SUPREME COURT OF QUEENSLAND

CITATION:	*Nugent v Stewart (Commissioner of Police) & Anor* [2016] QCA 223
PARTIES:	**KERRY DAVID NUGENT** (appellant) **v** **IAN STEWART (COMMISSIONER OF POLICE)** (first respondent) **ACTING INSPECTOR IAN THOMPSON** (second respondent)
FILE NO/S:	Appeal No 36 of 2016 SC No 2898 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 338
DELIVERED ON:	6 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2016
JUDGES:	Margaret McMurdo P and Morrison JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is dismissed.** **2. The appellant pay the respondents' costs, of and incidental to the appeal.**
CATCHWORDS:	POLICE – RIGHTS, IMMUNITIES, POWERS, DUTIES, AND LIABILITIES – PRIVILEGE AGAINST SELF-INCRIMINATION – where the appellant, who was a police officer, was suspected of committing an offence of misconduct in public office under s 92A of the *Criminal Code* – where the appellant attended two interviews conducted by the Queensland Police Service – where the first interview was an inquiry into the suspected commission of the offence of misconduct in office – where the appellant refused to answer claiming the privilege against self-incrimination – where the second interview commenced immediately thereafter and was a disciplinary interview – where the appellant continued to refuse to answer, claiming the privilege against self-incrimination – where the appellant was referred to a direction by the Commissioner of Police, requiring officers to answer questions put to them in a disciplinary interview and was told that non-compliance with the direction could result in disciplinary action – where the

appellant maintained his claim to privilege against self-incrimination – where the appellant sought a declaration in the Supreme Court that the privilege was available to be claimed by him in a disciplinary interview – where that application was dismissed and the learned primary judge found that a police officer's right to the privilege against self-incrimination had been impliedly abrogated by the *Police Service Administration Act* 1990 (Qld), the *Police Service (Discipline) Regulations* 1990 and the *Police Service Administration Regulation* 1990 – whether the provisions of the *Police Service Administration Act* 1990, the *Police Service (Discipline) Regulations* 1990 and the *Police Service Administration Regulation* 1990 impliedly abrogate the privilege against self-incrimination in a QPS disciplinary inquiry

Criminal Code (Qld), s 92A
Criminal Justice Act 1989 (Qld), s 1.3, s 2.23, s 3.22
Police Service Administration Act 1990 (Qld), s 1.3, s 2.3, s 4.8, s 4.9, s 7.2, s 7.4
Police Service Administration Regulation 1990 (Qld), r 1.6, r 2A.1, r 5, r 9(c)
Police Service (Discipline) Regulations 1990 (Qld), r 3, r 9, r 10

Al-Kateb v Godwin (2004) 219 CLR 562; [2004] HCA 37, cited
Azzopardi v The Queen (2001) 205 CLR 50; [2001] HCA 25, cited
Baff v Commissioner of Police (NSW) (2013) 234 A Crim R 346; [2013] NSWSC 1205, considered
Commissioner of Police v Justin (1991) 55 SASR 547, considered
Electrolux Home Products Pty Ltd v Australian Workers' Union (2004) 221 CLR 309; [2004] HCA 40, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, cited
New South Wales v Fahy (2007) 232 CLR 486; [2007] HCA 20, cited
Nugent v Ian Stewart (Commissioner of Police) & Anor [2015] QSC 338, affirmed
Petty v The Queen (1991) 173 CLR 95; [1991] HCA 34, cited
Police Service Board v Morris (1985) 156 CLR 397; [1985] HCA 9, considered
Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328; [1983] HCA 9, cited
R v Director of *Serious Fraud Office; Ex parte Smith* [1992] 3 All ER 456; [1993] AC 1, cited
R v Independent Broad-Based Anti-Corruption Commissioner (2016) 90 ALJR 433; [2016] HCA 8, cited
Sorby v The Commonwealth (1983) 152 CLR 281; [1983] HCA 10, cited
X7 v Australian Crime Commission (2013) 248 CLR 92; [2013] HCA 29, cited

COUNSEL:	P J Davis QC, with A D Scott, for the appellant A J Stoker for the respondent
SOLICITORS:	Queensland Police Union Legal Group for the appellant Public Safety Business Agency – Legal Division for the respondent

[1] **MARGARET McMURDO P:** The second respondent, Acting Inspector Ian Thompson, began investigating the appellant, Kerry Nugent, a police officer, both as to an alleged offence against s 92A *Criminal Code* 1899 (Qld) of misconduct in relation to public office, and as to a breach of discipline or misconduct under the regulatory scheme established by the *Police Service Administration Act* 1990 (Qld), the *Police Service (Discipline) Regulations* 1990 (Qld) and the *Police Service Administration Regulation* 1990 (Qld) applicable to all members of the Queensland Police Service (QPS). The investigation concerned Mr Nugent allegedly "tipping off" another officer about an investigation concerning that officer. When Mr Thompson interviewed Mr Nugent about the criminal matter under Chapter 15 *Police Powers and Responsibilities Act* 2000 (Qld), Mr Nugent claimed privilege against self-incrimination and the interview was terminated. It is common ground that Mr Nugent was entitled to claim privilege against self-incrimination in relation to this questioning about the alleged criminal offence against s 92A.[1] During Mr Thompson's second interview of Mr Nugent, this time about alleged breaches of the regulatory scheme, Mr Nugent again claimed privilege against self-incrimination in relation to some questions.

[2] He has appealed from the primary judge's order dismissing his applications for declarations that nothing in the regulatory scheme abrogates his right to refuse to answer questions in a disciplinary interview in reliance upon his privilege against self-incrimination, and that he was entitled to exercise that privilege in the disciplinary interview. I agree with Morrison JA that the appeal should be dismissed.

[3] Morrison JA has helpfully set out the relevant regulatory scheme.[2] It makes clear that the QPS is a disciplined organisation in which QPS members are given significant powers and immunities not enjoyed by the general public. They are required to keep the peace, prevent and detect crime, and protect the person and property of members of the community. QPS members can arrest those whom they believe to be wrong-doers and exercise physical control over them in ways which may be unlawful for others. In exchange for exercising these extraordinary powers, QPS members voluntarily accept the curtailment of some freedoms enjoyed by the general public, for example, the regulatory scheme requires that QPS members obey lawful orders and be disciplined if those orders are disobeyed. This is an essential aspect of an efficient, effective police service in which the public can have confidence.

[4] I note that the respondent did not contradict Mr Nugent's contention in oral argument that any admissions made by him during the disciplinary interview as to a criminal offence would be inadmissible in a criminal trial under s 10 *Criminal Law Amendment Act* 1894 (Qld) as a confession induced by a threat or promise by a person in authority.[3] That contention finds support in the regulatory scheme as it compels him to comply

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1 See *Police Powers and Responsibilities Act* s 397.

2 Morrison JA's reasons [18] – [42] (to be changed on collation).

3 T1-3 – T1-4, l 35 – l 15.

with a direction to answer questions, with penalties for non-compliance. But the matter has not been decisively determined and there may be a contrary argument.[4] Mr Nugent contends that the primary judge was wrong to follow the South Australian Full Court's interpretation in *Commissioner of Police v Justin*[5] of the High Court's decision in *Police Service Board v Morris*.[6] Instead, the appellant contends, his Honour should have followed the approach taken by Adamson J in the Supreme Court of New South Wales in *Baff v Commissioner of Police (NSW)*,[7] an approach consistent with that of the High Court in *Daniels Corp v ACCC*[8] and *Rich v ASIC*.[9] These contentions require a discussion of *Morris*, *Justin* and *Baff*.

Morris v Commissioner of Police

[5] In *Morris*, unlike the present case, police officers were being interviewed only as to questions of an administrative or disciplinary nature which did not involve any alleged criminal charges.[10] The police officers claimed privilege, refusing to answer some questions they were directed to answer. The applicable Victorian regulatory scheme provided that no member of the police force shall disobey any lawful order, written or otherwise, and any member who breached a regulation, or was guilty of misconduct, was guilty of an offence against the regulatory scheme. There were four separate judgments, all agreeing that there was no claim of privilege.

[6] Gibbs CJ articulated the question for decision as "whether the rule of the common law that a party is not bound to answer any question which might tend to expose him to the risk of a criminal conviction or the imposition of a penalty is capable of application."[11] Gibbs CJ, however drew the "obvious distinction between criminal offences and breaches of discipline."[12] His Honour observed that the regulatory scheme imposed penalties and a person cannot be compelled to answer a question which would tend to expose the person to any kind of punishment. This privilege, Gibbs CJ found, was capable of application in non-judicial proceedings, citing *Pyneboard Pty Ltd v Trade Practices Commission*[13] and *Sorby v Commonwealth*.[14] The relevant regulation, his Honour considered, was:

> "part of a statutory scheme which provides for the regulation and control of a police force – a body upon whose efficiency and probity the State must depend for the security of the lives and property of its citizens and a body which can operate effectively only under proper discipline."[15]

Although the regulation did not itself confer a power to require answers to be given to questions, its character was:

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4 See Debelle J's discussion in Commissioner of Police v *Justin* (1991) 55 SASR 547, 555 and the cases there cited, and the discussion of *R v Travers* (1958) SR NSW 85 in [16] of these reasons.
5 (1991) 55 SASR 547.
6 (1985) 156 CLR 397.
7 [2013] NSWSC 1205.
8 (2002) 213 CLR 543, [30] – [31].
9 (2004) 220 CLR 129, [142] and [179].
10 (1985) 156 CLR 397, 401 (Gibbs CJ).
11 Above, 402.
12 Above, 403.
13 (1983) 152 CLR 328, 340.
14 (1983) 152 CLR 281, 309.
15 (1985) 156 CLR 397, 404.

> "primarily designed to secure the obedience to orders rather than to compel the answering of questions…[so] the application of the privilege would be inappropriate and that the obligation to obey lawful orders is not intended to be subject to any unexpressed qualification."

