the immunity operates to treat that as defining the immunity concerned or the privilege concerned and that can be illustrated by the fact that s 38(3) - if one did adopt that interpreted technique it would prove too much because s 38(3) provides that the evidence can't be used against the person in criminal or

civil proceedings or proceedings before a tribunal acting judicially. Civil proceedings is obviously much broader than proceedings for the imposition of a penalty.

HER HONOUR: Yes.

MR DOYLE: And so the scope of 38(3) is broader than the occasion for penalty privilege. Now, all of these are only considerations, but we draw attention to that proposition.

Next, in s 38(2) we say it is important to note that s 38(2) could have adopted the structure of saying, "Where a privilege is claimed and the judge or the Coroner decide it is in the interests of justice that the answer be given, the person must answer the question." But it adopts a subtly different form. Instead it says, "Where the privilege is claimed and the decision is made to give a certificate" what that means is that you can't refuse to answer the question on the basis of that privilege and it's silent, we would say, as to any other bases to refuse to answer the question. Again, not a decisive textural consideration but consistent with crimination meaning just the self-incrimination privilege at least consistent with our thesis.

Finally on the text, we acknowledge that s 41 was amended at the same time as s 38 was and so s 41 does now say in subs(1)(c), "Subject to s 38 that your Honour may order a witness to give evidence on oath." But we say that need not be read as meaning that s 38 is the only circumstance in which you could ever be relieved from answering a question on oath, for example, privilege, legal professional privilege must still be available.

But secondly, we would submit that a ready explanation for that amendment is that s 41 makes clear that under s38 the Coroner need not give a certificate and if they do not, then that in and of itself will be a circumstance where a witness need not give evidence on oath, and so we would say it's really there to confirm or explain the operation of s 38 rather than produce a covering of the field consequence.

In relation to the intrinsic material, your Honour will have seen, I think, annexed to the affidavit of Jared Donald Clow on behalf of the Territory Attorney General, the Northern Territory law report – law reform committee report. Can I just take your Honour very briefly to that for really one purpose? Does your Honour have that affidavit. It might be the easiest way to find.

HER HONOUR: Well, I do here and I'm (inaudible), I think.

MR DOYLE: I think I can give your Honour a hardcopy, if that would help?

HER HONOUR: All right, that – it just seems to have done something to itself. Affidavit of Clough. I've got it, thank you very much.

MR DOYLE: Does your Honour have that?

HER HONOUR: Yes, apparently, I do.

MR DOYLE: JDC8.

HER HONOUR: Eight. We have printed copy of some, but not all affidavits.

MR DOYLE: Yes.

HER HONOUR: Because some of them were 3000 pages long.

MR DOYLE: Yes. Now, your Honour, in written submissions, we've made the point that this report obviously was entitled self-incrimination and never mentions the penalty privilege at all. But the point that I wanted to emphasise orally is that in the two appendices to the report, reference was made to various other provisions around Australia, both dealing with Coroners' Courts and otherwise on the question of privilege.

And the point that we would make is that these tables contain examples of two types of abrogation clause, which we would say are significant to the constructional question. The first type of clause which we say is consistent is that there were examples of provisions that referred only to questions that would incriminate, and we would say that is connoting the self-incrimination privilege.

There's no question of criminate connoting it broader, so incriminate. But where the scope of the protection once given extended beyond criminal proceedings. And two examples of that are the provision of the *Sex Discrimination Act* [1984] which is in appendix A, the third item.

And the – other example is the *Independent Commissioner Against Corruption Act*, New South Wales, which is also in that table. It's the last entry in it. So, there are other precedents of provisions that appear on their face to be squarely directed at incrimination rather than crimination or arguably penalty.

HER HONOUR: I understand the point.

MR DOYLE: Thank you. The second category is, there were provisions where penalty privilege was expressly abrogated, most relevantly, s 33AA of the New South Wales *Coroners Act*, which is in appendix B on the second page of appendix B. Now, there was a precedent for how you expressly deal with civil penalty in the very report that the legislative had before it, but it didn't adopt that style of provision.

There are numerous other examples of categories of cases which we've referred to in our written submissions, but the point is that this very report was obviously cognisant of the different drafting techniques, and we say that has some significance.

We say that what would seem to be likely is that the model for the Northern Territory provision was in fact s 47 of the Western Australian *Coroners Act*, which appears in appendix B on the first page. The language is very similar to the

Northern Territory provision. Can your Honour see that?

HER HONOUR: Yes.

MR DOYLE: Including criminate and expedient for the ends of justice. I think the Northern Territory Act might say, "expedient for the purposes of justice", but very similar model. But where, when granted, the protection under the Western Australian Act was only in relation to criminal proceedings.

So, it would seem likely, in our submission, that s 47 of the WA Act was only concerned with self-incrimination, but the draftsman – I withdraw that. The drafting technique adopted in 2002 seems to have been to pick up that model, but give a broader scope of immunity. Now, that's where this concept of doctors and so forth comes in, and your Honour would see that back on page 9 of the report - - -

HER HONOUR: Yes.

MR DOYLE: - - - where the authors of the report said under the heading, "The proposed NT amendment. The contents of the draft bill follow the WA *Coroners Act*."

But then two paragraphs below:

> "Two particular aspects of the bill may warrant further consideration. First the policy behind the amendment is to get to the truth. As many witnesses at inquests are more concerned about civil liability than criminal charges, the policy may be more likely fulfilled if the certificate were extended to include."

And the point I would make about that respectfully is what's been contemplated extending the effect of the certificate, but not expressly contemplating broadening the relevant privilege that is being dealt with. Now, the proposition that may witnesses at inquests are more concerned about civil liability, again, your Honour, that's broader than civil penalty.

HER HONOUR: Yes.

MR DOYLE: It might be dealing – and I would respectfully suggest it is dealing with this, a medical practitioner - - -

HER HONOUR: They don't want to get sued.

MR DOYLE: A medical practitioner might have a legitimate fear that evidence might incriminate them, for example, some for of manslaughter. But they're not so worried about being prosecuted, albeit that they have a basis to claim the privilege, they're worried that they'll be sued by the family or dependents.

And so the scope of the protection travels beyond the criminal, but it doesn't necessary connote that the privilege in issue travels beyond the criminal.

HER HONOUR: Yes.

MR DOYLE: We say the second reading speech in parliament is to the same effect. And so, there are arguments about the – whether s 38 engages with penalty privilege. We say it's not engaging with penalty privilege; it's engaging with self-incrimination privilege.

And if that proposition is right, we say it's a large step to say, well maybe s 38 was only directed at self-incrimination privilege but, by implication, you've got a complete abrogation of penalty privilege. I've rehearsed that argument before lunch.

HER HONOUR: Yes.

MR DOYLE: And I think your Honour understands the point.

HER HONOUR: I do.

MR DOYLE: Having said all of that, in the great traditions of having a bob each way, if your Honour wasn't satisfied that penalty privilege is preserved holus-bolus, which is our contention, we would adopt as a fallback proposition what the Attorney General says about taking a - - -

HER HONOUR: Yes.

MR DOYLE: - - - beneficial construction, because wherever privileges are concerned, one should strain in favour of the preservation of those sorts of principles.

