

ARTICLES

THE TROUBLE WITH *WOON*: THE SELECTIVE ANSWERING OF POLICE QUESTIONS AND THE RIGHT TO PRE-TRIAL SILENCE

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ABSTRACT

The 1964 High Court decision in *Woon v The Queen* is commonly understood to permit the drawing of an inference of a ‘consciousness of guilt’ when a suspect selectively responds to police questions. It is the author’s contention that, in the light of the emphatic endorsement of the right to pre-trial silence by the High Court in 1993 in *Petty v The Queen*; *Maiden v The Queen*, *Woon* should now be regarded as bad law and should no longer be followed.

‘The mere fact that the prisoner answered certain questions and did not answer others does not make his silence evidence against him any more than it would be evidence against him if he had been silent altogether. To draw an inference against an accused person because he answers one question and does not answer others, is, it seems to me, unfair’ — Angas Parsons J in R v Rudd and Dawson (1923) SASR 229 at 233.

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INTRODUCTION

A. *Woon* — A Resilient Authority

The 1964 High Court decision in *Woon v The Queen*¹ is commonly understood to permit the inference of a ‘consciousness of guilt’ where an accused has ‘selectively’ answered police questions when interviewed.² *Woon* has proven to be a remarkably resilient authority. It has been cited with approval regularly since 1964,³ and has survived both a wholesale legislative reform of the laws of evidence in the form of the Uniform *Evidence Acts*,⁴ and more recent High Court declarations of the importance of the right to pre-trial silence.

The author expresses his thanks to Nicholas Robinson of the Victorian Bar for his inspiration in writing this article. All responsibility for the opinions expressed within remains entirely with the author.

¹ (1964) 109 CLR 529.

² See, eg Ian Freckelton (ed), *Criminal Law Investigation and Procedure Victoria* (2000) [2.3.40] (‘The right to pre-trial silence does not extend to interviews in which an accused “selectively answers” questions. Where an interview includes both substantive answers (including denials) as well as answers such as “no comment”, the whole of the interview may be admissible.’ (footnote omitted)).

³ A search of Australian cases using the CaseBase program (LexisNexis Butterworths Online, <<http://www.lexisnexis.com>>) by the author on 9 January 2006 disclosed at least 23 occasions when *Woon* has been cited in Australian superior courts since 1968 including four citations since the turn of the 21st century.

⁴ See *Evidence Act 1995* (Cth) s 89(1)(a); *Evidence Act 1995* (NSW) s 89(1)(a); *Evidence Act 2001* (Tas) s 89(1)(a) and *R v Matthews* (Unreported, CCA(NSW), 28 May 1996), as discussed in J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Process* (7th ed, 2005) 620–2; see also *Yisrael v District Court of NSW* (1996) 87 A Crim R 63, 65–6 (Meagher JA). In 1985 and 1987 respectively the Australian Law Reform Commission handed down its Interim and Final Reports on *Evidence*. The Commission took the view that allowing an inference of consciousness of guilt to be drawn from partial silence was ‘fundamentally unfair’ ‘because to do so penalises an accused who may have been relying on his rights’: Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) [758]; Australian Law Reform Commission, *Evidence*, Final Report No 38, (Canberra: AGPS 1987) [165]. These reports formed the basis of what became the Uniform *Evidence Acts*. Accordingly, the Explanatory Note attached to the 1991 NSW *Evidence Bill* stated by reference to the clause that became in identical terms section 89 of the *Evidence Act 1995* (NSW) that it ‘overcomes the decision in *Woon*’. This reference was deleted from subsequent Explanatory Notes.