Gibbs CJ added:

> "...the character and object of the regulation provide a sufficient indication that it was not intended that an officer to whom such an order was given could object to obey it on the ground that his answer might expose him to penalties for breach of his duty."[16]

[7] Murphy J noted that the privilege protected against "self-exposure to criminal process", citing *Pyneboard*[17] for the principle "that the privilege does not extend to self-exposure to non-criminal process. If the police officers were asked a question the answer to which would tend to expose them to criminal proceedings they would be entitled to object to answering on the ground of self-incrimination and failure to answer on that ground would not constitute a breach of [the regulation]."[18] Murphy J noted that there was no suggestion of criminal prosecution; only if the penalties for breach of the regulation were criminal in nature (which his Honour did not consider they were) would the privilege apply.[19]

[8] Wilson and Dawson JJ considered the common law rule that a party is not bound to answer any question which might tend to expose the person to the risk of a criminal conviction or the imposition of a penalty. Their Honours found that it was capable of applying to a statutory provision which required members of the police force to answer questions tending to show they had committed disciplinary offences.[20] After citing *Pyneboard* and discussing the relevant regulatory scheme, their Honours noted that it provided for:

> "…a disciplined force, the members of which voluntarily undertake the curtailment of freedoms which they would otherwise enjoy. It is in that context that it may be necessary to draw the implication that the privilege is excluded by a provision designed to further the effectiveness of an organization based upon obedience to command."[21]

Their Honours determined that:

> "The legislature must have intended that any cause for suspicion touching a member's performance of his duties could be the subject of interrogation by a superior officer and that the member would be obliged to answer the questions put to him whether or not those answers would tend to incriminate him. With all respect to those who take a different view...the efficiency of the force demands this and the loyalty promised by every member when he takes the oath prescribed by the Act reinforces it."[22]

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16 Above, 405.
17 (1983) 152 CLR 328.
18 (1985) 156 CLR 397, 406 – 407.
19 Above, 407.
20 Above, 407 – 408.
21 Above, 409.
22 Above, 410.

[9] Brennan J (as his Honour then was) also emphasised that "the impairment of discipline in the police force" was a factor in favour of excluding the privilege,[23] adding:

> "The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty and upon the judicious exercise of their powers. Internal disciplinary authority over members of the police force is a means – the primary and usual means – of ensuring that individual police officers do not jeopardize public confidence by their conduct, nor neglect the performance of their police duty, nor abuse their powers. The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency. It cannot be thought that [the regulations] intend a police officer to be able to cloak with his silence activities that are prejudicial to the achievement of these purposes. To permit, under a claim of privilege, a subordinate officer to refuse to give an account of his activities whilst on duty when an account is required by his superior officer would subvert the discipline of the police force."[24]

[10] His Honour referred to:

> "...the incompatibility of a claim of privilege with the duty of a police officer to reveal information acquired in the course of his duty. We are concerned to determine whether the general duty of a police officer to obey the lawful order of a superior to answer questions about his activities whilst on duty is consistent with a right to refuse to answer questions on the grounds that the answer may tend to incriminate him. In my opinion, the discipline of a police force demands that answers be given fully and frankly to a superior officer who so orders. It follows that the privilege must be taken to be impliedly excluded from application to an order given under [the regulation] to answer questions seeking information about a police officer's activities whilst on duty."[25]

Commissioner of Police v Justin

[11] In *Justin*, a police officer was being questioned about two alleged offences of disobeying a lawful order contrary to the South Australian regulatory scheme. As in the present case, the questioning could elicit answers also relevant to alleged criminal charges. The investigating officer conducted one interview concerning the alleged criminal conduct in which Justin claimed privilege and a second interview concerning the disciplinary matters in which he again claimed privilege. A number of questions of law arising were referred to the South Australian Full Court which applied *Morris* and found the common law privilege to refuse to answer questions had been excluded under the regulatory scheme.

[12] King CJ, with whom Millhouse J agreed, considered there was no reason why the majority reasoning in *Morris* (Gibbs CJ, Wilson, Dawson and Brennan JJ) would not apply where the alleged breach of discipline also amounted to a criminal offence.[26]

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23 Above, 411.
24 Above, 412.
25 Above, 413.
26 (1991) 55 SASR 547, 550.

King CJ found there was no material difference between the South Australian regulation and the regulation considered in *Morris*[27] and emphasised that the questions subject to the claim of privilege, both criminal and disciplinary, related to events occurring in the course of the performance of the officer's duty. His Honour observed that the officer may not be bound to answer questions with respect to suspected criminal offences totally unrelated to his police duties or his position as a police officer.[28] But his Honour found that the effect of *Morris* was that the common law right to refuse to answer questions on the grounds of self-incrimination was excluded in relation to questions about the alleged disciplinary offences; the questioning did not give rise to an abuse of process.

[13] Debelle J considered that, were the matter free from authority, there was much which pointed to the conclusion that the regulation did not by necessary implication abrogate the common law privilege. His Honour considered, however, that *Morris* required the contrary conclusion[29] and agreed with King CJ's answers to the questions stated.[30] There was no appeal.

Baff v Commissioner of Police (NSW)

[14] In *Baff*, as in the present case and in *Justin*, a police officer was interviewed about an incident which occurred in the course of his duties and the questions had the potential to elicit answers which could result in both criminal and disciplinary charges. He successfully claimed privilege when interviewed about the alleged criminal charges and also sought to claim privilege about the alleged disciplinary charges.[31] He sought declarations that the directions to answer questions about the alleged disciplinary charges were not lawful and that he was entitled in the exercise of his privilege against self-incrimination to refuse to answer those questions.

[15] Adamson J noted that in *Morris* the questions which the police officers refused to answer related solely to alleged administrative or disciplinary charges and did not involve alleged criminal charges.[32] Her Honour noted with approval Murphy J's approach in *Morris*[33] and considered that, in light of the facts in *Morris* which concerned only the privilege against exposure to civil penalties, references in *Morris* to the privilege against self-incrimination should not be construed as applying to the privilege against exposure to criminal prosecution.[34] *Morris*, Adamson J considered, was authority only for the proposition that the privilege against exposure to civil penalties is excluded by necessary implication by a regulatory scheme requiring a police officer to obey orders; it was not authoritative as to whether the privilege against exposure to criminal prosecution was also excluded.[35]

[16] Her Honour discussed[36] *R v Travers*,[37] where a police officer argued that a report, which he provided without any claim of privilege and which he was required to prepare and provide under the relevant regulatory scheme, could not be used against

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27 Above, 551.
28 Above, 551.
29 Above, 555.
30 Above, 556.
31 [2013] NSWSC 1205, [19].
32 Above, [69].
33 See [7] of these reasons.
34 Above, [77].
35 Above, [78].
36 [2013] NSWSC 1205, [97].
37 (1958) SR (NSW) 85.

him in a criminal trial. The New South Wales Court of Criminal Appeal rejected that argument, stating:

> "... the law requires that a member of the police force shall obey a lawful order. It is not to the point to suggest that the order may become unlawful because in answering it the person to whom it is addressed might incriminate himself. We think that in requiring the answer to be given it is necessarily intended, in the absence of any indication to the contrary, that any right which the person addressed might have had to refrain from incriminating himself should be taken away. Moreover, the submission confuses the notion that a person may excuse himself from what would otherwise be a disobedience to an order which he may decline to answer and the lawfulness of the order itself. The lawfulness of the order cannot be judged according to the nature of the answer given. If the answer would incriminate the person addressed, it may possibly be that in some circumstances he might properly decline to answer but no such question arises in this case.
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> The appellant did in fact answer without protest. We think the order was a perfectly lawful one and...
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> ...the report...was properly admissible in evidence."[38]

[17] During oral argument in *Baff* the respondent, police commissioner, accepted that "*Morris* was solely concerned with the privilege against exposure to a civil penalty and and not the privilege against self-incrimination in so far as it related to exposure to criminal prosecution [and] that, in so far as [it] can be read as applying to the latter privilege, these remarks were *obiter*."[39]

[18] Adamson J did not consider herself bound by *Justin* as it misapplied *Morris* which should be construed as referring only to the privilege against exposure to civil penalty, not the privilege against self-incrimination and exposure to criminal prosecution.[40] Her Honour concluded that the privilege against self-incrimination was not abrogated by the New South Wales regulatory scheme;[41] no action could be taken against the police officer by reason of his refusal to answer questions in the exercise of a right which has not been abrogated and any order or direction requiring him to answer those questions would not be lawful.[42] There was no appeal.

Conclusion

[19] As Adamson J identified in *Baff*, there is a distinction between the privilege against self-exposure to criminal prosecution and the privilege against self-exposure to civil penalties,[43] even though the two were arguably sometimes conflated in *Morris*. Both privileges are fundamental rights and will only be abrogated by clear and unambiguous language or by necessary implication: *Potter v Minahan*[44] and *Coco v The Queen*.[45]

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38 Above, 107 – 108.
39 [2013] NSWSC 1205, [59].
40 Above, [104] – [105].
41 Above, [109] – [114].
42 Above, [116].
43 [2013] NSWSC 1205, [7] citing *R v Director of Serious Fraud Office; Ex-parte Smith* [1993] AC 1, 30-31 (Lord Mustill).
44 (1908) 7 CLR 277, 304 (O'Connor J).
45 (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

Mr Nugent's claim of privilege was against self-exposure to penalties under the regulatory scheme.

[20] That scheme,[46] as in *Morris*, *Justin* and *Baff*, did not abrogate either privilege in terms. It provided for the regulation and control of members of a police service upon whose efficiency and honesty the members of the community depend for the security of their person and property and for the preservation of peace and public order. The QPS operates effectively under the regulatory scheme through a hierarchical model, with junior police officers obeying the lawful orders of superiors and with disciplinary consequences for insubordination. Members of the QPS voluntarily undertake both their important privileges and responsibilities of office together with their voluntary submission to obedience to the lawful commands of superiors. This is reinforced by the police officers' oath or affirmation of office.[47] Under the regulatory scheme, the duty of police officers to the community and to upholding the law outweighs any misguided sense of mateship to fellow officers who may have acted unlawfully, including senior officers.

[21] Nothing in *Baff* undermines the reasoning of Gibbs CJ, Wilson, Dawson and Brennan JJ in *Morris*, which makes clear that a regulatory scheme for a police service like that to which Mr Nugent was subject, clearly abrogated by necessary implication the privilege against self-exposure to civil penalties.