Finally, if I may, and I think I've been a bit quicker than I thought I would be, it is tempting to ask questions such as, what rational policy objective could there be for directing a provision at self-incrimination privilege and leaving alone penalty privilege.

But we would respectfully submit that, first of all, the principle of legality doesn't turn on such kind of suppositions, it requires it to emerge with the requisite clarity that it was intended to be dealt with, even though not stated.

But even ordinary principles of statutory construction, and I think Mr Boyle might be proposing to address your Honour briefly on this topic, urge against turning what would be a desirable policy or perhaps an assumption as to what would have been a better way of dealing with something into the interpretation of course, the purpose follows from text - - -

HER HONOUR: Yes, you made that point in your written submissions. I did and we just make the final point that – two final points, if I may.

First, that one possible rhetorical answer to the rhetorical question, is that penalty privilege just hadn't been a problem for the Coroner's jurisdiction. It was self-incrimination privilege that had been claimed. And it is, in my respectful submission, not without significance that the Law Reports aren't littered with arguments about this. Now, your Honour might say, well perhaps no one's had the temerity to argue it, but perhaps it just hasn't proved to be a great difficulty. Not the sort of difficulty that would mean, you must read - - -

HER HONOUR: We're speculating here aren't we.

MR DOYLE: We are. But my point is the negative one, that one can't speculate that because, for example, it would impede a full investigation into Deaths in Custody, penalty privilege can't possibly apply. Because that really does assert - - -

HER HONOUR: It's not the argument that's put against you. The argument is a much more nuanced one. And that is, that if you are adopting a purposive approach to construction of this section, then those are relevant matters - - -

MR DOYLE: Yes.

HER HONOUR: - - - to take into account.

MR DOYLE: Very well. And the final point is, if one was to look for a rationale that would distinguish between the two privileges, and their treatment, I would come back to the point I made earlier about s 35(3). It is at least perhaps one incidental aspect of the Coroner's function, that there may be references to police for prosecutions, or to the DPP, and it could be supposed, or argued, that as an adjunct to that, there's a qualified right to overcome self-incrimination, in the right case. But, because there is no role of referring disciplinary matters, there is no need to confer a right to abrogate the penalty privilege.

Now you will find no evidence of that in the intrinsic materials, but it just goes to show that if one wants to start guessing at rationales, there are lots of conjectural things that can be said. We say, the result here is not irrational bizarre, in the way that it was in Pyneboard. And if the court pleases, those are our submissions.

HER HONOUR: Yes, thank you very much, Mr Doyle.

Now, I take it that Mr Boyle will now - - -

MR BOYLE: Yes, your Honour. And I'll be - - -

MR GAME: Could I just raise one matter, your Honour. It's Mr Game for the Attorney.

HER HONOUR: Yes.

MR GAME: There's a proposed second declaration sought, which is described as 2B. It's not really in there. We oppose that amendment, and we oppose the putting of that. It's a matter for your Honour how your Honour wants to deal with it. But I can explain the basis of our objection now, or after (inaudible) - - -

HER HONOUR: Well could we ask Mr Boyle, if he is content with the amendment proposed by counsel for Mr Rolfe, Constable Rolfe - - -

MR BOYLE: Yes, well that's what I was going to say, your Honour. I might short circuit that and say that having had the benefit of both the Attorney's submissions, and further time to reflect on it, we no longer press for what they describe as I think in par 8 of the Attorney General's submissions, as the declaration 2B.

HER HONOUR: Yes.

MR BOYLE: And instead, effectively slipstream onto what Constable Rolfe's team have put forward as 2A - - -

HER HONOUR: Yes.

MR BOYLE: - - - well – yes, 2A, effectively.

HER HONOUR: Thank you very much for that.

Well – and Mr Boyle, can I just ask you, because we are – we have very limited time, if you could restrict your submissions to anything that you need to say, in addition to what's already been very amply covered by Mr Doyle.

MR BOYLE: Yes. I really only have two points to make very briefly, your Honour. And I think I can make them in about five to 10 minutes.

HER HONOUR: Thank you.

MR BOYLE: But the first point, and this goes back to something that Mr Doyle was just exchanged in a debate with your Honour about, in relation to the question of guessing, in effect, at the purposes to be achieved by the amendment, and the relevance of this concept of getting to the truth. And the idea that somehow that purpose might itself be thwarted, if it were the case that penalty privilege effectively remained untouched, and unabrogated by the section. Now, we've addressed this in par 13 of the written submissions.

And I don't propose to really return to anything that's already said there. But I've given your Honour the reference to what was said by their Honour's, Gageler and Keane JJ in *Taylor v The Owners - Strata Plan*. Which is at [2014] Vol 253 CLR, beginning at page 531. And the relevant paragraph is at par 65.

In that regard, I wanted to just draw to attention what state of in s 62A of the *Interpretation Act* 1978. And what that section provides is for a construction to be

adopted, which would effectively advance the purpose, is to be preferred to one which would not.

But in the present case, effectively, both constructions propounded on either side, one by the interveners and one by Mr Doyle and myself, both would advance the purpose, in my submission, of - - -

A PERSON UNKNOWN: Both would what? Advance the - - -

MR BOYLE: - - - both would – both would advance the purpose of getting to the truth. Because what is effectively been provided, as Mr Doyle's already taken your Honour through, is – and it's also done quite thoroughly in the submissions of NAAJA, to demonstrate that prior to the 2002 amendment, there was a blanket privilege operating that meant that one could refuse to answer a question on the basis of self-incrimination privilege. And in our submission, other privileges, and then 38(3) was amended, to effectively provide a road through that, in limited circumstances.

And so - - -

HER HONOUR: When you say "that amendment", is anything – it doesn't matter whether you say – whether it's applied only to self-incrimination privilege, or to that plus the penalty privilege - - -

MR BOYLE: Correct.

HER HONOUR: - - - it has had the effect of making it easier to get to the truth. So both would advance, is that what you're saying?

MR BOYLE: Then both would advance – yes, both would advance the purpose. And in those circumstances, s 62A doesn't permit the court to do anything further in terms of discerning a best purpose. The provision can be contrasted with that which was considered by the High Court in the decision of – I'll just find the reference, your Honour. It's *Lacey v Attorney General of Queensland* [2011] 242 CLR at page 573.

And in that case, the Queensland equivalent of in effect s 62A, was one which required the promotion of the best achievement of the purpose. And so my submission is that a provision like that can be contrasted with 62A, where effectively, once you have competing constructions which both promote the purpose, then there's no longer any difficulty, your Honour is still effectively confronted with having to try to reconcile what the construction, appropriate construction is. And in my submission, that falls back into the text.

And in that regard, the only other thing which I wanted to draw your Honour's attention to was the decision of *Carr v The State of Western Australia* [2007] 232 CLR, beginning at page 138. And at pars 5 to 6 of that decision, in the judgement of his Honour, Gleeson CJ, he notes that effectively a purposive construction can be of

little assistance where there's a competing balance being struck, and you've got uncertainty as to how far the provision goes in order to achieve the purpose.