B. Pre-Trial Silence — Right and Reality

While a suspect's right not to respond to police questions at interview, and the right to silence generally, has been a subject of constant interest for lawyers, politicians and academics, it is unclear how frequently the right is actually exercised, at least at the pre-trial stage.⁵ There is an unscrutinised myth afoot that the right to answer 'no comment' to police questions is exercised almost exclusively by hardened criminals to frustrate legitimate police investigations.⁶ What little research has been done would suggest that 'selective' 'no comment' interviews i.e. where an interviewee answers, in substance, 'no comment' to certain police questions while answering others, are as common as 'comprehensive' 'no comment' records of interview where a suspect answers 'no comment' to all substantive questions.⁷ From a practical perspective therefore, the possible evidential value of selective 'no comment' interviews is at least as pertinent as that of interviews where the accused gives a wholly 'no comment' series of answers.⁸

⁵ See, eg the recent research of Dixon D (with Travis G) in New South Wales discussed in Hunter et al, above n 4, 613–16; see also, D J Galligan, 'The Right to Silence Reconsidered' [1988] 41 *Current Legal Problems* 69, 74; T Parsons, 'Right to Silence under Review' (1998) 72 *Law Institute Journal* 46, 47; R Leng, *The Right to Silence in Police Interrogation* (1993) 10–19; Brown D, *PACE ten years on: a review of the research* (1997) 168–9; Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Right to Silence: Final Report* (1999) 5.

⁶ See, eg the comments of the then British Home Secretary, Michael Howard in 1994 rejecting a Royal Commission recommendation of the retention of the right to silence ('the so called right to silence is ruthlessly exploited by terrorists ... it's time to call a halt to this charade. The so called right to silence will be abolished ... it is professional criminals, hardened criminals and terrorists who disproportionately take advantage of and abuse the present system') extracted in Parsons, above n 5, 47; see also, Justice Davis, 'Justice Reform: A personal perspective' (Summer 1996) *Bar News* 5, 10; New South Wales Law Reform Commission, *Right to Silence*, Report No 95 (2000) 36–40; Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Right to Silence, Final Report* (1999) 5–6.

⁷ See the recent research of Dixon, above n 5; see also, Leng, above n 5; Brown, above n 5.

⁸ Of course, a 'selective' 'no comment' interview may contain admissions, false denials and lies in that part or parts of the interview where a suspect *does* respond to police allegations and questions. This paper is not concerned with the evidential value of those admissions, false denials and lies contained in the part or parts of the interview where the suspect does not exercise their right to pre-trial silence.

C. Three contentions about Woon

Contra the frequency with which *Woon* is still cited with approval, *Woon* is a problematic decision for contemporary lawyers. Specifically, I contend the following:

1. During his two interrogations by police, Woon *did* exercise his right to pre-trial silence, albeit selectively;
2. The drawing of adverse inferences based on a ‘consciousness of guilt’ where a suspect has selectively exercised the right to pre-trial silence as permitted by *Woon* is incompatible with the subsequent High Court statements about the inviolability of the right to pre-trial silence as found in *Petty v The Queen*; *Maiden v The Queen*⁹; and
3. Pursuant to the second contention outlined above, and in the light of other relevant High Court authorities decided since 1964, Woon would have been acquitted had his trial been held today.

II. WOON V THE QUEEN

A. The facts

Leslie Woon was convicted in 1963, along with his three co accused, Walter Raymond Radcliffe, William Edward Stuart and Charles Lance Shirreff, of ‘breaking and entering’¹⁰ the counting house of the English, Scottish and Australian Bank at the corner of Flinders Lane and Russell Street in Melbourne and stealing the sum of £35 000. While there was no dispute as to the fact that the bank had been broken into and the money stolen, there was no direct evidence implicating Woon in the commission of the offence. Moreover, he gave no evidence himself, as did neither of his other three co-accused. As summarised by Kitto J in the High Court, ‘[t]he case against [Woon] depended upon evidence

⁹ (1991) 173 CLR 95.