[22] In the present case, as in *Justin* and *Baff*, it is common ground that the police officer claiming privilege was being questioned about matters which could result in both disciplinary and criminal charges, whereas in *Morris* the officers were at risk of only disciplinary charges. It is difficult to reconcile the differing approaches under the broadly similar regulatory schemes considered in *Justin* and *Baff*. Neither case was subject to appeal but *Baff* was briefly referred to with apparent approval by the New South Wales Court of Criminal Appeal in *Beckett v The Queen*,[48] although in a context which is of no present relevance. Adamson J in *Baff* concluded that in circumstances where the questioning under the regulatory scheme could result in exposure to criminal prosecution, the privilege against self-incrimination was not abrogated by the regulatory scheme. Her Honour's thoughtful analysis turned in large part on the police commissioner's concession in that case[49] and the concern that the answers given in the regulatory investigation might be used against the police officer in a criminal proceeding, a concern apparently not present in this case. I consider that it is to *Morris*, not *Baff*, that this Court should look for guidance. *Morris* makes clear that a regulatory scheme for a police service like that to which Mr Nugent was subject, abrogated the privilege against self-exposure to civil penalties.

[23] In contending that *Morris* does not apply where the questioning of a police officer about regulatory offences might expose the officer to criminal charges so that privilege against self-exposure against criminal sanctions can be claimed, the appellant places reliance on the High Court's observations concerning privilege since *Morris* in *Daniels*[50] and *Rich*.[51] But those observations were not made in the context of construing

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46 Discussed in [2] of these reasons.

47 See *Police Service Administration Act*, s 3.3 and *Police Service Administration Regulation*, regs 2.1 – 2.2: to "well and truly serve" the Crown "according to law" and to "cause Her Majesty's peace to be kept and preserved…[and] to the best of [the police officer's] skill and knowledge discharge all the duties legally imposed upon [the police officer] faithfully and according to law."

48 [2014] NSWCCA 305, [114], [135] – [136].

49 See [17] of these reasons.

50 At [30]-[31].

51 At [142], [179].

whether a regulatory scheme concerning a police service abolished the privilege against self-exposure to penalties under it. They are of no particular assistance in this case. By contrast, Brennan J's observations in *Morris*[52] were cited with approval very recently by French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ in "*R" v Independent Broad-Based Anti-Corruption Commissioner*. This does not suggest the High Court has distanced itself from the majority view in *Morris*.

[24] It is true that, unlike in *Morris*, Mr Nugent's answers concerning the alleged disciplinary offences may also be relevant to alleged criminal conduct. It appears common ground, however, that his answers to questioning about the disciplinary offences cannot be used against him in any criminal prosecution. Even so, in case it might later be argued that admissions made when questioned about alleged disciplinary offences could be used against him in a criminal proceeding despite s 10 *Criminal Law Amendment Act*, it may be prudent for him to claim privilege against self-exposure to criminal prosecution.[53] But, for the reasons I have given, such a claim would not extend to privilege against self-exposure to penalties under the regulatory scheme; he was obliged to answer these questions.

[25] For these reasons I consider that Mr Nugent was not entitled to the declarations he sought and the primary judge was right to refuse his application. I agree with the orders proposed by Morrison JA.

[26] **MORRISON JA:** Mr Nugent is a police officer. He was suspected of tipping off a fellow officer who was then under investigation, thus committing an offence of misconduct in public office under s 92A of the *Criminal Code* 1899 (Qld).

[27] He attended two interviews conducted by members of the Queensland Police Service (**QPS**). The stated purpose of the first interview was an inquiry into his suspected commission of the offence of misconduct in office. Mr Nugent refused to answer questions on the basis of a claim to privilege against self-incrimination. That interview was then terminated.

[28] The second interview commenced immediately thereafter. That was a disciplinary interview. Again, Mr Nugent refused to answer questions on the basis of a claim to privilege against self-incrimination.

[29] He was then referred to a direction by the Commissioner of Police, requiring officers to answer questions put to them in a disciplinary inquiry. He was also told that non-compliance with the direction could result in disciplinary action. Mr Nugent maintained his claim to privilege against self-incrimination.

[30] Mr Nugent sought a declaration in the Supreme Court[54] that the privilege against self-incrimination was available to be claimed by him in the disciplinary interview. That application was dismissed. The learned primary judge found that a police officer's right to the privilege against self-incrimination had been impliedly abrogated by the *Police Service Administration Act* 1990 (Qld), the *Police Service (Discipline) Regulations* 1990 and the *Police Service Administration Regulation* 1990.

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52 Set out at [9] of these reasons were cited.

53 See *Travers* (1958) SR (NSW) 85, 106 – 107, discussed at [16] of these reasons where the failure of the police office to claim privilege against self-incrimination for criminal charges seemed to be a relevant factor in allowing the report prepared under the regulatory scheme to be tendered in Travers' subsequent criminal trial.

54 *Nugent v Ian Stewart (Commissioner of Police) & Anor* [2015] QSC 338.

[31] Mr Nugent appeals from that decision.

[32] The issue raised on the appeal is whether the provisions of the *Police Service Administration Act* 1990 (**the Act**), the *Police Service (Discipline) Regulations* 1990 **(the Discipline Regulation**) and the *Police Service Administration Regulation* 1990 (**the Administration Regulation**) impliedly abrogate the privilege against self-incrimination in a QPS disciplinary inquiry.

[33] The declaratory relief the applicant seeks is that:

(a) nothing in the *Police Service Administration Act* 1990, the *Police Service (Discipline) Regulations* 1990 or any directions given to members of the Queensland Police Service generally, or the applicant specifically, abrogates the applicant's right to refuse to answer questions in a disciplinary interview in reliance upon his privilege against self-incrimination;

(b) the applicant was entitled to exercise that privilege in a disciplinary interview on 5 March 2015.

The appellant's submissions

[34] In this Court, senior counsel for Mr Nugent relied on two main points in contending that there was no abrogation of the right to claim privilege against self-incrimination.

[35] First, the fundamental nature of that right was emphasised, with reference to authority characterising it as a "cardinal principle of our system of justice",[55] a "fundamental … bulwark of liberty" and a "basic and substantive common law right".[56] The contention also emphasised the need for caution in rejecting its application and the need for "irresistible clearness" in legislation to have that effect.[57]

[36] It was contended that when the statutory provisions are examined there is no discernible intention to abrogate the right to claim privilege against self-incrimination. In this respect the references to "the law" in the various provisions was said to show preservation of the right, as it was part of "the law". That was contrasted with the right in respect of penalty privilege which was not a substantive right and not available outside judicial proceedings.

[37] Secondly, he sought to distinguish the High Court's decision in *Police Service Board v Morris*,[58] on which the learned primary judge placed reliance. Part of that approach was to attempt to show that *Morris* was concerned only with the privilege against being subjected to a penalty,[59] and therefore whatever was said about privilege against self-incrimination was obiter dicta. This was said to be a point misunderstood by the South Australian Full Court in *Commissioner of Police v Justin*,[60] when it followed *Morris*, but correctly recognised in *Baff v Commissioner of Police (NSW)*,[61] where *Morris* was distinguished and not followed by Adamson J in the Supreme Court of New South Wales.

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55 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 294.

56 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340 (***Pyneboard***); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 137 [104] (***X7***).

57 Relying on *X7* at [86].

58 (1985) 156 CLR 397. (***Morris***)

59 Referred to in the submissions and in these reasons by the useful tag "penalty privilege".

60 (1991) 55 SASR 547. (***Justin***)

61 [2013] NSWSC 1205; (2013) 234 A Crim R 346. (***Baff***)

[38] In order to determine whether the right to claim privilege against self-incrimination has been impliedly abrogated, it is necessary to identify the precise right or immunity in question, then the impact of the statutory provisions.

The nature of the right

[39] The common law right at issue in this case is often called the right to silence. That was described by Lord Mustill in *R v Director of Serious Fraud Office; Ex parte Smith*[62] as referring to "a disparate group of immunities, which differ in nature, origin, incidence and importance".[63] Lord Mustill identified six categories of the disparate immunities. Of those, only two are potentially relevant to the issues in this case:

(a) first, a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them; and

(b) secondly, the specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

[40] It is really only the first that is at issue here, as Mr Nugent did answer various questions during the discipline interview, declining to answer only when he claimed that the answer might incriminate him. However, the second can be seen to comprehend the first, in this case, in the sense that a refusal to answer any particular question on the ground that the answer might incriminate him is, nonetheless, an exercise of immunity from being compelled to answer.

[41] Both, then, are comprehended here, and are hereafter referred to in these reasons as the privilege against self-incrimination.

[42] That privilege was described in *Petty v The Queen*[64] in these terms:

> "A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played. That is a fundamental rule of the common law which, subject to some specific statutory modifications, is applied in the administration of the criminal law in this country. An incident of that right of silence is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information. To draw such an adverse inference would be to erode the right of silence or to render it valueless."

The statutory regime

[43] The Act provides for the creation of the Police Service, constituted by "a body of persons" who are police officers: ss 2.1 and 2.2. The Service is to be maintained at all times: s 2.1. The objects of the Act are to provide for the maintenance of the Queensland Police Service and the development and administration of that service: s 1.3.

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62 [1993] AC 1 at 30-31.

63 *Azzopardi v The Queen* (2001) 205 CLR 50 at [160] per McHugh J; *X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29 per French CJ and Crennan J. (***X7***)

64 [1991] HCA 34; (1991) 173 CLR 95, at 99.

[44] Section 2.3 of the Act sets out the functions of the police service as (relevantly):

> "The functions of the police service are the following—
>
> (a) the preservation of peace and good order …
>
> (b) the protection of all communities in the State and all members thereof—
>
> (i) from unlawful disruption of peace and good order that results, or is likely to result, from…
>
> (ii) from commission of offences against the law generally;
>
> (c) the prevention of crime;
>
> (d) the detection of offenders and bringing of offenders to justice;
>
> (e) the upholding of the law generally;
>
> (f) the administration, in a responsible, fair and efficient manner and subject to due process of law and directions of the commissioner, of—
>
> (i) the provisions of the Criminal Code;
>
> (ii) the provisions of all other Acts or laws for the time being committed to the responsibility of the service;
>
> (iii) the powers, duties and discretions prescribed for officers by any Act."