And he talks there, in the Chief Justice's judgement, about the problem of effectively not all, you know, the pursuit of a purpose by legislation is not one that is taken at all costs. And so the submission that we make here, consistently with what Mr Doyle has already said, is that the amendment in 38 only goes so far. And it's not appropriate we say, or correct, to go so far as others have said. And those were the only matters that I wanted to address your Honour on.

HER HONOUR: Thank you very much for that, Mr Boyle. I am just making a not of that final point.

MR BOYLE: And I otherwise adopt all the submissions made in writing by both Constable Rolfe and Sergeant Bauwens and also adopt the submissions that were made by Mr Doyle.

HER HONOUR: Yes, thank you very much. Thank you.

Now, Mr Game, you are up next.

MR GAME: Can your Honour hear me?

HER HONOUR: I can hear you. I can barely see you but I suppose that is not going to be altered much.

MR GAME: Sorry, something has happened at this end which is we can't see anybody now. We can only hear you and I am not entirely sure that I can fix that and our monitor person is not here with us. We will have to get him back but I can make a start but I won't be able to see - I probably won't be able to continue anyway, your Honour - - -

HER HONOUR: Well really, it's most important that we can hear you, isn't it?

MR GAME: I am happy to press on, even though I can't see you. I am sorry, but I will press on forward.

HER HONOUR: Yes.

MR GAME: And I wonder how are we going to proceed, (inaudible) of senior counsel giving the hard work to the junior counsel, but I am gong to address first on the statute and what we see as a relatively short way home to this case and then Ms Edwards is going to address, hopefully, the pointedly and relatively briefly to the aspects of the authorities that you were taken through with Mr Doyle but to the end, of saying one simply cannot ignore Daniels and this court is obliged to follow Daniels and Rich and that's pretty much the ends of it in terms of this question about still trying to apply Pyneboard.

Now, I am going to leave that to her. Now, so first, in respect of this question about whether or not these are curial proceedings, relevantly speaking, we say that they're not in the relevant sense of curial proceedings that may expose to penalty even curial proceedings (inaudible) set out an exposure to penalty in some other proceedings as at times to which Mr Doyle referred. These are not those kind of proceedings at all and we set out our submissions on this, at pars 59 and 60, actually through to 62 and I won't repeat that. We do say that what - - -

HER HONOUR: So 49 and 60 through to 62?

MR GAME: 62 of our submissions, your Honour. I won't repeat that but that is the position that we put but quite clearly these are not relevantly curial proceedings in the context of having (inaudible), briefings, discovery, (inaudible) of course a Coroner is supposed to act - must act judicially, but these are proceedings of an executive kind and, your Honour, that is not what the Coroner found at par 30 and we support that finding.

We also observe that in Bell, it appears to have been assumed at that point in the judgment that the proceedings were not curial for the purposes of his Honour resolving that question. So, to - - -

HER HONOUR: What paragraph in Bell were you referring me to?

MR GAME: So where I am referring you to in Bell is this, your Honour, if you go to Bell you will see par 149:

> "It is common ground in the present case that penalty privilege can be claimed in curial proceedings notwithstanding that a penalty could not be imposed."

HER HONOUR: Sorry, which paragraph in Bell? I'm sorry, I missed that?

MR GAME: (Inaudible) 149.

HER HONOUR: 49?

MR GAME: 149.

HER HONOUR: Yes, okay. 149.

MR GAME: And then you see it's the whole page and following on from - - -

HER HONOUR: So this is becoming unsatisfactory. I can't hear you, Mr Game, there is too much interference. There's just - you're cutting in and out.

MR GAME: Sorry, your Honour.

HER HONOUR: Would you like to - could I just stand down for a couple of minutes and see if we can do better with the sound - and even get your picture back?

MR GAME: I've got your picture back now but we will see if we can do better with - is that better with the sound already?

HER HONOUR: Yes, it is.

MR GAME: But something happened (inaudible) - - -

HER HONOUR: Counsel here are nodding so that everybody thinks so. We will proceed.

MR GAME: So then the (inaudible) - so what I was going to say is the discussion proceeds in 151 and following, that the focus is about penalty privilege outside of curial proceedings, and that is the context of the discussion thereafter. So there really isn't support anywhere for the idea that in the relevant sense with which we are talking about, the Coronial proceedings are curial in nature for the relevant purpose of determining the question about abrogation of various privileges. They do not have those characteristics.

Now, I am not going to take your Honour through all of the relevant provisions of the legislation but you will see one particular provision - first of all we see reportable deaths extent of - in the definition to - it's s 12(8) to where death was caused or contributed by injury, filed in (inaudible). Section 26 is a provision that marks out this (inaudible) Act (inaudible). It goes - - -

HER HONOUR: I am sorry, Mr Game, we are losing you again. I think when you put your head down.

MR GAME: I see. Sometimes you call me "Mr Glass" but actually my name is Mr Game.

HER HONOUR: I'm sorry, Mr Game. I have said that at least three times and I apologise.

MR GAME: All right. That's fine. Anyway so the point about s 26 is that - and this really responds to something that Mr Doyle said a little while ago, that all of these pieces of legislation recognised the need for proper investigations following the Aboriginal Deaths in Custody Commission's final report, but s 26 goes further and it actually places obligations of a specific kind on a Coroner in respect of deaths in custody and we see "Must investigate and report on their supervision and treatment and may investigate on a matter connected with public health or safety or the administration of justice that is relevant to the death."

But then s 34, if we just note, s 34(1)(a) also has its breadth because it had (v) that includes any relevant circumstances concerning the death or - and it goes on. And then little (ii), "A Coroner may comment on a matter." So they are both obligations and power.

So, your Honour, this brings one thing to s 38 and there is a clear legislative context to this and I am going to briefly take you to both to the second reading speech which is JD7 behind the affidavit of Mr Clow.

HER HONOUR: Can I just make sure we've got that? JDC7, yes?

MR GAME: Now, this is (inaudible) context where s 38 says that a person, “Shall not be compelled to answer a question that my tend to incriminate the person".

HER HONOUR: Yes?

MR GAME: So it's in this context and then on the first - on page 452 of the debates, there's a paragraph in the right-hand column, it begins - - -

HER HONOUR: The objective?

MR GAME: - - - for making (inaudible) recommendations - where's the objective, yes, and then the next paragraph and then it says, "It may be that" - it talks about medical practitioners refusing to answer questions on the basis of self-incrimination. And then it says “It may be that in these cases, the concern for these witnesses may not be that they he or she may be charged with a criminal offence, but that civil or disciplinary proceedings, may result from the giving of evidence.”

(Inaudible) committed a criminal offence, that – that would expose one to civil or disciplinary proceedings in itself. So it’s kind of – we have the excuse (inaudible) criminal offence, but we don’t have the excuse if it’s something less, is kind of the – the idea. Then if we look to the report itself, we see that the report (inaudible) the letter written by the president. The letter is – the report is driven, to a substantial degree, by concerns of the Coroner. And we see at the end of the letter, “If a certificate is given, the protection of the certificate should extend to civil, as well as criminal proceedings” - - -

HER HONOUR: I’m sorry, are we looking at the Law Report Committee Report, at JDC8?

MR GAME: Yes.

HER HONOUR: What page?

MR GAME: So the front of – you turn to the second – at the front of it, there’s a letter, 2 October 2001.

