SUPREME COURT OF QUEENSLAND

CITATION:	*Wright v The State Coroner* [2016] QSC 305
PARTIES:	**KEVIN JOHN WRIGHT** (applicant) **v** **THE STATE CORONER, TERRY RYAN** (respondent)
FILE NO/S:	SC No 497 of 2016
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	16 December 2016
DELIVERED AT:	Cairns
HEARING DATE:	9 December 2016
JUDGE:	Henry J
ORDER:	**Application dismissed**
CATCHWORDS:	MAGISTRATES – CORONERS – INQUESTS AND INQUIRIES – PROCEEDINGS AT INQUEST OR INQUIRY – WITNESSES – where the Coroner held that the applicant is required to give evidence before a s 10 *Coroner's Act* 1958 (Qld) inquiry – where the applicant seeks a declaration that a s 10 inquiry under the *Coroner's Act* 1958 (Qld) does not abrogate the common law privilege against self-incrimination – where the applicant submits s 34 of the *Coroner's Act* 1958 (Qld) does not expressly oust the right to claim privilege against self-incrimination in respect of questions about s 10 inquiries – whether the applicant can be compelled to answer questions for the s 10 inquiry pursuant s 34 of the *Coroner's Act* 1958 (Qld). EVIDENCE – ADDUCING EVIDENCE – WITNESSES – COMPETENCE AND COMPELLABILITY – COMPELLABILITY – where the Coroner held that the applicant is required to give evidence before a s 10 *Coroner's Act* 1958 (Qld) inquiry – where the applicant submits that pursuant to the legality principle the *Coroner's Act* 1958 (Qld) does not expressly abrogate the right to claim privilege against self-incrimination – whether s 34 of the *Coroner's Act* 1958 (Qld) does expressly oust the right to claim privilege against self-incrimination in respect of questions about s 10 inquiries

Acts Interpretation Act 1954 (Qld), s 14B(1)
Attorney-General Act 1999 (Qld), s 7(1)(i)
Coroner's Act 1958 (Qld), s 4, s 7B, s 8 , s 9, s 10, s 33, s 34

Azzopardi v R (2001) 205 CLR 50, cited
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334, cited
Momcilovic v The Queen (2011) 245 CLR 1, cited
Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328, cited
R v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13, cited
Sorby v The Commonwealth (1983) 152 CLR 281, cited
X7 v ACC (2013) 248 CLR 92, cited

COUNSEL: M Jonsson QC for the applicant
K Mellifont QC for the Attorney-General

SOLICITORS: Connolly Suthers Lawyers for the applicant
Crown Law for the respondent
Crown Law for the Attorney-General

[1] A coronial inquest has commenced in Townsville into the disappearance of Anthony John Jones, last seen in November 1982.

[2] A question arising in that inquiry into a missing person is whether the Act under which it is being held, the *Coroner's Act 1958* (Qld) ("the Act"), abrogates the common law privilege against self-incrimination in such an inquiry under that Act. The Coroner has ruled that it does.[1] The applicant contends it does not. He seeks a declaration to that effect, in terms referable to the inquest.[2]

[3] The respondent has taken no active role in the application, as is conventional,[3] and the Attorney-General appears in the absence of a contradictor, as is appropriate.[4]

[4] The two sets of reasons by the Coroner that have provoked this application, have been exhibited. While a transcript of the inquest so far has not been exhibited, it is apparent from the second set of those reasons, which related inter alia to the applicant, that the applicant is yet to give evidence. Indeed his Honour's ruling in his second reasons appears on its face to require no more than that the applicant is required to give evidence. In the course of argument I expressed reservations whether I could, without access to the transcripts of the proceeding below, conclude that the controversy provoking this application has moved sufficiently from a theoretical to concrete situation so as to make

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1 His Honour's rulings are more qualified than that but such a conclusion is inherent in his rulings.
2 The declaration actually sought by the application and the declarations sought in the alternative during argument are in longer form, but the conclusion critical to any of them is, as the applicant contends, that the Act does not abrogate the common law privilege against self-incrimination in an inquiry under that Act with respect to a missing person.
3 See for example *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13, 35-36.
4 See s 7(1)(i) *Attorney-General Act 1999* (Qld).

a declaration an appropriate form of relief.[5] By the end of argument it was apparent I did not need to form a concluded view on that point and therefore I did not require the inquest transcript. That is because, even if I were satisfied that a declaration of the kind sought is a legitimate form of relief in the present context, I would decline to make the declaration because I am in agreement with the Coroner on the merits. That is, I agree the Act does abrogate the applicant's right to claim privilege against self-incrimination in respect of the particular type of inquest presently under way.