[45] The importance of the Service to the community is emphasised by the fact that the functions in s 2.3, are to be acted "in partnership with the community at large to the extent compatible with efficient and proper performance of those functions": s 2.4(2).

[46] If a question arises as to a person's identity as an officer, or to a person's entitlement to exercise the powers or to perform the duties of an officer, the Act provides that "the general reputation of a person, who is an officer, as being an officer is evidence of that identity and entitlement": s 3.4 of the Act. The same section also provides that the absence of, or failure to produce, any written appointment or other documentary proof (to establish the police officer's identity or entitlement to exercise the powers and perform the duties) does not prejudice or otherwise affect the exercise of the powers or the performance of the duties by a police officer.

[47] Under the Act, the Commissioner is "responsible for the efficient and proper administration, management and functioning of the police service in accordance with law": s 4.8(1). For that purpose, the Commissioner is "authorised to do, or cause to be done, all such lawful acts and things as the commissioner considers to be necessary or convenient for the efficient and proper discharge of the prescribed responsibility": s 4.8(3). In discharging that responsibility, the Commissioner is, subject to the Act, "to ensure compliance with the requirements of all Acts and laws binding on members of the police service, and directions of the commissioner": s 4.8(4)(b).

[48] The Commissioner is given power to issue directions under s 4.9 of the Act:

> "(1) In discharging the prescribed responsibility, the commissioner may give, and cause to be issued, to officers, staff members or

police recruits, such directions, written or oral, general or particular as the commissioner considers necessary or convenient for the efficient and proper functioning of the police service.

(2) A direction of the commissioner is of no effect to the extent that it is inconsistent with this Act.

(3) Subject to subsection (2), every officer or staff member to whom a direction of the commissioner is addressed is to comply in all respects with the direction."

[49] Thus it is evident that the power to give or issue directions is very broad: "such directions, written or oral, general or particular as the commissioner considers necessary or convenient for the efficient and proper functioning of the police service": s 4.9(1).

[50] The requirement for compliance with the Commissioner's directions is first mentioned in s 2.3(f). That obedience is central to the administration of the service, as can be seen from the additional references to the Commissioner's directions:

(a) a breach of discipline includes a breach of a direction given by the Commissioner: s 1.4;

(b) "Subject to section 7.1 where it applies, in performance of the duties of office, an officer is subject to the directions and orders of the commissioner …": s 3.2(1);

(c) the Commissioner is to "ensure compliance with the requirements of … directions of the commissioner": s 4.8(4)(b);

(d) unless a direction is inconsistent with the Act, "every officer or staff member to whom a direction of the commissioner is addressed is to comply in all respects with the direction": s 4.9(3);

(e) the Commissioner can direct that certain equipment must be surrendered when a person ceases to be an officer, and that must be complied with: s 10.13; and

(f) where an officer is suspected by the Commissioner of being unfit to perform duties, the Commissioner can direct that officer to submit to a medical examination; if the officer fails without reasonable cause to comply with that direction, "it is to be conclusively presumed that the commissioner's suspicion is true": s 8.3(1) and 8(2A).

[51] There are provisions that are designed to "enhance the public's confidence in the service and the integrity of the service": Part 5A. Thus, officers must submit to random alcohol testing if approved by the Commissioner: s 5A.9, as well as if they are suspected of contravening specified alcohol limits while on duty: s 5A.8. They must also submit to targeted drug testing, where the limit is that there must be no evidence of a dangerous drug: s 5A.12 and s 5A.13. The Commissioner is given wide disciplinary powers if an officer tests positive for alcohol or drugs: s 5A.16.

[52] The Commissioner is given power to obtain information about a person's criminal history if they wish to be engaged by the Service: Part 5AA. The potential employee is required to make that disclosure, which includes offences and disciplinary action under a public sector disciplinary law: s 5AA.8.

[53] Part 7 of the Act deals with "Internal command and discipline". The Act imposes duties on each police officer in respect of matters of misconduct and breaches of discipline, in s 7.2:

> "(1) In this section—
>
> ***conduct*** means conduct of an officer, wherever and whenever occurring, whether the officer whose conduct is in question is on or off duty at the time the conduct occurs.
>
> ***officer*** includes a police recruit.
>
> (2) If any officer or staff member—
>
> (a) knows or reasonably suspects that conduct to which this section refers has occurred; or
>
> (b) is one in respect of whom it can be reasonably concluded that the officer or staff member knew or reasonably suspected that conduct to which this section refers has occurred;
>
> it is the duty—
>
> (c) of the officer or staff member, in the case of conduct that is misconduct, to report the occurrence of the conduct, as soon as is practicable, to the commissioner and to the chairman of the Crime and Corruption Commission; and
>
> (d) of the officer, in the case of conduct that is misconduct or a breach of discipline, to take all action prescribed by the regulations as action—
>
> (i) to be taken in the circumstances of the case; and
>
> (ii) to be within the authority of an officer of the rank or description to which that officer belongs.
>
> (3) The commissioner may, by written instrument, exempt stated officers or staff members who have or are likely to have knowledge of conduct that is an alleged contravention of the *Anti-Discrimination Act 1991* from compliance with subsection (2), generally or on stated conditions.
>
> (4) The commissioner may give an exemption under subsection (3) only if the commissioner is reasonably satisfied giving the exemption will not adversely affect the welfare of the officers or staff members affected by or involved in the conduct.
>
> (5) However, if a person is given an exemption generally because the person is likely to have knowledge of an alleged contravention of the *Anti-Discrimination Act 1991* and the person is the person against whom the complaint for the contravention is made, the exemption does not operate in relation to the complaint against the person.
>
> (6) Also, the commissioner may, by written instrument, exempt an officer or staff member from compliance with subsection (2), generally or on stated conditions, if the officer or staff member—

(a) is appointed to provide confidential counselling services to officers and staff members; or

(b) is a prescribed person under section 5A.21A.

(7) An exemption under subsection (6) only operates while the officer or staff member is providing professional counselling services in an official capacity.

(8) If a person is not required to report misconduct under subsection (2) because of an exemption under subsection (3), the commissioner also is not required to report the misconduct."

[54] The importance of the standard of the Police Service conduct to the community is shown by the definition of "misconduct" which includes conduct which "does not meet the standard of conduct the community reasonably expects of a police officer": s 1.4. That standard is maintained by the discipline imposed on officers, and administered by the Commissioner.

[55] Officers are subject to very wide disciplinary control. Section 7.4 provides that an officer is "liable to disciplinary action in respect of the officer's conduct, which the prescribed officer considers to be misconduct or a breach of discipline on such grounds as are prescribed by the regulations". The seriousness with which the Act treats a finding of misconduct is shown by the requirement that, in the event of such a finding, "the commissioner must give a QCAT information notice to the officer and the Crime and Corruption Commission for the decision or finding within 14 days after the making of the decision or finding": s 7.4(2A).

[56] Part 7A of the Act even gives the Commissioner power to start or continue an investigation into a breach of discipline by a former officer.

[57] Regulation 3 of the Discipline Regulation states the objects in this way:

"The object of these regulations is to—

(a) provide for a system of guiding, correcting, chastising and disciplining subordinate officers; and

(b) ensure the appropriate standards of discipline within the Queensland Police Service are maintained so as—

(i) to protect the public; and

(ii) to uphold ethical standards within the Queensland Police Service; and

(iii) to promote and maintain public confidence in the Queensland Police Service."

[58] Regulation 9 of the Discipline Regulation provides for disciplinary action to be taken against a police officer in various circumstances which include:

"(1) For the purposes of section 7.4 or part 7A of the Act, the following are grounds for disciplinary action—

…

(c) a contravention of, or failure to comply with, a provision of a code of conduct, or any direction, instruction or order given by, or caused to be issued by, the commissioner;

(d) a contravention of, or failure to comply with, a direction, instruction or order given by any superior officer or any other person who has authority over the officer concerned; …."

[59] Regulation 10 then provides for the type of disciplinary sanctions that can be imposed upon a finding of misconduct:

> "Subject to regulations 11 and 12 (and without limiting the range of disciplines that may be imposed by the commissioner or a deputy commissioner pursuant to section 7.4(3) of the Act or regulation 5) the disciplinary sanctions that may be imposed under these regulations are the following—
>
> (a) cautioning or reprimand;
>
> (b) a deduction from the officer's salary or wages of an amount equivalent to a fine of 2 penalty units;
>
> (c) a reduction in the officer's level of salary or wages (not being a reduction to a level outside that applicable to an officer of that rank);
>
> (d) forfeiture or deferment of a salary increment or increase;
>
> (e) a reduction in the officer's rank or classification;
>
> (f) dismissal from the police service."

[60] The Administration Regulation is the means by which the Commissioner's duty to administer and maintain the Service is regulated. It requires that all officers are to take reasonable steps to familiarise themselves with the provisions of the Act, regulations made under the Act, and those codes of conduct, general instructions and determinations that apply to them: reg 1.6. Amongst the particular matters within the Commissioner's responsibility are: the promotion or demotion of officers, the training and development of members of the service, and the discipline of members of the service: reg 2A.1.

[61] The Administration Regulation makes detailed provision in relation to non-disciplinary matters, such as: transfers, vacancies and promotions; resignation and retirement; and alcohol and drug testing.

[62] Regulation 5.3 of the Administration Regulation provides that an officer must not withdraw from his or her duties unless authorised by the Act, any regulations made under the Act or by the Commissioner. Those duties are those of a constable at common law: s 3.2 of the Act. A constable at common law had the duty to maintain the King's peace for the benefit of the citizenry, bringing to justice those by whom it is infringed.[65] It is that duty that is reflected in the oath and affirmation that an officer must take before entering upon the duties of an officer.

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65 Mozley & Whiteley's Law Dictionary, 10th ed., 1988.

[63] Those duties now include: that the performance of an officer's duties is subject to the directions and orders of the commissioner: s 3.2(1) of the Act; and that in s 4.9(3) of the Act, namely to comply in all respects with the Commissioner's direction.