HER HONOUR: Yes.

MR GAME: And we see in the second page of the letter, and I also had the opportunity of discussing with Mr Cavanagh. And Mr – the very end of that letter, it refers to the suggestion that, if a certificate is given, the protection of the certificate should extend to civil as well as criminal proceedings, as in the Tasmanian

legislation. Then, your Honour, if you go to the report, and I won't read this to you, but the body of the report, at page seven.

HER HONOUR: Yes.

MR GAME: In our submission, very much support the position that the purpose of this was to ensure that accounts could be obtained, for people who have exposure of less than a criminal offence, but an exposure to civil penalty. And we see, on page eight, again, in to – there's a paragraph begins "Obviously power to seek evidence", and then it goes on:

> "In these cases, it is frequently the lessor offenders, or those not offending at all, but caught up in a web of circumstances etcetera who can provide evidence vital to the investigation. It is for the Coroner to determine whether - (inaudible)."

And so then Mr Cavanagh expresses his concern in that following paragraph. So, and we see again, that under the – on page nine, under the proposed amendment, we see in a paragraph that begins "Two particular aspects", and it says, in the third sentence:

> "As many witnesses at an inquest are more concerned about civil liability (inaudible) criminal matters and guilt, the policy may be more likely fulfilled if the certificate were extended to include any criminal, civil, or other proceedings."

So we say, that the context is plain enough.

Now, the question, in our submission, if we turn to s 38, is whether or not (inaudible) submission put by NAAJA that the penalty (inaudible) substantive (inaudible). It's at most, a rule of evidence. We say that there's a – that the short answer, we prefer – I'll put this in a different – we see that that (inaudible) an argument that's well and truly available on – on the authorities. And it's not relevant that this case came after Pyneboard. This amendment came after Pyneboard, but shortly before Daniels.

So it may have been based on a misunderstanding about what the law was. But, we say, and this is Mr Doyle's fall-back position, that Mr Doyle's fall-back position is our front and centre position. Which is what is happening here, is that it is – this legislation is aimed to be able to get at the truth, but it's also a protective provision. So if your Honour would want to protect testimony that exposes people to potentially let's say the criminal liability, or to civil penalty, you're not going to want to be going into an inquiry as to whether it's on the fine point of one or the other, because, for example, a criminal offence is obviously going to expose you to a civil penalty, of some kind, or a penalty of some kind, if you are in a position of employment with the state, for example, as a police officer, or a prison officer.

So it's not really feasible to be sitting around saying well this one's a crime, that one's a civil penalty, when you've got a protective provision of this kind. And so this legislation is intended to jump over that. It's protective. And that's the kind of driving idea of this, which really means Mr Doyle's argument just doesn't work, because none of the cases he's taken you to, actually deal with this kind of situation. Now he also relied on why there's a discretion whether or not to give a certificate. But this is quite important, your Honour, because it works in a – funnily enough, it works in a counter intuitive sort of a way.

So, sometimes if a person is exposed for a terribly serious offence, and (inaudible) coming up or potentially coming up, it's much more likely to give – not give them the certificate, but not require them to give the evidence. And that's what happens in those one – in 128 cases all the time. I'd say all the time, often enough in criminal trials, in your court, and presumably, I don't practise in them a lot, but in trial courts, where 128 of the *Evidence Act* comes up. That's what happens.

But in a situation like this, (inaudible) let's say, it's the exposure to civil penalty, but not to criminal charges, it's much less likely to be the situation that you would decline to give somebody a certificate because they – because they have committed some breach of discipline, for example, for which they may come before either the Commissioner, or before the Tribunal. So that's – that's how – so this – this provision is intended, in our submission, to pick up whatever that exposure might be, of an adverse kind, to – to both crime and to penalty. And as I say, were it otherwise, the whole thing would collapse to the ground, because – in respect of police officers and prison officers, because things that would incriminate them, would certainly expose them to civil penalty.

So there would be a loop hole that would bring the provision to the ground. As I say, (inaudible) we prefer the submission, so what we say is happening here, is penalty privilege is not sitting here waiting to be abrogated. Penalty privilege is on the sidelines, and it's been picked up and both identified, and then accepted as a basis for claiming privilege. So that it's – it's actually – it's given by s 38, and then it's qualified. And that's how it works, in our submission. And that's a – that's a purposive, protective operation of the provision.

It facilitates the obtaining of testimony, and it makes sense. So that's – so when one - - -

HER HONOUR: I'm sorry, could I just ask you, Mr Game, I'm sorry, could I just ask you this. That – that purposive and protective interpretation of s 38 works, whether the section both gives and qualifies the privilege, or whether it both abrogates, or whether it simply qualifies a pre-existing privilege, doesn't it? Doesn't her Honour, the Coroner, right in saying that?

MR GAME: That's right. Yes, so what I'm – that's why there's a short way home, in our respectful submission, is that whether it brings it up, recognises it or whether it identifies something that exists and has to be addressed, either way, the outcome, in our respectful submission, is identical.

HER HONOUR: Yes.

MR GAME: And so, there's – and there's (inaudible). This is a problem that has to be dealt with, and this is how we're going to deal with it.

HER HONOUR: Yes.

MR GAME: So, that in every case - in a way, it doesn't matter, because in every case, you can bring forward the thing that you're concerned about. And if the thing is entirely trivial, then you're unlikely to get a certificate. But if the thing is terribly serious and you're likely to go to trial, you might not get the certificate because the certificate isn't going to protect you for X7 kind of reasons.

That's to say, (inaudible) to an account in a non-curial context where you're not obliged to give your account until you stand trial before a jury and so forth. The kind of X7 and leave type of considerations that would apply in that situation.

So, as I say, then if you look at the words, there's no magic in criminate and we've given – and that comes from the Western Australian provision, "tend to criminate', of course, those words come up in many of the provisions, but "tend to" is – that's the idea, may lead to or may assist in establishing.

So, again, you already have a kind of an idea of qualification. And how would you work that out if the second there was an exposure to a civil penalty – an exposure to, for example, disciplinary proceedings, how would you kind of stop then and say, well it tends to criminate you. But that's not going to help you because you're also exposed to a civil penalty; you're also exposed to disciplinary proceedings, so I can't give you the certificate.

So, that's the kind of – and there is an aspect to the fact that Mr Rolfe is playing dice. He's playing dice, because is NAAJA's submission is correct, he ends up having to give the account with no protection at all. And we recognise that that construction is open, but we say that our construction is preferable and should be adopted.

And then if we proceed through, at 38, there's a – he may not be pursuing it, but Mr Bauwens' counsel said that s 38 is a power to order a witness to give evidence. It's not, it's just about the giving of the certificate. It's just about – the power is in 41. But then we see - - -

HER HONOUR: 41?

MR GAME: It's in 41, yes.

HER HONOUR: Yes.

MR GAME: And the words, "subject to s 38" are the additional relevant words that

were brought in by the amendment. So, but then we see subs (2) is the machinery of it, no longer entitled to refuse (inaudible). So, you're got the certificate, now you're going to give the evidence, i.e., it's going to assist as it was Mr Cavanagh or any Coroner – it has to be the Coroner. It can't be a deputy Coroner with deaths in custody. So, that's the machinery of it.