¹⁰ The old common law offence of ‘breaking and entering’ has now been replaced in Victoria with the statutory offence of ‘burglary’: *Crimes Act 1958* (Vic) s 76.

given by police officers as to his answers to statements and questions that had been put to him during two interrogations'.¹¹

A transcript of what Woon said to the detectives who interrogated him on the two occasions he was questioned is helpfully extracted in the official report.¹²

1. *The first interrogation*

The first interrogation occurred at a police station in Sydney on 29 November 1962. Before being questioned, Woon was cautioned that 'you do not have to answer any questions unless you wish to do so'.¹³ He was informed that Stuart, Radcliffe and Shirreff have been arrested and charged with the 'bank robbery',¹⁴ of the English, Scottish and Australian Bank, and was asked whether he knew them. He acknowledged that he knew Stuart but said that he had 'never heard' of the other two.¹⁵ He was then told, '[y]ou have been implicated as being one of the persons who broke into the bank and that is why we have come to Sydney to see you'. Woon answered 'Did they say that? It looks like I'm going to be charged. I better not say anymore'.¹⁶ He was subsequently asked 'Do you deny breaking into the bank with the others?' to which he replied 'I would say that you are going to charge me with this. I better not say anymore'.¹⁷

An allegation was put to Woon of his holding a large sum of money in a safe deposit box. The following questions ensued:¹⁸

(Q) Have you any money in a safe deposit box?

¹¹ *Woon v The Queen* (1964) 109 CLR 529, 534; see, also, 542 (Windeyer J) ('[T]here was no evidence against Woon other than his answers to the police and his possession of some money, notes which may or may not have been some of those stolen from the bank').

¹² See *Woon v The Queen* (1964) 109 CLR 529, 530–2.

¹³ *Ibid* 530.

¹⁴ The vernacular term 'bank robbery' appears in the report (*Woon v The Queen* (1964) 109 CLR 529, 530, 532), although of course the crimes in question are more accurately described in the modern nomenclature as 'burglary and theft', there being no assault or threat of force used in the course of the theft to convert it to an offence of robbery.

¹⁵ *Woon v The Queen* (1964) 109 CLR 529, 530.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Ibid* 530–1.

- (A) Yes, I have 8000 pounds.
- (Q) Where is that?
- (A) That is my business.
- (Q) Are you prepared to show us this money?
- (A) No.
- (Q) Why not? If the money is alright, you have got nothing to worry about.
- (A) I do not think I should.
- (Q) Is this money part of the money stolen from the bank?
- (A) Now, that is a question that I should not answer.
- (Q) Well, how do you account for this money? What income have you?
- (A) Now, that is my business.

The interviewing detective then returned to the issue of Woon's acquaintance with the other three men charged with the crime, specifically a 'Raymond Radcliffe of 3 Robinson Street, Ringwood'.¹⁹ After repeating his denial of knowing Radcliffe, Woon was asked:²⁰

- (Q) Is it not a fact that you have sent telegrams to a man at that address?
- (A) Now, that is something you might be able to check on. I will not say I have and I will not say I have not.

The detective then asked Woon about his presence in Melbourne at the time of the theft from the bank.²¹

- (Q) Are you prepared to tell us the dates that you were in Melbourne during the last 12 months?
- (A) I would rather not.

¹⁹ Ibid 531.

²⁰ Ibid.

²¹ Ibid.

And finally:²²

- (Q) Have you anything to say about the allegations which have been made against you?
- (A) I should not say too much, I am just trying to work out what I should do now.

2. *The second interrogation*

By the time of Woon's second interview in Melbourne on 10 December 1962 the police had made further investigations about the telegrams sent to the accused Radcliffe referred to in Woon's first interview. In the face of this material, Woon now admitted that he did know Radcliffe and that he had sent a telegram to him under a false name.²³ He admitted meeting Radcliffe near the 'Melbourne Football Ground at Jolimont'.²⁴ He was then asked 'Was it to plan the bank robbery?' He responded 'I will not answer that.'²⁵ The central allegation about the bank robbery was put to him in the following terms:²⁶

- (Q). Do you deny breaking into the bank?
- (A) I do not deny it and I do not admit it.
- (Q) Do you deny being in Melbourne that night?
- (A) I will not answer that question.