[64] The necessity for, and importance of, discipline in the conduct of the Service, in the interests of the community, is signified by the Discipline Regulation, the entire objects of which are devoted to providing for a system of "guiding, correcting, chastising and disciplining" officers, and ensuring that "appropriate standards of discipline within the Queensland Police Service are maintained": reg 3. Importantly, the aim of ensuring that appropriate standards of discipline are maintained is not just to uphold ethical standards, but also to "promote and maintain public confidence in the Queensland Police Service": reg 3(b)(iii).

[65] The Administration Regulation, itself, contains provisions, such as reg 5, whereby the Commissioner is given disciplinary powers.[66] The grounds for disciplinary action include:[67]

(a) unfitness, incompetence or inefficiency in the discharge of duties;

(b) negligence, carelessness or indolence in the discharge of duties;

(c) a contravention of, or failure to comply with, a provision of a code of conduct, or any direction, instruction or order given by, or caused to be issued by, the commissioner;

(d) a contravention of, or failure to comply with, a direction, instruction or order given by any superior officer or any other person who has authority over the officer concerned;

(e) absence from duty except on leave or with reasonable cause; in this case, the Commissioner has the power to compel an officer to submit to a medical examination as to the officer's mental or physical condition, or both;

(f) misconduct; and

(g) conviction of an indictable offence.

[66] Importantly, reg 9(c) makes it a ground for disciplinary action, if an officer disobeys a direction given by the Commissioner.

[67] The range of sanctions that can be imposed for a disciplinary breach is wide, from a caution or reprimand, to deduction of pay and a reduction in salary, to a reduction in rank and ultimately dismissal from the Service: reg 10.

The Commissioner's direction

[68] Under the Complaint and Resolution Procedures Policy, the Commissioner gave a direction that was relied upon at Mr Nugent's interview:

> "Pursuant to ss 4.9(1) and 2.5 of the *Police Service Administration Act 1990*, all members of the Police Service (including police officers, police recruits and staff members), are instructed to truthfully, completely and promptly answer all questions directed to them by

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66 Others officers have similar powers in certain circumstances: ss 6, 7 and 8.

67 Discipline Regulation, reg 9.

a member responsible for conducting an inquiry or investigation on behalf of the Commissioner. In the case of a staff member, a direction can only be given where the allegations are made in relation to duties performed in the Service (i.e. there is a nexus with official duties). This includes an administrative or disciplinary complaint.

This is NOT intended to apply to complaints that involve, or are likely to involve, allegations of criminal offences. In that case, a criminal record of interview, in compliance with the *Police Powers and Responsibilities Act 2000* and the *Police Responsibilities Code*, must be attempted before any directed interview. At the outset of a discipline interview, the Commissioner's direction should be reinforced in the following terms:

> 'Pursuant to s 4.9 of the *Police Service Administration Act 1990*, the Commissioner has directed all members of the Police Service (including police officers, police recruits and staff members) to truthfully, completely and promptly answer all questions directed to them by a member responsible for conducting an inquiry or investigation on behalf of the Commissioner into any matter, including an administrative or disciplinary complaint.
>
> That direction is located in s 4.4.9 of the Complaint and Resolution Procedures policy. I remind you that you are bound by that direction.
>
> Should you refuse or fail to comply with the Commissioner's direction, you commit a breach of s 9(1)(c) of the *Police Service (Discipline) Regulations 1990*. Failure to comply with a lawful direction of the Commissioner provides grounds for disciplinary action.'"

Approach to statutory construction

[69] The construction of the statutory provisions in order to discern whether there is an intention to abrogate fundamental rights at common law attracts particular rules. Kiefel J referred to them in *X7*:[68]

> "[158] The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness. That is not a low standard. It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so."

[70] In *Al-Kateb v Godwin*,[69] Gleeson CJ said, of the approach to construction in respect of legislation conferring upon the Executive a power of administrative detention:

> "[19] Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention

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68 *X7* at [158]. Internal footnotes omitted.

69 (2004) 219 CLR 562, at [19]; [2004] HCA 37. Internal footnotes omitted.

> that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases. It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that '[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.'"

[71] In *Electrolux Home Products Pty Ltd v Australian Workers' Union*,[70] Gleeson CJ said:[71]

> "[20] In *Coco v The Queen*, Mason CJ, Brennan, Gaudron and McHugh JJ said:
>
> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights. (footnote omitted)
>
> [21] The joint judgment in *Coco* went on to identify as the rationale for the presumption against modification or abrogation of fundamental rights an assumption that it is highly improbable that Parliament would "overthrow fundamental principles, infringe rights, or depart from the general system of law" without expressing its intention with "irresistible clearness". In *R v Home Secretary; Ex parte Pierson*, Lord Steyn described the presumption as an aspect of the principle of legality which governs the relations between Parliament, the executive and the courts. The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have

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70 [2004] HCA 40.

71 [2004] HCA 40, at [20]-[21]. Internal footnotes omitted.

> intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law."

Discussion

Construction of the statutory provisions

[72] All of the provisions reviewed above in paragraphs [43] to [67] constitute a scheme of legislation pointing clearly to the fact that the Police Service consists of a disciplined force, the members of which are given powers and immunities not enjoyed by the general community. For example the power to keep the peace and arrest wrongdoers enables an officer to exercise physical control over the citizens in ways that would otherwise constitute an unlawful assault if done by an ordinary citizen. The price of the powers they are given is that they voluntarily undertake the curtailment of certain freedoms, which they would otherwise enjoy. The very effectiveness of the Service is based upon obedience to command, and discipline. That obedience and discipline are essential to the State's reliance upon the Service to protect the lives and property of its citizens. That obedience and discipline are essential to the Service maintaining the confidence and respect of the community they serve.

[73] In my view, the nature of the Service, as reflected in those legislative provisions referred to above, fits aptly within the descriptions given in *Morris*:

> "The provisions of the Act itself are relevant only in so far as they show that the provision now directly in question (reg. 95A(7)) is part of a statutory scheme which provides for the regulation and control of a police force – a body upon whose efficiency and probity the State must depend for the security of the lives and property of its citizens and a body which can operate effectively only under proper discipline."[72]
>
> and
>
> "In arguing for the exclusion of the privilege the learned Solicitor-General of Victoria stressed the importance to the community of an efficient and well-disciplined police force. It is an hierarchical institution the efficiency of which depends upon the faithful performance of duty by every member including obedience to any lawful order: see ss.13 and 14 of the Act, and the form of Oath set out in the Second Schedule.
>
> We think that these matters are of significance in determining the nature of the Act and the Regulations made under it, as well as the purpose which both were designed to achieve. … It is essential to bear in mind that the Act and Regulations here are dealing with a disciplined force, the members of which voluntarily undertake the curtailment of freedoms which they would otherwise enjoy."[73]
>
> and
>
> "The legislation is designed to regulate and control the activities of what is a disciplined force in such a way as to achieve an effective and

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72 Gibbs CJ at 404.

73 Wilson and Dawson JJ at 408-409.

> efficient organisation in which the members are to perform their duties in conformity with a code so as to afford protection to the community and allow the disciplining of members who breach that code."[74]
>
> and
>
> "The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty and upon the judicious exercise of their powers. Internal disciplinary authority over members of the police force is a means — the primary and usual means — of ensuring that individual police officers do not jeopardize public confidence by their conduct, nor neglect the performance of their police duty, nor abuse their powers. The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency."[75]

[74] None of the legislative provisions referred to above state expressly that the privilege against self-incrimination is abrogated. If it is to be found, it must be because it arises from implication.

[75] In my view, one of the important aspects is that the Commissioner is empowered to give directions to achieve the aim of ensuring that officers, and the service as a whole, operate efficiently and in a disciplined manner. The direction given demonstrates that, as it states: "Pursuant to ss 4.9(1) and 2.5 of the *Police Service Administration Act 1990*, all members of the Police Service … are instructed to truthfully, completely and promptly answer all questions directed to them by a member responsible for conducting an inquiry or investigation on behalf of the Commissioner." The section it recites, s 4.9 of the Act, gives the Commissioner power to give or issue: "such directions, written or oral, general or particular as the commissioner considers necessary or convenient for the efficient and proper functioning of the police service".

[76] No officer, not even the Commissioner, can ignore such directions. The Commissioner is obligated to "ensure compliance with the requirements of all… directions of the commissioner": s 4.8(4)(b) of the Act. And a breach of a direction given by the Commissioner is a breach of discipline: s 1.4 of the Act and s 9(c) of the Discipline Regulation.

[77] The central importance of the requirement that officers obey the orders or directions they are given has been recognised in other authority (not concerned with questions of privilege). Thus, in *New South Wales v Fahy*,[76] where a police officer was suing for damages:

> "[21] The *Police Service Act* prescribed (s 12) the ranks of police officers within the Police Service. Read as a whole, the *Police Service Act* demonstrated that the evident purpose of the legislation was, as may be expected, to create an hierarchical and disciplined force. Chief among the statutory provisions giving effect to that purpose was s 201 which made it a criminal offence for a police officer to neglect or refuse either to obey any lawful order or to carry out any lawful duty as a police officer."[77]

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74 Brennan J at 412, quoting Crocket JA in the court below.

75 Brennan J at 412.

76 [2007] HCA 20; (2007) 232 CLR 486. (***Fahy***)

77 *Fahy*, per Gummow and Hayne JJ at [21]. Internal footnotes omitted.

> "[204] There was reference in argument to the *Police Service Act* 1990 (NSW), and in particular to s 201 of it, which makes it a criminal offence for an officer to refuse, or neglect, to obey a lawful order, or to perform a lawful duty. Of a member of a disciplined armed force, hardly less could be expected."[78]

[78] Further, the legislation makes it plain that the powers reposed in the Commissioner, and exercisable over officers, are there not only to make the service a disciplined and efficient body, but also to make it better able to uphold the law publicly, to preserve and enhance the public confidence in the Service, and preserve and enhance the protection of the community's lives and property. In my view, an important aspect of that is the fact that when a person becomes an officer in the service, that person gives up various rights that are enjoyed by the ordinary citizen. Thus, as examples, an officer is subject to: (i) disciplinary procedures unlike anything in the public arena, even for incompetence, inefficiency, carelessness and indolence; (ii) compulsion to submit to a physical or mental examination; (iii) random drug and alcohol tests;[79] (iv) having the person's criminal history examined; and (v) required obedience, breach of which can result in monetary punishment by reduction in salary or demotion in rank.