In subs (3), now subs (3) is picking up the idea in the second reading speech and the report that the idea that it would just be criminal offences not admissible in criminal or civil proceedings or in proceedings before a tribunal.

So, there is a tribunal under the *Police Administration Act* and there is also a person potentially in the shape of the commissioner who can exercise powers in respect of less serious matters that don't go before the tribunal where things like cautions can be imposed.

So, the argument that was put to you by Mr Doyle (inaudible) along these lines, well, don't just - - -

HER HONOUR: Sorry.

MR GAME: Don't read subs (1) found by reference to subs (3), that's consequential. But the thing is, the project Blue Sky and every case that we reach tells us to re-evidencing and you have to kind of understand them together.

So, why would you just do it in respect of criminal offences, but not things that expose you to a civil penalty. Now, then he says, well maybe their concern is in relation to civil proceeding, not civil – not heavily privilege, not civil penalty, but civil penalty, but civil proceedings.

So, you have protection in relation to exposure in crime than to findings, perhaps in civil proceedings, but not to penalty privilege. And it just doesn't make sense. The whole point of this is to feed this as the context of subs (1) to catch those things that expose people to some form of adverse finding, whether it be as a crime or a civil penalty or a punishment or a disciplinary proceeding, it's intended to catch them.

And that's how it works. And it actually works quite – it works quite well because you won't – you're seized of the discretionary issue that I explained to you before about balancing out whether to grant it, but you're not engaging in filleting, one way or another, whether something exposes you to a crime, per se, or to something less, or there's something exposes you, but it doesn't expose you to a crime and therefore you don't get the certificate. This jumps off - - -

HER HONOUR: Sorry, Mr Game, can I just ask you this?

MR GAME: Yes.

HER HONOUR: Did you perhaps raise it a little too widely in saying that the whole point is to catch things that expose people to any adverse consequence, because

although it says - - -

MR GAME: You're right.

HER HONOUR: - - - that you can't - - -

MR GAME: Yes, your Honour.

HER HONOUR: Because, so like civil liability, for example, is not caught by the wording of 31(1) even though civil proceedings are mentioned in 38(3). Would that be right?

MR GAME: I accept that, yes. I'm sorry, I went too – I got carried away with myself, your Honour. It's not the first time. Anyway, that's absolutely correct. You have to read them together, just in the way that I said.

HER HONOUR: Yes.

MR GAME: Now, so the – anyway, that's s 38 and that's how it works, we say. And it's not a clumsy or a difficult provision. It actually can be made to work quite coherently with what magistrates – what Coroners, I beg your pardon, are required to do in Coronial hearings.

Now, there are some further sections I just need to refer to and then I'm going to hand over the hard work to Ms Edwards. But s 39 is obviously important because if one lands on the point that these are not rules of – these are not substantial rights, but, at the most, rules of evidence.

We see in s 39 that a Coroner can inform him or herself not bound by the rules of evidence. So, again, it's a provision that frees up a Coroner to seek the truth without being caught, for example, by the hearsay rule where some very important evidence might come. So, again, something that facilitates the obtaining of the truth.

And then, s 41 is the power. So, that is how – and we see, as I said before, subs 41(1)(c) was – brought in the words, "subject to s 38" and that – so, that basically is how we say this works.

Now, that's all I want to say about it, but I do want to take your Honour briefly to some provisions of the *Police Administration Act* and just to show your Honour something that's of some relevance to our submission. But I think of more considerable relevance to the argument that NAAJA was just to put.

But I just wanted to direct your Honour to these provisions. Section 76(1)(d) and that's how this looked in 2001 and that's very similar to the kind of provision considered in Morris in the High Court, where the privilege was found to be abrogated. And then we see s 77, Effective Criminal Proceedings, "For the avoidance of doubt, anything may be done or continued under this part, notwithstanding that criminal proceedings in respect of the matter to which it relates

have been commenced or are contemplated." And that gets over, what I would describe as *McMahon v Gould* type of considerations.

That's to say priority of proceedings. Then we come to s 79A. Now in one way, s 79A might be regarded as being unnecessary. But in New South Wales, in 2013, a decision was handed down in a case called Baff(?), and that is the source of the problem that required the legislature to revisit s 79A, and to make it explicit. So that it says, "This section" – and we've provided your Honour with the – I think with the Second Reading material in relation to that. And that's – I won't take you through it, but that's JDC11. And the history of that case called Baff is explained as being the trigger of this.

Now, the point about it is - - -

HER HONOUR: Could I just – I'd just like to make sure that we've got – are keeping track of what's in evidence. You're tendering, I take it – I mean I know normally the affidavits are read, but it's easier to keep track of them if, you know, if they're tendered, as Mr Doyle did. So can I mark the affidavit of Jared Donald Clow exhibit P2, along with, exhibits JDC6.

MR GAME: Yes.

HER HONOUR: JDC7, and now you say JDC11, is that right?

MR GAME: That's correct, your Honour, yes.

HER HONOUR: All right, thank you.

So someone can keep track of that.

EXHIBIT P2: Affidavit of Jared Donald Clow, along with JDC6, JDC7 and JDC11

MR GAME: Thank you. If you just look at JDC – JDC11.

HER HONOUR: Yes.

MR GAME: You see on the second page - - -

HER HONOUR: Second page?

MR GAME: Actually, depends on the print. If we look at the – so if we look at – does your Honour have page 5117?

HER HONOUR: Yes.

MR GAME: It starts at the second amendment, above the right-hand and second column.

HER HONOUR: What does it do? Bottom – yes.

MR GAME: If you start, your Honour, second column - - -

HER HONOUR: Yes have that.

MR GAME: - - - on the second amendment. The second amendment. So then it talks about (inaudible) column of 5118. And then (inaudible) that there was this decision called Baff, which said that a police officer didn't have to – was not obliged - - -

HER HONOUR: Yes.

MR GAME: - - - to answer the questions, which may or may not be correct. And I would doubt very much – I mean no disrespect whatsoever to the learned judge, but it's doubtful that it was correct in the light of Morris. But (inaudible) to 79A, make the point plain. So the point about s 79A is, that it then says in explicit terms (inaudible) the member is required to answer questions, and then not excused from answering a question that may a) incriminate the member, or b) make the member liable to a penalty.

Now the point about this, is - - -

HER HONOUR: Where do I find that? That's – that's the actual wording of s 79A.

MR GAME: Yes - - -

HER HONOUR: Okay.

MR GAME: - - - so the only – from our perspective, the relevance of this is more limited than (inaudible) makes of them, but we do make a point about it. Because we say that the (inaudible) to this is, that the police officer concerned, does not have penalty privilege in the substantive context of police discipline.

HER HONOUR: Yes, can I just say though that that – isn't that a matter that's more relevant to the Coroner's job, assuming that your interpretation of s 38 of the Coroner's Act is correct, isn't that more relevant to the Coroner's job - - -

MR GAME: Absolutely.

HER HONOUR: - - - in deciding whether a certificate should be issued or not?