B. *Woon's trial*

Woon stood trial with his three co-accused in the Supreme Court of Victoria in September 1963. After hearing the evidence, including the tender of the complete transcripts of the two police interrogations of Woon, the trial judge charged the jury as to the use it could make of both Woon's admitted lie to the police, being Woon's initial denial that he knew Radcliffe, and Woon's 'selective' answering of questions put to him in the course of

²² Ibid.

²³ Ibid 532.

²⁴ Ibid. Despite the all conquering ambitions of the Victorian based Australian Football League ('the AFL'), as any Melburnian would know, the ground in question is more properly known as the Melbourne Cricket Ground, commonly abbreviated as 'The MCG'.

²⁵ Ibid.

²⁶ Ibid.

both periods of interrogation.²⁷ While he directed the jury that Woon was within his rights in saying nothing, and that no adverse inference could properly be drawn from refusals to answer,²⁸ he added that such answers that Woon chose to give, though not amounting to admissions of any of the facts suggested by the police, might be considered by the jury ‘for the purpose of seeing whether they revealed a consciousness on the part of [Woon] that he was guilty of the crime about which he was being questioned.’²⁹ His Honour remarked to the jury ‘[a] man may not intend to show his hand, gentlemen, but on the other hand he may just do that very thing’.³⁰

Woon and his three co-accused were duly found guilty of all charges.

C. Woon’s appeal to the Victorian Court of Criminal Appeal

Woon initially sought leave to appeal from his conviction in the Full Court of the Victorian Supreme Court sitting as a Court of Criminal Appeal. This application was refused. He then sought special leave to appeal to the High Court.³¹

D. Woon’s special leave application to the High Court

In Woon’s special leave application to the High Court, he argued not that the evidence of the two police interrogations was inadmissible, but that ‘the judge should not have allowed the case to go to the jury because there was no admission of guilt and no evidence *aliunde* implicating [him].’³² All five presiding justices of the High Court³³ rejected Woon’s argument and refused special leave. The leading judgment was delivered by Kitto J. With respect to the trial judge’s charge to the jury, Kitto J stated:

²⁷ Ibid 534 (Kitto J).

²⁸ Ibid 535 (Kitto J).

²⁹ Ibid (Kitto J).

³⁰ Ibid 534.

³¹ Ibid 532.

³² Ibid 533.

³³ Kitto, Taylor, Menzies, Windeyer and Owen JJ.

If the jury had been left under an impression that they were entitled to draw inferences against the applicant from mere refusals to answer, or from statements that amounted only to refusals to answer, there would have been serious fault to find with the charge ... but the repeated directions the judge gave on the topic were as clear as could be wished. Indeed, the applicant does not contend otherwise. What he complains of is that the judge, taking the jury as he did in detail through the evidence of the interrogations, left them with a question of whether the applicant, by the replies he chose to make disclosed, albeit unwittingly, that he was conscious of having been a member of the party that broke into the bank on the relevant occasion. There was, I think, ample room for the jury to find in some of the answers the applicant gave, considered in the light of the facts he admitted as to the telegrams, sufficiently convincing indications of a guilty conscience to satisfy them beyond reasonable doubt that he was in fact guilty. If, therefore, it is the law that an accused person's answers to matter(sic) put to him may properly be used, not only for the sake of any admissions or recognitions they may contain or imply concerning particular facts, but also for the sake of any unintended proof they may afford that the accused person was afflicted with a consciousness of guilt³⁴ of the crime alleged against him, the applicant's contention that there is no evidence against him fit to be left to the jury must necessarily fail.³⁵

III. WOON *DID* EXERCISE HIS RIGHT TO PRE-TRIAL SILENCE, ALBEIT SELECTIVELY

This first contention be further broken down into two parts: first, *may* the right to pre-trial silence be exercised selectively? (i.e. is it correct to assert that a suspect in responding to certain allegations but not others is exercising their right to pre-trial silence?); and secondly, if the answer to the first part is yes, did Woon himself, albeit selectively, exercise his right to pre-trial silence?