[79] As the Service performs most of its duties in public, and in ways that often impact on the liberty of citizens, it is essential that the Service be, and be seen to be, a fully disciplined body, able to perform with efficiency and probity. Equally essential to that, is the need for the Service, through the Commissioner, to be able to probe officers as to their conduct affecting questions of discipline, and for answers to be compellable. That is the evident purpose of the legislative provisions to which are referred to above.

[80] In my view, the necessary consequence of that is that, in a disciplinary interview, a police officer's right to maintain a claim to self-incrimination has been impliedly abrogated.

The Police Service Administration Act 1990 and the Criminal Justice Act 1989

[81] The *Police Service Administration Act* was enacted in 1990, soon after the *Criminal Justice Act* 1989 (Qld)[80] was enacted. They each formed part of the response to the findings of the Fitzgerald Inquiry.[81] However, for reasons which appear below I am unable to accept the contention by senior counsel for Mr Nugent, that they must be read together as one statutory scheme.

[82] The *Criminal Justice Act* had some aspects similar to the *Police Service Administration Act*, but there are also differences.

[83] The similarities include that under the *Criminal Justice Act*:

(a) the objects included the investigation of complaints of official misconduct, and the determination of disciplinary charges of official misconduct: s 1.3(a)(v) and (vi);

(b) "official misconduct" included conduct: (i) adversely affecting, or that might adversely affect, the honest and impartial discharge of functions or exercise of

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78 *Fahy*, per Callinan and Heydon JJ at [204].

79 Absent some employment requirement, the ordinary citizen only faces that prospect in the context of driving a vehicle.

80 The forerunner of the *Crime and Misconduct Act* and its subsequent revisions.

81 Report of the Commission of Inquiry, 3 July 1989.

powers; or (ii) misuse of information or material acquired in connexion with the discharge of functions or exercise of powers; and which constituted, or could constitute, a criminal offence or disciplinary breach: s 2.23; and

(c) proceedings could be brought before a Misconduct Tribunal of the Commission, which had the power to dismiss, reduce in rank or reduce in salary: ss 2.40-2.44.

[84] However, it had some express provisions which did not appear in the *Police Service Administration Act*:

(a) a person in attendance before the Commission was not entitled, subject to s 3.9,[82] to remain silent with respect to any relevant matter, or refuse or fail to answer a question relating to a relevant matter, on the grounds that to comply would tend to incriminate that person: s 3.22;

(b) however, s 3.22(5) provided that where a disciplinary charge before the Misconduct Tribunal[83] was concerned, s 3.22 was "not authority under which to compel a person charged with a disciplinary charge of official misconduct to adduce evidence relevant to the charge to a Misconduct Tribunal"; and

(c) a statement furnished by a person to the Commission after an objection on the basis of incrimination, "is not admissible in evidence against the person or witness in civil or criminal proceedings or in disciplinary proceedings" except for perjury or contempt proceedings: s 3.24.

[85] The differences are also seen in the differing objects of the two statutes. Under the *Criminal Justice Act* the objects included the establishment and maintenance of:

(a) a permanent body[84] to advise on the administration of the criminal justice system in Queensland, with a view to ensuring its efficiency and impartiality, and investigate and deal with organized and major crime: s 1.3(a)(i), (iii) and (iv); and

(b) a Parliamentary body to inform the legislative Assembly on such activities, amongst others.

[86] Under the *Police Service Administration Act* the objects were the maintenance of the Queensland Police Service and the development and administration of that service: s 1.3.

[87] Whilst there is some similarity in that each has provision for investigating and dealing with official misconduct, there is no sign that each was intended to be read together. It would have been a simple thing for the legislature to have provided that, if it were intended.

[88] When the two Acts, as originally framed, are considered, it was evidently intended that a police officer's right to resist answering relevant questions, about the same conduct amounting to misconduct, might be different depending on whether the questioning was conducted under one Act as opposed to the other. The *Criminal Justice Act* provided that a claim to privilege against self-incrimination could not be made so as to resist answering before the Commission: s 3.22. However, the answers

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82 Which enabled a claim to legal professional privilege, Crown privilege and parliamentary privilege to be maintained.

83 A specific body established under s 2.31 as part of the Official Misconduct Division of the Criminal Justice Commission.

84 The (then) Criminal Justice Commission.

given to the Commission could not be used in criminal or disciplinary proceedings: s 3.24. Thus there was a form of protection notwithstanding the loss of the right to refuse to answer on a claim to privilege against self-incrimination.

[89] However, s 3.22(5) provided that where the Misconduct Tribunal was dealing with a disciplinary charge, s 3.22 was "not authority under which to compel a person charged with a disciplinary charge of official misconduct to adduce evidence relevant to the charge to a Misconduct Tribunal". That is, once a person was charged with a disciplinary charge and it was being dealt with by the Misconduct Tribunal, that person could not be obliged by s 3.22 to adduce evidence relevant to the charge.

[90] Under the *Police Service Administration Act* and the Discipline Regulation, a claim to privilege against self-incrimination cannot be made so as to resist answering, for the reasons given above. However, there is a form of protection notwithstanding the loss of that right. As senior counsel for Mr Nugent conceded, answers given as a result of the Commissioner's direction to answer would be inadmissible in criminal or disciplinary proceedings, as being the product of a threat or inducement.

Police Service Administration Act and "the law"

[91] Senior counsel for Mr Nugent also advanced a contention based on the fact that various provisions of the Act referred to "the law", such as:

(a) s 2.3 – the functions of the Service and the Commissioner include "upholding the law" and acting "subject to due process of law";

(b) s 4.8(1) – the Commissioner is charged with the functioning of the Service "in accordance with law"; and

(c) s 4.8(4)(b) – the Commissioner, in discharging the prescribed responsibility is to "ensure compliance with the requirements of all Acts and laws binding on members of the police service".

[92] The contention was that as a substantive right under the common law the right to claim privilege against self-incrimination was part of "the law", as that phrase connotes the common law, and therefore that was a factor showing that the Act preserved the right, rather than abrogated it.

[93] I do not accept that contention. Accepting (without deciding) that the substantive right is part of "the law", the same "law" includes the principles under which implied abrogation can occur. The contention therefore has a degree of circularity that is self-defeating.

Consideration of authority

[94] Support for that conclusion comes from *Morris* and *Justin*.

[95] In *Morris*, Gibbs CJ referred to the regulation in that case,[85] which had similar effect to that here, in this way: "the character of the regulation, which is primarily designed to secure the obedience to orders rather than to compel the answering of questions, indicates both that the application of the privilege would be inappropriate and that the

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[85] Regulation 95A(7) of the Police Regulations provided inter alia that "no member of the Force shall … disobey ... any lawful order written or otherwise". The officer had been directed to answer the questions. Regulation 88(1) provided that a breach of a regulation amounted to misconduct and an offence.

obligation to obey lawful orders is not intended to be subject to any unexpressed qualification".[86]

[96] Wilson and Dawson JJ said:

> "It is essential to bear in mind that the Act and Regulations here are dealing with a disciplined force, the members of which voluntarily undertake the curtailment of freedoms which they would otherwise enjoy. It is in that context that it may be necessary to draw the implication that the privilege is excluded by a provision designed to further the effectiveness of an organization based upon obedience to command. To admit of exceptions, such as the privilege against self-incrimination, without the possibility of having regard to the circumstances in which they might have to be applied, may be alien to the nature and purposes of the organization which the legislation seeks to regulate."[87]

> "Regulation 95A in its application to a case such as the present is clearly relevant to the efficiency of the force and, as the Chief Justice has observed, its breadth is such as to admit of no qualification. Inspector Holliday's questions were lawful. In our opinion the respondents were obliged to obey the direction to answer them. It is not to the point that Inspector Holliday may have sufficient evidence aliunde to proceed against the respondents for a disciplinary offence related to the performance of their duties on 15 December 1977. He was entitled to think, in the context of a purely departmental investigation, that the efficient government of the force required the respondents to be open and frank in explaining their behaviour and that he had the authority to order them to answer his questions. If the privilege were to be extended to them, it would also have to be extended to members of the force in circumstances where there was reason to suspect misconduct in the performance of their duties but no proof. If in such circumstances a member was entitled to and did claim the privilege the suspicion would thereby be heightened without any action being open to those responsible for the government of the force. The legislature must have intended that any cause for suspicion touching a member's performance of his duties could be the subject of interrogation by a superior officer and that the member would be obliged to answer the questions put to him whether or not those answers would tend to incriminate him. With all respect to those who take a different view, we would have thought that the efficiency of the force demands this and the loyalty promised by every member when he takes the oath prescribed by the Act reinforces it."[88]

[97] Brennan J said:

> "Whether an obligation arising under a particular statute is qualified by the privilege depends on the intention of the legislature – an intention that is likely to be uncertainly perceived if the statute does not make an express provision. This is such a case. I agree that the factors referred to by the Chief Justice tend to show that reg. 95A(7)

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86 *Morris* at 404.
87 *Morris* at 409.
88 *Morris* at 410.

> of the Police Regulations 1957 (Vic.) intends to exclude the privilege and to leave without qualification the obligation cast on a subordinate police officer to obey an order by a superior officer to answer a question asked of the subordinate as to his activities whilst on duty. I need not repeat what I said recently in *Controlled Consultants Pty. Ltd. v. Commissioner for Corporate Affairs* (1985) 156 CLR 385) about the factors that generally weigh in favour of excluding the privilege, but I would refer to a further factor which seems to me to be significant in the present case. That factor is the impairment of discipline in the police force if a police officer may claim the privilege when ordered to give information about his activities whilst on duty."[89]
>
> and
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> "The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty and upon the judicious exercise of their powers. Internal disciplinary authority over members of the police force is a means – the primary and usual means – of ensuring that individual police officers do not jeopardize public confidence by their conduct, nor neglect the performance of their police duty, nor abuse their powers. The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency. It cannot be thought that the Police Regulations intend a police officer to be able to cloak with his silence activities that are prejudicial to the achievement of these purposes. To permit, under a claim of privilege, a subordinate officer to refuse to give an account of his activities whilst on duty when an account is required by his superior officer would subvert the discipline of the police force."[90]

[98] In *Justin*, regulation 27(1)(a) of the *Police Regulation* 1982 (SA) provided that if an officer disobeyed an order by the Commissioner, without good and sufficient cause, that officer committed a breach of the regulations. The officer was directed to answer questions in a disciplinary interview, and refused, claiming privilege against self-incrimination.