[5] The principles falling for consideration in this application are well established. It is a general principle of common law that a witness cannot be compelled to answer any question the answer to which would tend to incriminate the witness,[6] that is, to expose the witness to criminal conviction.[7] This common law right to claim privilege against self-incrimination attracts an interpretative principle. That principle, known as the legality principle, is that Parliament is presumed not to intend to interfere with common law rights and freedoms except by clear and unequivocal language so that where constructional choices are open, statutes ought be construed to avoid or minimise their effect upon common law rights or freedoms.[8] Thus a statute ought not be interpreted as taking away the right to claim privilege against self-incrimination unless a legislative intent to do so clearly emerges from the words of the statute, whether by express words or necessary implication.[9]

[6] The present inquest results from a direction of the Attorney-General that a previous inquest into Mr Jones' disappearance be re-opened. The earlier inquest was conducted as an inquiry in respect of a missing person pursuant to s 10 of the Act. It is common ground that the present inquest is also being held pursuant to s 10 of the Act, being an inquiry into the "cause and circumstances of the disappearance" of Mr Jones and "into all such matters and things as will or will be likely to reveal whether" Mr Jones is alive or dead.

[7] Such an "inquiry" conforms to the Act's definition of "inquest". An inquiry under s 10 is one of four different types of inquests for which the Act provides.[10] The inquest's specific status as an inquiry under s 10, a missing person inquiry, is of particular significance. Sections 33 and 34 of the Act single out such an inquiry for exceptional treatment in respect of self-incrimination.

[8] Section 33 provides:

> "**33. Protection of witnesses and counsel**
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> **(1)** Subject to the provisions of this Act, every witness attending and giving evidence at any inquest and every counsel or solicitor appearing before a coroner holding any inquest shall have the same protection and

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5 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 356.

6 For a discussion of the origins of the principle, see *Azzopardi v R* (2001) 205 CLR 50, 91-107.

7 As to the like privilege in respect of exposure to civil penalty, see *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 334-337.

8 *Momcilovic v The Queen* (2011) 245 CLR 1, 46.

9 *Sorby v The Commonwealth* (1983) 152 CLR 281, 309.

10 The other three are pursuant to s 7B (Inquests on death), s 8 (Inquests into fires), and s 9 (Inquiry when body destroyed or irrecoverable).

> immunities as witnesses and counsel or solicitor appearing before justices in any proceeding under the Justices Act.
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> **(2)** Without limiting the generality of subsection (1) and except upon an inquiry under section 10, nothing contained in this Act shall render any person compellable to answer any question tending to incriminate himself or herself or, upon an inquest into a death, render a husband or wife competent or compellable to answer any questions tending to incriminate his or her spouse." (Emphasis added)

[9] Section 33(2) has a protective interpretative effect. Setting aside the exception it mentions and its reference to spousal compellability, its effect is that nothing in the Act renders a person compellable to answer any question tending to incriminate himself or herself. This was obviously an attempt by the legislature to emphasise the Act ought not be read as abrogating the common law privilege against self-incrimination.

[10] Section 33(2) expressly excludes s 10 inquiries from its protective interpretative effect. That it exempts s 10 inquiries from its operation does not of itself carry the necessary implication that the right to claim privilege against self-incrimination in s 10 inquiries is abrogated by s 33(2). However it will obviously carry contextual interpretive assistance in respect of a section of the Act that does appear to take the positive step of abrogating that right in respect of s 10 inquires.

[11] That positive step appears to have been taken in s 34, which relevantly provides:

> "**34 Admission of evidence**
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> **(1)** In any inquest the coroner may admit any evidence that the coroner thinks fit, whether or not the same is admissible in any other court, provided that no evidence shall be admitted by the coroner for the purposes of the inquest unless in the coroner's opinion the evidence is necessary for the purpose of establishing or assisting to establish any of the matters within the scope of such inquest. …
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> **(4)** Without derogating from any other provision of this Act, any person who has or who alleges or has alleged that the person has knowledge or information concerning any matter or thing relevant to an inquiry under section 10, or who the coroner has reason to believe has, or is alleging or has alleged that the person has such knowledge or information, shall be a competent and compellable witness at such an inquiry both as to such knowledge or information and as to the sources from which the person obtained same.
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> **(5)** A statement or disclosure made by any witness at an inquiry under section 10 in answer to any question put to the witness by or before the coroner shall not (except in proceedings in respect of contempt of a Coroner's Court or of an offence against the Criminal Code, sections 123 and 126 to 130 respectively) be admissible in evidence against the witness in any civil or criminal proceedings." (Emphasis added, footnotes omitted)

[12] Section 34(4) applies to a witness who on any of the bases stipulated is understood to have knowledge or information concerning any matter or thing relevant to an inquiry under section 10. These reasons will hereafter refer to such a witness as "a relevant

witness". On its terms, s 10 identifies such relevant matters or things, which I will hereafter refer to as "s 10 topics", as being:

- "the cause and circumstances of the disappearance of [the] missing person";
- "such matters and things as will or will be likely to reveal whether such missing person is alive or dead";
- "if such person is alive or likely to be alive, the whereabouts of such person".

[13] The express effect of s 34(4) is that a relevant witness "shall be a compellable witness at such inquiry both as to the knowledge or information" the witness has on s 10 topics "and as to the sources from which the person obtained same".

[14] The applicant submitted s 34(4) has the effect of compelling a relevant witness to attend a s 10 inquiry to give evidence.[11] But the sub-section's language goes further than that. The sub-section expressly provides such a witness "shall" be compellable "as to" s 10 topics. That is, the section's language relates not merely to attendance but to the topics of questioning in respect of which the witness is compellable at a s10 inquiry.