³⁴ For a criticism of Windeyer J's interchangeable use of the phrases 'consciousness of guilt' and 'guilty conscience' in this passage, see A Palmer, 'Guilt and Consciousness of Guilt' (1997) 21 *MULR* 95, 106 (at footnote 34).

³⁵ *Woon v The Queen* (1964) 109 CLR 529, 535 (Kitto J).

A. *The Right to Pre-Trial Silence — Can it be exercised selectively?*

1. *Rights to Silence*

As was famously argued by Lord Mustill, the expression ‘the right to silence’ has been used with reference to an array of different rights and privileges.³⁶ At issue in *Woon* is one of those ‘rights to silence’, indeed, arguably the most important one,³⁷ that of the right not to respond to police questioning, or what is sometimes referred to as the right to ‘pre-trial silence’.

The High Court has recognised the right to pre-trial silence as a ‘fundamental right’.³⁸ The fact that the right of pre-trial silence applies to questions and allegations put by the police under police interrogation and not to communications between parties who are equals³⁹ underlines that the right to pre-trial silence is fundamentally about the relationship between the individual and the State: ‘the rule is designed to prevent oppression by the police or other authorities of the State’.⁴⁰ Peculiar policy considerations militate in favour of its retention notwithstanding any appeals to ‘common sense’ that inferences should be drawn from a suspect’s silence.⁴¹ The right to pre-trial silence has proven to be resilient, withstanding the scrutiny of numerous public inquiries.⁴² Its resilience strongly suggests that the policy justifications underlying the right remain relevant.

³⁶ R v Director of the Serious Fraud Office; Ex Parte Smith [1993] AC 1, 30–1.

³⁷ See, Mirko Bagaric, ‘The Diminishing “Right” of Silence’ (1997) 19 *Sydney Law Review* 366, 380.

³⁸ *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95, 101 (Mason CJ, Deane J, Toohey J, McHugh J).

³⁹ See, eg, *R v Salahattin* [1983] VR 521.

⁴⁰ *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95, 107 (Brennan J).

⁴¹ Ibid 128–9 (Gaudron J); Justice G L Davies, ‘The Prohibition against Adverse Inferences from Silence: A Rule without a Reason? — Part I’ (2000) 74 *Australian Law Journal* 26.

⁴² For example, in 1997 the Scrutiny of Acts and Regulations Committee of the Victorian Parliament was given a reference by the Victorian Attorney-General to review the right to silence. In its final report the Committee recommended ‘that no changes be made to the law relating to pre-trial silence.’ (Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Right to Silence: Final Report* (1999)). In New South Wales in 1997 the Attorney General referred to the NSW Law

2. *The right to pre-trial silence can legitimately be exercised selectively*

An interviewee who responds to some police questions but refuses to answer others can legitimately be said to be exercising their right to pre-trial silence, albeit selectively: it is incorrect to assert that the right to pre-trial silence must be exercised *in toto*, or not at all. In fact, as will be discussed shortly, *Woon* itself stands as authority for precisely the contrary proposition.⁴³ The standard police caution does not advise the suspect that they must either elect to answer questions, or refuse to answer them, as a ‘one off option’ at the commencement of police questioning.⁴⁴ A characterisation of selective responses to police questioning as a legitimate exercise of the right to pre-trial silence reflects both the practical and legal reality of police interviews and interviewing techniques.