[99] King CJ[91] identified the question that the court was to address, in these terms:[92]

> "The critical question in the present case, to my mind, is whether a direction by a superior officer to answer questions is a lawful order requiring obedience under that regulation, notwithstanding that the answers to the questions might tend to incriminate the officer being questioned in relation to criminal offences alleged to have been committed in relation to his duties as a police officer. In *Police Service Board v. Morris* (supra) the High Court held that the corresponding Victorian regulation had the effect of excluding the common law privilege against self-incrimination and that a direction to answer was a lawful order notwithstanding that the answer might tend to incriminate

89 *Morris* at 411.
90 *Morris* at 412.
91 With whom Millhouse J concurred.
92 *Justin* at 550.

> in respect of a disciplinary offence under the Police Regulation 1957 (Vic). The disciplinary offence in question in that case did not amount to a criminal offence and it is necessary to consider whether reg 27(1) excludes the common law privilege where the order is to make an answer to a question which might tend to incriminate the person questioned in respect of a criminal offence. It is necessary to consider, therefore, whether the decision of the High Court in *Police Service Board v. Morris* is determinative of the question in the present case or whether the fact that the disciplinary breach under investigation also amounted to a criminal offence relevantly distinguishes *Morris*' case from the present case."

[100] King CJ then reviewed the various judgments in *Morris* and said:

> "It seems to me that to hold that the requirement in the regulation to obey a lawful order does not apply to answering a question, the answer to which might tend to incriminate the offender of a criminal offence, would be to construe the regulation as subject to a substantial qualification and would therefore be inconsistent with the judgments of the four judges in *Morris*' case."[93]

[101] Debelle J referred to the fact that police officers were required to take an oath to "faithfully discharge all duties imposed on [them] as a member of the Police Force", the provisions giving the Commissioner control and management of the Police Force, that the Commissioner was empowered to give orders and directions not inconsistent with the Act, and that officers were obliged to obey such orders, under regulation 27.[94] His Honour then identified the two questions as being: (i) whether the "common law privilege against self incrimination applies where a police officer is being asked questions by a superior officer as part of an internal enquiry as to whether the police officer has properly conducted himself in the discharge of his duties"; and (ii) whether regulation 27 impliedly abrogated that common law privilege.[95]

[102] Debelle J said:[96]

> "Were the matter free from authority, there is much which points to the conclusion that the regulation does not by necessary implication abrogate the common law privilege. But this question has been determined by the High Court in *Police Service Board v. Morris*, where the court considered reg 95A(7) of the *Police Regulations* 1957 (Vic)."

and

> "The High Court held that, although the common law privilege was capable of applying to a statutory provision of this kind which required members of the Police Force to answer questions tending to show the commission by them of disciplinary offences, the privilege was excluded by the terms of the regulation. I do not think that the fact that there is an investigation as to whether the same conduct also gives rise to a breach of the criminal law as well as to a breach of discipline distinguishes this case from the decision in *Police Service Board v.*

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93 *Justin* at 551.
94 *Justin* at 552-553.
95 *Justin* at 554.
96 *Justin* at 555.

> *Morris*. There is nothing in the reasons of their Honours which points to that conclusion. Further, it would impose a severe restriction on the capacity to make a departmental inquiry, if the inquiry had to be postponed until such time as the question whether the officer had been guilty of an offence against the criminal law had been determined: cf *Sorby v. Commonwealth* (1983) 152 CLR 281 at 306-307."

[103] In the recent decision in *R v Independent Broad-Based Anti-Corruption Commissioner*,[97] the High Court referred to *Morris*:[98]

> "[56] It is also to be borne in mind here that the appellants are duty-bound to give an account of their conduct in the course of their duties by reason of their membership of a disciplined police force.[99] That duty is reinforced in respect of investigations by the IBAC by s 84(2) of the IBAC Act. Where such a duty exists, it is not difficult to discern an intention to abrogate the privilege against self-incrimination where allegations of police misconduct are to be examined. In *Police Service Board v Morris*,[100] Brennan J said:
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> "The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force … The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency … To permit, under a claim of privilege, a subordinate officer to refuse to give an account of his activities whilst on duty when an account is required by his superior officer would subvert the discipline of the police force."
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> [57] These observations have special force where the full circumstances of the misconduct of concern can be expected usually to be such as to be peculiarly within the knowledge of the police officers concerned.[101]"

Can *Morris* and *Justin* be distinguished?

[104] Senior counsel for Mr Nugent relied upon the single judge decision in *Baff* as authority to demonstrate that the only question in *Morris* was as to the privilege against answering questions that might expose the officers to disciplinary penalties (which was referred to as "penalty privilege"), and not as to the privilege against self-incrimination. Thus, it was contended that *Morris* should be confined to questions of penalty privilege, and everything else was obiter dicta. Further, relying on *Baff*, it was said that the court in *Justin* misunderstood what was decided in *Morris*, and therefore that authority was wrongly decided.

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97 [2016] HCA 8.

98 [2016] HCA 8 at [56]-[57]. Internal footnotes omitted.

99 *Police Service Board v Morris* (1985) 156 CLR 397, which concerned reg 95A(7) of the *Police Regulations* 1957 (Vic).

100 *Morris* at 412.

101 See *Mortimer v Brown* (1970) 122 CLR 493 at 496; [1970] HCA 4.

[105] Some support was sought from the fact that the learned primary judge treated the passages of *Morris* referred to above, as "seriously considered dicta".[102]

[106] In *Baff*, a police officer was directed by the Commissioner of Police to answer questions about an incident when, in the course of his duties, his gun discharged and injured a person. The officer was exposed to the risk of criminal prosecution because a bullet from the gun in his control injured the person. He refused to answer questions about the incident and claimed the protection of the common law privilege against self-incrimination.

[107] The way in which *Baff* should be considered must take into account the fact that there was a concession as to whether *Morris* was solely concerned with penalty privilege as opposed to the privilege against self-incrimination:[103]

> "Although the Commissioner initially submitted that I was bound by authority to refuse the relief sought in the summons, he accepted in the course of argument that *Morris* was solely concerned with the privilege against exposure to a civil penalty and not the privilege against self-incrimination in so far as it related to exposure to criminal prosecution. He accepted that, in so far as what the High Court said in *Morris* can be read as applying to the latter privilege, those remarks were obiter. He did, however, submit that the privilege against self-incrimination and the privilege against exposure to civil penalty "merged" in the circumstances of the instant case."

[108] Adamson J examined the various judgments in *Morris* and then stated:[104]

> "[77] Although there are statements in *Morris* in which the distinction between the privileges is not expressed, and the expression "privilege against self-incrimination" is used to cover more than one privilege, the facts in *Morris* made relevant only the privilege against exposure to civil penalties since no question of exposure to criminal liability arose in that case. The references in the judgments in *Morris* to the privilege against self-incrimination, are not, in my view, necessarily to be construed as applying to the privilege against exposure to criminal prosecution.
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> [78] *Morris* is authority for the proposition that the privilege against exposure to civil penalties is excluded by necessary implication by a provision requiring a police officer to obey orders. It makes no authoritative determination whether the privilege against exposure to criminal prosecution is also excluded. The question whether Parliament has excluded a privilege either expressly or by necessary implication must be addressed by reference to the specific privilege concerned."

[109] The statement that, references in the judgments in *Morris* to the privilege against self-incrimination are not **necessarily** to be construed as applying to the privilege against exposure to criminal prosecution, seems to have been based on the view that the factual basis for *Morris* could not admit of anything but penalty privilege. However, in my respectful view, that is not an accurate analysis of *Morris*.

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102 Reasons [32], referring to *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.
103 *Baff* at [59].
104 *Baff* at [77]-[78].

[110] Gibbs CJ expressed the questions to be decided by the High Court in *Morris* as:[105]

> "Since on either view the respondents must succeed, the substantial questions that now fall for decision are whether the rule of the common law that a party is not bound to answer any question which might tend to expose him to the risk of a criminal conviction or the imposition of a penalty is capable of application to a case such as the present and if so whether it has been excluded by the Act or regulations."

[111] Wilson and Dawson JJ expressed the questions in this way, by reference to what Gibbs CJ had said:[106]

> "As his Honour explained, two questions of substance now fall for decision. The first is whether the rule of the common law that a party is not bound to answer any question which might tend to expose him to the risk of a criminal conviction or the imposition of a penalty is capable of application to a case such as the present."

[112] They agreed with Gibbs CJ in respect of that first question, saying:[107]

> "We agree with his Honour in answering this first question in the affirmative. The privilege is inherently capable of applying to a statutory provision which requires members of the police force to answer questions tending to show the commission by them of disciplinary offences."

[113] As can be seen, the majority in *Morris* expressed the question for decision as including whether a party is bound to answer any question which might tend to expose him to the risk of a criminal conviction, quite apart from the imposition of a penalty. With respect, I have a deal of difficulty in reading those passages as demonstrating that the majority completely misunderstood the relevant questions for determination. Plainly, the majority considered that privilege against self-incrimination in respect of a criminal offence was comprehended by the issues in *Morris*.

[114] In *Justin*, King CJ stated the question for determination as:[108]

> "The critical question in the present case, to my mind, is whether a direction by a superior officer to answer questions is a lawful order requiring obedience under that regulation, notwithstanding that the answers to the questions might tend to incriminate the officer being questioned in relation to criminal offences alleged to have been committed in relation to his duties as a police officer. In *Police Service Board v. Morris* (supra) the High Court held that the corresponding Victorian regulation had the effect of excluding the common law privilege against self-incrimination and that a direction to answer was a lawful order notwithstanding that the answer might tend to incriminate in respect of a disciplinary offence under the Police Regulations. The disciplinary offence in question in that case did not amount to a criminal offence and it is necessary to consider whether reg 27(1) excludes the common law privilege where the order is to

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105 *Morris* at 402.
106 *Morris* at 407.
107 *Morris* at 408.
108 *Justin* at 550.