[15] In making a relevant witness "compellable" to answer questions as to s 10 topics, as s 34(4) expressly does, it necessarily invests the Coroner with the power to compel a relevant witness to answer questions about s 10 topics. This must mean more than that the Coroner merely has the ordinary qualified power of a presiding judicial officer to require witnesses to answer relevant questions asked of them.[12] That ordinary power is qualified by the right of a witness not to be compelled to answer a question on the ground the answer would tend to incriminate the witness. The Act's specific provision in s 34(4) for compellability only in respect of questions asked of relevant witnesses about s 10 topics of itself suggests it confers more than that ordinary qualified power. That is, where the narrow circumstances contemplated by s 34(4) apply, the sub-section overrides the right a relevant witness would otherwise ordinarily have not to be compelled to answer a question on the ground the answer would tend to incriminate the witness. If it did not have that effect the sub-section would serve no purpose.

[16] The applicant submitted s 34(4) does not expressly oust the right to claim privilege against self-incrimination, for instance by stating a relevant witness shall have no right to claim privilege against self-incrimination in respect of questions about section 10 topics.[13] The Coroner's second set of reasons acknowledged "the drafting of these provisions may be regarded as anachronistic". It is relevant to bear in mind the provisions were the product of legislative drafting practices well over half a century ago and drafting practices, including as to clarity and simplicity of style, can change.[14] It does not follow from the fact that alternative clear language might now be thought of that the language used is not clear enough. Moreover, it will be recalled that the abrogation of the right to claim privilege against self-incrimination may be made clear by necessary implication.

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[11] Applicant's written submissions [21], [30].

[12] That ordinary power is reflected in s 38A of the Act which permits a Coroner at any form of inquest under the Act to commit to prison a witness who refuses "without just excuse" to answer questions.

[13] Applicant's written submissions [26].

[14] A consideration reflected in s 14C *Acts Interpretation Act* 1954 (Qld).

[17] Section 34(4)'s effect does not fall for consideration in isolation from the surrounding words of the statute. In *X7 v ACC*[15] Kiefel J observed the irresistible clarity required by the principle of legality will "usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to …abrogate or restrict and has determined to do so". The conclusion the legislature has so determined here is compelled as a matter of certain inference when the terms of s 34(4) are read in the light of s 33(2)'s express exclusion of s 10 inquiries from its interpretative protection of witnesses from "being compellable to answer any question tending to incriminate". There is no sensible explanation for s 33(2)'s exception of s 10 inquiries from its operation unless s 34(4) is read as abrogating the right of a relevant witness in a s 10 inquiry to claim privilege against self-incrimination in respect of questions about s 10 topics. When s 34(4) is read in context I conclude it overrides that right by necessary implication.

[18] The applicant also placed reliance upon the Act's s 4(5), which provides for the persistence of existing legal principles "except where, and as far as, it is inconsistent with" the Act. However the above discussed operation of ss 33(2) and 34(4) are obviously exceptions of the kind contemplated by s 4(5).

[19] My conclusion makes it unnecessary to have recourse to extrinsic material to assist in interpretation.[16] I record for completeness however that the extrinsic materials in respect of the Act and more particularly its 1943 predecessor to which I was referred in argument[17] make it plain the legislature intended "to see to it" without "loophole"[18] that in missing person inquiries witnesses with relevant information would be compelled to provide it.

[20] I also record that s 34(5) was of neutral significance in the argument before me because, while it prevents the use of statements or disclosures by a witness at a s 10 inquiry against the witness elsewhere (with some exceptions) it does not limit that protection solely to statements or disclosures on s 10 topics in the same way s 34(5) confines its focus to such topics.

[21] In his first reasons the Coroner concluded, "the privilege against self-incrimination can be overridden in an inquiry under s 10 of the Act". In his second reasons he concluded, in a similar vein, "that under sections 33 and 34 of the Act, the Parliament has made special provision for missing persons inquiries, in which the privilege against self-incrimination can be overridden." Those conclusions were correct.

[22] To remove doubt, while these reasons have spoken of the Act's abrogation of the right to claim privilege against self-incrimination, the Act's abrogation of that right is restricted. It is, as explained above, confined to s 10 inquiries where a relevant witness is asked questions about s 10 topics. Thus it would not prevent a relevant witness in a s 10 inquiry exercising the right to claim privilege against self-incrimination in respect of questions which are not about s 10 topics. This is readily illustrated by reference to a scenario raised

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15 (2013) 248 CLR 92, 153.
16 Per s 14B(1) *Acts Interpretation Act*
17 Hansard 1943 pp1763-1764, 1958 pp 319-320.
18 Hansard 1943 pp1763.

but not directly ruled upon in the Coroner's first reasons. Were a witness to admit when giving evidence at a s 10 inquiry to being drug affected and then asked what drug had been taken, the witness could still exercise the right to claim privilege against self-incrimination because such a question is not about s 10 topics.

[23] In light of these reasons and the conclusion reached the application must fail. No order as to costs is sought.

[24] My order is:

Application dismissed.