MR GAME: Yes. That's exactly right, your Honour. That – so we see if of some significance, but limited to that, that you've just raised with me. But we don't wish to add to it. But that's – those are the statutory provisions, that's the statutory context that wanted to take you to now, as I said, I'm going to leave the hard for Ms Edwards, whose going to address you, as needed, on the cases.

HER HONOUR: Yes, thank you, Mr Game. And I apologise once again, for getting your name wrong, not once, but I think three times.

MR GAME: So it's been a blight in my career, your Honour. Judicial officers calling me all sorts of different - - -

HER HONOUR: Yes.

Ms Anderson.

MS EDWARDS: Edwards, your Honour.

HER HONOUR: There you go, I've done it again. I'm sorry Ms Edwards. This is – this is a blight on my entire character.

MS EDWARDS: Your Honour, I don't propose to go through the cases in detail like Mr Doyle. And if I could give you – your Honour an overarching view of the (inaudible) of where I'm going. There are three. The first is that the Attorney takes no issue with the correctness of the decision in Dean J in Refrigerated Express and does your Honour mind if I just refer to the cases without their citations?

HER HONOUR: Yes, they've been put on the record once I think.

MS EDWARDS: So our first proposition is that Refrigerated Express and the line of authority that flows from that, up to and including the decision of the settlement in QC Resources, which is referred to in the plaintiff's submission. Relates to a particular issue which is civil actions and discovery and interrogatories within those actions, and can be availed by defendants in civil actions, in certain circumstances. And we would respectfully say, that that line of authority is to some extent, a red herring. Because there's no quarrel that that is something that's available to defendants in civil actions.

The second proposition is that it's simply not open to follow the reasoning of the plurality in Pyneboard, without taking account the significant qualifications to that reasoning in the decisions of Daniel and Rich. And that not only does the reasoning, with respect to penalty privilege in Pyneboard no longer hold good, but that effectively that decision stands, with respect, for very little anymore. Because the decision in Daniels can be to some extent, seen as a wholesale attack on most of the underlying reasoning in Pyneboard. And thus any approach that uses Pyneboard as a foundation is on a – on a very flimsy foundation after those two decisions of the High Court.

And the third proposition, which is connected, is that the criticism that was made of Brennan J's decision in Pyneboard, is illustrative of the attack on Pyneboard more generally, but it doesn't support the plaintiff's idea. And that's the notion that the fact that Brenna J was criticised for failing to adopt the approach of *Potter v Minihan* and the principle of legality, it doesn't follow that the court here is endorsing the notion that the principle of legality applies to penalty privilege. And in fact, we would go so

far as to submit that the court in Daniels has unambiguously stated that the opposite is the case.

If I could start, your Honour, just by taking your Honour to the decision in Pyneboard.

HER HONOUR: Yes, hang on, wait a minute. Just let me find it. Yes.

MS EDWARDS: If I could take your Honour to par 25, which is also in the reported version at page 335.

HER HONOUR: 335.

MS EDWARDS: Yes.

HER HONOUR: Sorry, I'm just – yes, I have it.

MS EDWARDS: Your Honour, at the last paragraph at the bottom of that page, there's a paragraph that starts "It's well settled." And Mr Doyle took your Honour to that this morning. That raises the issue, which was our first proposition, which is there's no controversy between the parties that a party, which would in this case mean a party to a civil action, cannot be compelled, and your Honour will see in that very paragraph, there's a reference to civil actions. And a reference to discovery and interrogatories.

And there's no dispute that that is the case. And nor is there any dispute that Dean J, in Refrigerated Express, drew a distinction which is still being applied in courts today, which is a distinction between a court refusing to make an order for discovery or pleadings, or for interrogatories, where the proceeding itself is for the imposition of a penalty, but requiring, effectively, parties to do it on a case-by-case basis, where the exposure is in a collateral proceeding.

HER HONOUR: Yes.

MS EDWARDS: But the next point that's made in Pyneboard is again in relation to something which is no longer is dispute, which is whether or not that rule can be confined as a principle of discovery or equity and it's determined that it's a reflection of the law of privilege.

HER HONOUR: Yes.

MS EDWARDS: And that determination is made at par 15, which is on page 337. And it's in the middle of the page, your Honour; there's a paragraph that starts, "Accordingly, the construction -" Again, there's no issue – there's no issue with those principles that are expounded in that paragraph, and many of the cases that are relied upon in footnote 41 are merely a reflection of that paragraph.

But then the next point that the court turns to, when it says, "Before turning to 155, we need to deal with one further point, is whether or not the penalty is inherently incapable of application in non-judicial proceedings."

HER HONOUR: Yes.

MS EDWARDS: And the analysis that follows, and I won't take your Honour to it, but it goes on for several pages, and it looks at streams of authority pointing in either direction before it concludes at page 341, which is at par 27.

HER HONOUR: Yes. That's in the middle of the page. "We're not prepared to hold the privilege as inherently incapable." Yes?

MS EDWARDS: Yes. Yes. Precisely, your Honour, and as we will go to later, the court said in *Daniels*, "Well, that doesn't necessarily mean the opposite follows."

HER HONOUR: No. And isn't the – isn't a key part of that paragraph the issue of its availability falls to be decided by reference to the statute itself; and that's your point, isn't it?

MS EDWARDS: It is certainly one of my points, your Honour, but there's two points, and that's certainly one. One is that it falls to be determined by the statute, but then there's this issue of default presumptions. And when one is employing statutory construction, does one employ the default presumption of the principle of legality or the principle in *Potter v Minahan* that you don't take away a common law right without express words or necessary attainment(?). Or is it a lesser principle which would give rise to a lesser default?

HER HONOUR: Yes.

MS EDWARDS: The reasoning that follows in – after par 27 is, based on the assumption that it is a fundamental common law right, but it has been excluded, and as your Honour observed this morning, which therefore makes this decision obiter from the perspective of the plaintiffs. But the court, essentially, provides three reasons why the privilege is excluded in Pyneboard, and the court comments on all of those reasons in Daniels.

The first is the commission would find it virtually impossible to establish the existence of contraventions. And that appears at 343, at par 33. The second reason is, essentially, that they're not troubled about the fact that their approach would make the express avocation of self-incrimination in subs (7) to be otiose. They say "that doesn't matter, it doesn't affect our analysis."

And then the third reason, which is significant for present purposes, is that – and this is at the bottom of page 344, at par 38, the bizarre consequences of the appellant's construction. And that is that it would set up a lopsided situation, where a person could object on the basis of penalty privilege but not on the basis of self-incrimination. And they describe that as irrational.

Your Honour, only that third contention survives in Daniels. But if I could just briefly mention the decision of Murphy J, because Murphy J's decision in Pyneboard was endorsed by the High Court in Daniels.

Murphy J, at par 5, which is at page 345 - - -

HER HONOUR: Just let me write this one first. Yes?

MS EDWARDS: Murphy J is, respectfully, somewhat dismissive of the penalty privilege, and refers to it as, "the origin arising from judicial hostilities are common in former suits to penalties;" says that "application outside that context is difficult to justify, but it would be absurd if a witness could refuse to answer on the basis of a lesser privilege but not on the basis of self-incrimination."