> make an answer to a question which might tend to incriminate the person questioned in respect of a criminal offence. It is necessary to consider, therefore, whether the decision of the High Court in *Police Service Board v. Morris* is determinative of the question in the present case or whether the fact that the disciplinary breach under investigation also amounted to a criminal offence relevantly distinguishes *Morris*' case from the present case."

[115] King CJ returned to the fact that the breach in *Morris* did not involve a criminal offence, and whether that had any effect on its authority:

> "Although the alleged breach of discipline did not amount to a criminal offence, I am unable to find anything in the reasoning of the four judges who took the majority view to suggest that that was pertinent to their decision."[109]

and (having reviewed the decisions of Wilson, Dawson and Brennan JJ)

> "It seems to me that to hold that the requirement in the regulation to obey a lawful order does not apply to answering a question, the answer to which might tend to incriminate the officer of a criminal offence, would be to construe the regulation as subject to a substantial qualification and would therefore be inconsistent with the judgments of the four judges in *Morris'* case."[110]

[116] Debelle J considered that *Morris* was determinative of the question in *Justin*, saying:

> "The High Court held that, although the common law privilege was capable of applying to a statutory provision of this kind which required members of the Police Force to answer questions tending to show the commission by them of disciplinary offences, the privilege was excluded by the terms of the regulation. I do not think that the fact that there is an investigation as to whether the same conduct also gives rise to a breach of the criminal law as well as to a breach of discipline distinguishes this case from the decision in *Police Service Board v. Morris*. There is nothing in the reasons of their Honours which points to that conclusion."[111]

[117] In my view, it is plain that the court in *Justin* did not misunderstand what *Morris* was authority for. All judges acknowledged that the offence in *Morris* did not amount to a criminal offence, but considered that *Morris* was determinative of the question they had to answer, which did involve responses that might incriminate the officer in criminal offences. In my view, that is not surprising given that the majority in *Morris* identified the questions for determination as they did.

[118] In *Baff*, Adamson J distinguished *Justin* in this way:[112]

> "[104] The difficulty with *Commissioner of Police v Justin* is that although the Court purported to apply *Morris*, *Morris* did not decide the question that arose in *Commissioner of Police v*

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109 *Justin* at 550.
110 *Justin* at 551.
111 *Justin* at 555.
112 *Baff* at [104]-[105] and [109].

> *Justin*. Whether the privilege against self-incrimination, in the sense of privilege against exposure to criminal prosecution, was excluded by the statute did not fall for determination in *Morris*. The only relevant privilege that arose in *Morris* was the privilege against exposure to civil penalty. As the cases referred to above illustrate, this is the way *Morris* has been understood and referred to by the High Court in subsequent cases.
>
> [105] Moreover it does not appear from the reasons in *Commissioner of Police v Justin* that the Court appreciated that it was extending what was decided in *Morris* by applying what the High Court decided with respect to the abrogation of the privilege against exposure to civil penalty to the privilege against self-incrimination, of the privilege against exposure to criminal prosecution. For these reasons I do not consider *Commissioner of Police v Justin* to be persuasive and I decline to follow it."

And

> "[109] For the reasons given above, I do not consider that the High Court in *Morris* decided the question to be determined in the instant case. I do not consider that the Court in *Commissioner of Police v Justin* did other than apply what it, in my view mistakenly, understood to be the ratio decidendi of *Morris*."

[119] For the reasons explained above *Morris* was not confined in the way *Baff* suggests, and the court in *Justin* was not "extending what was decided in *Morris*". In my respectful view Adamson J was incorrect to use that a basis to not follow *Justin*.

[120] Given that there were significant differences in the legislation under consideration in *Baff*, compared to that here, *Baff* is not persuasive otherwise. Senior counsel for Mr Nugent did not suggest it was, apart from the basis to distinguish *Morris* and *Justin*.

[121] For the reasons above I would not adopt *Baff* in so far as it suggests that *Morris* is, or should be, limited to questions of penalty privilege. The High Court in *Morris* identified the relevant questions as encompassing privilege in a wider sense. If it is to be limited further then that is a matter for the High Court, particularly in light of the seeming approval given to it in *Independent Broad-Based Anti-Corruption Commissioner*. Further, *Justin* is authority of another intermediate appellate court, which should be followed unless plainly wrong.[113] I do not consider it is plainly wrong.

Conclusion and orders

[122] For the reasons expressed above the appeal must be dismissed. I would propose the following orders:

1. The appeal is dismissed.

2. The appellant pay the respondents' costs, of and incidental to the appeal.

[123] **MULLINS J:** I will not repeat the legislative provisions set out in the reasons of Morrison JA.

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113 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, at [135].

[124] The relevant facts are set out in paragraphs [1] to [5] of the learned primary judge's reasons: *Nugent v Ian Stewart (Commissioner of Police) & Anor* [2015] QSC 338 (the reasons).

[125] The primary judge refused to make the declaration sought by Mr Nugent that nothing in the *Police Service Administration Act* 1990 (Qld) (the Act) and the *Police Service (Discipline) Regulations* 1990 (Qld) and the *Police Service Administration Regulation* 1990 (Qld) (the Regulations) specifically abrogated his right to refuse to answer questions in a disciplinary interview in reliance upon the privilege against self-incrimination. The primary judge (at [25] of the reasons) declined to follow the reasoning of Adamson J in *Baff v Commissioner of Police (NSW)* (2013) 234 A Crim R 346 who distinguished *Police Service Board v Morris* (1985) 156 CLR 397 and *Commissioner of Police v Justin* (1991) 55 SASR 547 to hold that the relevant New South Wales legislation did not abrogate incrimination privilege.

[126] The primary judge followed the approach of the various judgments comprising the majority in the High Court in *Morris* (at 404, 409, 410 and 412) and concluded (at [31] and [35] of the reasons) that the operation of the Act and the Regulations resulted in the abrogation of the incrimination privilege.

[127] At the heart of the appeal is the construction of the relevant legislative scheme and whether the primary judge erred by applying the *dicta* from *Morris* in construing the Queensland legislative scheme for discipline of police officers.

[128] There is no issue that it must be clearly expressed or necessarily implied before a legislative scheme is construed as abrogating incrimination privilege: see the authorities summarised by Muir JA in *Hamdan v Callanan* [2016] 1 Qd R 128 at [10]-[19], set out in the reasons at [22].

[129] It is the Act and the Regulations that comprise the legislative scheme. The direction given by the Commissioner which is set out in [18] of the reasons that was made under s 4.9(1) of the Act applied to the discipline interview of Mr Nugent, but the direction itself cannot be used to construe the legislative scheme.

[130] In *Morris*, Gibbs CJ set out the relevant facts at 401 that the police officers were questioned by an inspector on the performance of their duties and were assured that "the matters to which the questions related were of an administrative or disciplinary nature and did not involve any criminal charges". The relevant regulation prescribed that no member of the police force "shall … disobey … any lawful order written or otherwise". The majority held that the character of the regulation in the context of the relevant Act was such as to indicate that the application of penalty privilege was inappropriate (at 405, 410 and 413). Although technically the facts in *Morris* raised the issue only of penalty privilege, the manner in which the court dealt with the issue indicated that the reasoning of the majority applied equally to incrimination privilege. I agree with the analysis of *Morris* undertaken by the primary judge (at [28]-[34] of the reasons) and Morrison JA set out in [110]-[113] above. I also agree with the analysis of Morrison JA of *Justin* set out at [114]-[117] above. I also agree with the analysis of the President set out in the reasons above of *Morris*, *Justin* and *Baff*.

[131] The Act and the Regulations have embraced the character and discipline of a police force that underpinned the approach of the majority in *Morris*. The power of the Commissioner to give directions under s 4.9(1) of the Act is related directly to the

Commissioner's responsibility set out in s 4.8(1) of the Act "for the efficient and proper administration, management and function in the police service in accordance with law". This echoes the reference in *Morris* by Gibbs CJ at 404 to the Victorian police force that is described as "a body upon whose efficiency and probity the State must depend for the security of the lives and property of its citizens and a body which can operate effectively only under proper discipline". Similar statements are found in the joint judgment of Wilson and Dawson JJ at 409 and the judgment of Brennan J at 412.

[132] Prior to the enactment of the Act, the *Criminal Justice Act* 1989 (Qld) (the 1989 Act) which was part of the implementation of the Report of the Commission of Inquiry dated 3 July 1989, known as the Fitzgerald Inquiry, set up what was then known as the Criminal Justice Commission and a structure for the investigation of official misconduct (as defined in s 2.22 of the 1989 Act) and Misconduct Tribunals to hear and determine disciplinary charges of official misconduct in prescribed circumstances which included the conduct of a member of the police force. Senior Counsel for Mr Nugent advanced an oral argument which he conceded frankly depended on reading the 1989 Act and the Act as a statutory scheme. Although the 1989 Act introduced the additional structure for external investigation and discipline of members of the police force in certain circumstances as a result of the Fitzgerald Inquiry, it is apparent from the respective contents of the 1989 Act and the Act that they do not constitute a statutory scheme which would justify construing the Act and the Regulations by reference to provisions of the 1989 Act.

[133] There was no error in the primary judge applying the approach of the majority in *Morris* in construing the Act and the Regulations as impliedly abrogating incrimination privilege.

[134] During the hearing of the appeal counsel for Mr Nugent gave examples of where the inability of a police officer to claim the incrimination privilege in a discipline interview would operate harshly against the police officer, but where it would not necessarily undermine the discipline of the police service, if the incrimination privilege could be relied on by the officer. These are arguments on policy questions that can be pursued with the Legislature for legislative reform to provide for exceptional circumstances where the primacy of a disciplined and efficient police service could arguably give way to the right of the police officer to refuse to answer questions in a discipline interview on the basis of the privilege against self-incrimination. The court's role, however, is to construe the legislation according to its current terms in context and in accordance with settled principles of statutory construction, having regard to the authorities that are relevant to that task.

[135] I therefore agree with the orders proposed by Morrison JA.