And then he goes on at page 346 to emphasise the distinct features of self-incrimination which are very different in nature and origin. And we would rely upon that and the reference to *Sorby* in that context, because the fact of lesser privilege is significant in the High Court reasoning which follows.

HER HONOUR: Sorry, where do I find that? Can you just – which paragraph?

MS EDWARDS: The paragraph in Murphy J's decision - - -

HER HONOUR: I've got Murphy J's decision. Page 346?

MS EDWARDS: Yes; 346 there's a heading "Privilege against - - -

HER HONOUR: Yes.

MS EDWARDS: - - - self-incrimination." And there's some detail which follows on page 356 and ongoing.

HER HONOUR: Yes.

MS EDWARDS: Which – where his Honour makes very clear that it is a separate and distinct privilege because of its origins, its history and its implications. And again, at page 347, right at the bottom of the page, he then comes back to the idea that it would be absurd.

HER HONOUR: Yes, I see that. Yes.

MS EDWARDS: So he's contrasting and comparing a lesser privilege and a greater privilege, and then coming back to the notion of an absurdity, a lopsided outcome that would preserve one and not the other.

HER HONOUR: Yes.

MS EDWARDS: And then if I could take your Honour now to *Daniels*?

HER HONOUR: Yes.

MS EDWARDS: I'll go straight to par 9, your Honour, which is on page 552.

HER HONOUR: Yes.

MS EDWARDS: Your Honour, that's in relation to legal professional privilege, which was the subject matter at issue in Daniels, as Mr Doyle outlined this morning. But what we say is significant about those paragraphs is that a sharp distinction is being drawn between legal professional privilege on the one hand and penalty privilege on the other.

And that starts at par 10, where it's referred to as "a rule of substantive law. Not merely a rule of evidence and not confined to discovery and inspection and the giving of evidence in judicial proceedings." And those contradistinctions, we rely upon, because we're saying that a distinction is being drawn.

And then that goes on at par 11; again to say that, "It's not merely a rule of substantive law, it is an important common law right or, more importantly, an important common law immunity." And in the context of that paragraph, that is it's not just a common law right or even an important common law right, it has special status, which gives rise to the Potter v Minahan principle.

HER HONOUR: Yes.

MS EDWARDS: And then it goes on, starting at par 12, to turn to the reasoning of Pyneboard. And Mr Doyle took you to 13, which refers to the different types of privileges. And as your Honour just noted at par 15, a court says that the finding that it's not inherently incapable doesn't mean that it is available, and they refer expressly to Murphy J in that paragraph.

And ultimately, is approach – his Honour's approach, Murphy J, is going to be adopted by the Court in Daniels, but there's – and I don't mean this disrespectfully – there's a comment that at par 16 which might be regarded as a swipe at Brennan J because it is stated that- - -

HER HONOUR: He didn't give effect to the rule in Potter v Minahan.

MS EDWARDS: Yes. But the underlying premise, of course, of that is that he was assuming the penalty privilege was a fundamental common law right and the court, in what follows, is going to make it unambiguously clear it disagrees with. And then the attack on the reasoning of Pyneboard continues, that it goes at 17 to those two key basis – sorry, those two key bases.

One, that it's too hard for the Commission to prove. They refer to that at 17 and then they say the second was the irrationality, that idea that it's absurd to create a

lopsided outcome. And then they refer, at par 18, to the notion that they weren't troubled by the express abrogation in subs (7). And they say, "Well, that's contrary just to a principle that would give it work to do."

And so – and they develop that for some time before they return to the construction of legal professional privilege, but at par 25 – which is on page 557 – at 55 – at 25, they say:

> "The first question that arises is whether the approach in Pyneboard should be followed."

And they – and the plurality continues:

> "There are a number of difficulties with that course."

And they again refer to the problem with Brennan J's approach and then they also refer to the difficulties with the approach. And then they refer to a different difficulty at 26 and 27, which relates to the first bases adopted in Pyneboard. And then they refer to the problem with assuming that the express abrogation in subs (7) is otiose, and they say that's inconsistent with statutory construction. That's at 28. And at 29, they – the court concludes or those three judges – sorry, withdraw that. Those four judges conclude – the majority in Daniels conclude:

> "Given the difficulties with the approach, that approach should not be followed for the purposes of s 155."

In our submission that is, effectively, overruling the bulk of the reasoning in Pyneboard with one carve-out. And that is, they go on to say:

> "That is not to say Pyneboard was wrongly decided."

And we respectfully agree with Mr Doyle that what the court is saying there is, "We're not overturning the decision in Pyneboard because the outcome is one that we agree with." And that – they go on to say:

> "And that is because it can be supported by the reference to the absurdity."

So that's what's left standing, as it were, after that review of the decision in Pyneboard. And they do go on to speak about Naismith v McGovern at 31, but as I've indicated, that that's not controversial that that principle applies. But what they then say at par 31 is:

> "However, there seems little, if any, reason why that privilege should be recognised outside judicial proceedings."

And so in our submission, what that is saying is that, "There is a box which penalty privilege applies and we're keeping it in that box and we see no reason to extend it beyond that point." And they finally make a reference to the fact that self-

incrimination is not available to corporations which, of course, was something that was assumed without being decided in Pyneboard. And Mr Game is reminding me that it says that:

> "The privilege against exposure to penalty (inaudible) purpose which is those who allege criminality or other illegal conduct should prove it."

And I will go very, very briefly Rich, your Honour, which is just to say that – if your Honour could go to par 23, which is on page 141. It's clear that the court in Rich has wholeheartedly adopted the analysis of Daniels and that means that it has wholeheartedly embraced the attack on Pyneboard. And that that is followed through from 23.

At 24, it acknowledges that that part of Pyneboard I mentioned in 15 that's not controversial – which is that it goes beyond equity – but then says – it acknowledges that the underlying purpose is to say that those who allege criminality should prove it, or other illegal conduct. And then it says:

> "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 to judicial proceedings."

So whether or not an inquest is a judicial or a curial proceeding, as a principle of statutory construction, we would say that it's clear from Daniels and Rich that there isn't a default presumption applied to penalty privilege as a fundamental rule of law, that Potter v Minahan would apply. And I won't take your Honour in detail to – and I should indicate – I won't take your Honour in detail to the decision in Frugtniet other than to say that the – it was suggested that that decision is confined to its particular context because of a comment at par 7 that the court wasn't willing to make ruling with respect to the application in (inaudible) judicial proceedings.

HER HONOUR: I'm losing – I'm sorry, you're breaking up, Ms Edwards. I think it's when your head goes down to look at something, we don't get the sound as – it breaks up.

MS EDWARDS: Apologies, your Honour. I just need to lay my hands on the decision.

HER HONOUR: Looking at Frugtniet?

MS EDWARDS: Frugtniet at par 7.

HER HONOUR: Okay.

MS EDWARDS: The court was invited to make a broad ruling and the court declined to make that broad ruling, particularly in the context of differences in Federal jurisdiction. But what we would say is the significance of Frugtniet is that its

analysis is the same in the sense of saying that it's not open to a court to apply Pyneboard as if Daniels and Rich had never happened. And that – at par 52 of that decision, the court said:

> "The passage from Daniels effectively determines the meaning that can be given to Pyneboard and Sorby for the purposes of this case. And it's not open to regard Pyneboard as continuing to be authority, if it ever truly was, for the proposition that the starting point is the penalty privileges, if capable of applying in a non-curial setting, subject only to statutory interpretation leading to its nonapplication or abrogation."

And we would say that that analysis and that conclusion is not obiter, but fundamental and also emerges from independent analysis of those High Court decisions. So, while we do respectfully rely on the skilful reasoning of the Full Federal Court in that case, we would suggest that that emerges, if your Honour would look at the same case in the same way.

And again, at par 53, it states that it's reasonably clear that penalty privilege is not even a substantive rule of law that must be found to have a non-curial setting. And finally, your Honour, in that decision, we would respectfully adopt the analysis that at 78, 79 and 80, make clear that it's simply not permissible for a primary judge to follow Morris and Pyneboard without taking into account those significant qualifications.

And your Honour will see that right at the top of that page at 76:

> "In substance, the question turns on whether her Honour was entitled not to apply the obiter by the High Court in Daniels and Rich, and instead rely upon Pyneboard, Sorby and Morris."

And our submission is, with respect, that is what's happening today, the plaintiffs are asking your Honour to disregard the comments of the High Court in Daniels and Rich and apply select passages in Pyneboard and Morris as if they didn't occur.

And so, our final proposition is, we would respectfully adopt the reasoning of the Full Federal Court as to why that's not permissible for a primary judge and then say that that is precisely, with respect, what his Honour, Blue J did in Bell, which is that he put to one side the decisions of Daniel and Rich and applied Pyneboard.

And your Honour has been taken to this judgment in detail. If I could just take your Honour to the passage at par 163, where his Honour says that an obvious tension between the decisions of Pyneboard, Sorby and Morris on the one hand and the seriously considered obiter remarks by the High Court in Daniels.

So, his Honour's not taking issue that Daniels is seriously considered dicta at 163. But he says that it's preferable that this tension be resolved by an authoritative decision of the High Court, and it's not essential for him to decide the question, I do not do so. But in fact, that's, with respect, precisely what we say he does do.

He wholly applies the reasoning in Pyneboard that's been overturned in Daniels, the analysis which follows starting at the start of 498.

HER HONOUR: 498?

MS EDWARDS: Yes, so at paragraph - - -

HER HONOUR: Page – sorry.

MS EDWARDS: And you see his Honour there states that he considers the Coroner's reasoning to be erroneous because it takes the approach adopted by Brennan J, rather than the approach adopted by the plurality.

But the only reason that Brennan J's approach was erroneous was because he made an assumption which wasn't made out in the first place, which was that penalty privilege was a fundamental common law right. And then his Honour says that the approach that should have been adopted was that of Mason CJ, Wilson and Dawson is expressly endorsing the reasoning that was applied in Pyneboard.

HER HONOUR: Contrary to the reasoning in Daniels.

MS EDWARDS: Yes, thank you, your Honour. And then, it goes on at 168 to make the point that your Honour has already, I believe, observed today which is his Honour also says that it might be different with self-incrimination and legal/professional privilege.

HER HONOUR: Yes.

MS EDWARDS: And then, what follows is – and your Honour would see this particularly at par 170, is that his Honour wholeheartedly applies the reasoning in Pyneboard by saying it's a common law right. And then, essentially refers to penalty privilege as being on like terms as self-incrimination and legal/professional privilege.

And so to refer back, the reasons that I took your Honour to those passages, with respect, both to legal/professional privilege in Daniels and also to Murphy J's commentary in Daniels is, is that it's very clear that they can't be put on an equal footing.

And so, our submission in this respect is that Blue J has effectively fallen foul of what the Full Court and the Federal Court said in Frugtniet was not a permissible approach to reasoning. However, we would note, respectfully, your Honour, that whilst Bell could be criticised on this basis, we don't think that it's necessary for your Honour to necessarily make a ruling.

There will be – on the basis that it's distinguishable because of the substantial differences between the legislation in South Australia at the relevant time and the legislation in the Northern Territory.

HER HONOUR: But this is set out more fully in your written submissions, isn't it?

MS EDWARDS: Yes.

HER HONOUR: What paragraph is that?

MS EDWARDS: I'd need to bring it up, your Honour, because I don't have those submissions in front of me at the moment. But I just add to that, your Honour - - -

HER HONOUR: Yes.

MS EDWARDS: - - - that the most significant tension between Bell and the South Australian legislation and the Northern Territory legislation is that the decision in Bell didn't create that lopsided absurdity that the High Court has repeatedly made reference to in Pyneboard and Daniels, because the effect was to preserve three privileges that self-incrimination, penalty privilege and legal/professional privilege.

However, we would submit that the ultimate effect of his Honour's approach was to make the Coronial system unworkable because those – confirmation of that privilege may (inaudible) and we would refer to the second (inaudible) amending Act that came in shortly after the Bell decision.

HER HONOUR: Well, the effect of the Bell decision on the Coronial system in South Australia is not something I need to comment on, is it?

MS EDWARDS: It's not, your Honour, save to one extent, which is a comment is made in – when dealing with the issue of abrogation and intendment. A comment is made by the plaintiff that all Australian jurisdictions have privilege bars that operate within them.

There is no Coronial jurisdiction in Australia which has an absolute bar available for self-incrimination and penalty privilege. And in our submission, that's because it would be impossible for a Coroner to discharge their statutory duties if both were expressly preserved.

But I respectfully agree with your Honour that we're getting beyond what we need to for the purposes of this decision.

HER HONOUR: Yes, thank you.

MS EDWARDS: Those are the submissions, unless I can assist your Honour further.

HER HONOUR: No, thank you very much, Ms Edwards.

Right, so where are we? It's 20 past 4:00. So we have – well, 10 minutes. What is the preferred course of action? We do have tomorrow at 10 o'clock if we need to continue, so it's probably NAAJA next, would that be right?

MR NEKVAPIL: Your Honour, Dr Freckelton is senior to me and I defer to his seniority, if he wished to commence this afternoon?

HER HONOUR: I see.

Dr Freckelton, I will leave it up to you then in that case. (a), do you want to go before NAAJA and (b) if so do you want to start this afternoon or 10 o'clock tomorrow morning?

MR FRECKELTON: Thank you, your Honour. We would prefer that NAAJA go first and given the hour, it may be most useful to commence in the morning. We won't be lengthy. We just want to make a few short points to your Honour pulling together some of the strands that we have heard.

HER HONOUR: All right. Well, I think we will have plenty of time. Are you content with that?

MR NEKVAPIL: I will be probably more efficient if I start in the morning because my speaking notes, if I revise them in light of everything that has already been said, will be much shorter and therefore will save time by finishing early.

HER HONOUR: Yes. I think that is a very wise course to adopt. We will do that. And I should just check with Mr Boe.

Are you content to go last?

MR BOE: I should go last, your Honour, so I am content to go last.

HER HONOUR: And if we start at 10 o'clock that is still going to leave plenty of time for your submissions is it not?

MR BOE: Absolutely, it will, your Honour.

HER HONOUR: All right. Thank you for that.

We will adjourn the court now.

ADJOURNED 4.21 PM TO THURSDAY 24 NOVEMBER 2022