The right to pre-trial silence can never be exercised by complete, stony and enduring silence in the face of police questioning. First, all jurisdictions in Australia have abrogated the right to pre-trial silence to some extent. It is an offence in most circumstances not to provide the police with a correct name and address when asked,⁴⁵ those who drive motor vehicles are

Reform Commission the issue, *inter alia*, of whether any inference should be able to be drawn from the exercise of the right to silence. In its final report in 2000, the NSW Law Reform Commission recommended that no change be made to section 89 of the *Evidence Act 1995* (NSW) to permit an adverse inference to be drawn where a suspect remains silent in the face of police questioning (New South Wales Law Reform Commission, *Right to Silence*, Report No 95 (2000)). For a brief history of previous inquiries both in Australia and the United Kingdom into the right to silence when questioned by police, see New South Wales Law Reform Commission, *Right to Silence*, Report No 95 (2000) 31–5.

⁴³ Further, in *R v McNamara* [1987] VR 855 the trial judge directed the jury in the following terms (at 867): ‘The law is that no adverse inference can be drawn from a refusal to answer *any* or all questions’ (emphasis added). No exception to this aspect of the charge to the jury was taken by the Full Court of the Supreme Court of Victoria: see *R v McNamara* [1987] VR 855, 868.

⁴⁴ The Victorian Police Standing Orders, for example, require a police member to caution an interviewee before the commencement of an interview saying ‘words to this effect, or something similar in meaning: ‘You are not obliged to say anything, but anything you say may be given in evidence’ (Standing Order 8.9(3)).

⁴⁵ Eg, *Crimes Act 1958* (Vic) s 456AA makes it an offence under certain circumstances not to provide a police officer with a correct name and

required under penalty to divulge even more information, such as their licence details.⁴⁶ Police questioning of suspects almost invariably begins with such non controversial questions, such as questions concerning a suspect's name, address and occupation. Police investigators, legitimately and as part of the robust nature of police interrogations,⁴⁷ often encourage a taciturn suspect to 'loosen up' by asking them a series of non controversial questions before moving gradually to the more contentious and potentially incriminating part of the interview.

B. *Did Woon himself selectively exercise his right to pre-trial silence?*

Even if it is conceded that the right to pre-trial silence can be exercised selectively, it could be argued that Woon himself did not exercise the right to pre-trial silence. This argument finds support in some distinguished quarters. In *Weissensteiner v The Queen*,⁴⁸ Brennan and Toohey JJ, citing *Woon*, made the following assertion:

If the suspect does not exercise his right of silence but chooses to respond selectively to questions asked or allegations made, his conduct (including his refusal to respond to particular questions or allegations) is evidence to which the jury may have regard and from which, according to the circumstances, an inference may be drawn that he has a consciousness of guilt.⁴⁹

1. *Does it matter that Woon never used the words 'No comment'?*

Perhaps the expression 'no comment' had not yet entered common parlance, or at least the criminal argot, back in 1962. That Woon himself never used it, whereas so many of our modern interviewees [at least selectively] do,⁵⁰ may arguably be

address; see also *Crimes Act 1914* (Cth) s 3V; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 11–13.

⁴⁶ Eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 14–18.

⁴⁷ See, eg, *R v Swaffield*; *Pavic v R* (1998) 192 CR 159, 220 (Kirby J) ('Subterfuge, ruses and tricks may be lawfully employed by police acting in the public interest').

⁴⁸ (1993) 178 CLR 217.

⁴⁹ *Weissensteiner v The Queen* (1993) 1978 CLR 217, 231 (emphasis added).

⁵⁰ See above n 5.

significant in the application of *Woon* to contemporary records of interview. If one adopts a literal approach to applying *Woon*, then problems emerge in applying it to selective ‘no comment’ interviews’ i.e. where an interviewee answers some questions put to them by the police but answers ‘no comment’ to others. Simply (and literally) put, the accused *Woon* did not provide a selective no comment interview, and therefore the case has no application to that type of interview. As attractive as this argument may be to defence practitioners seeking to marginalise the awkward authority of *Woon*, it is submitted that it is an incorrect characterisation of *Woon*’s responses to the two police interrogations.

It is a trite but obvious point to make that a suspect must ordinarily say something in order to exercise their so called ‘right to silence’. The fact that *Woon* chose to respond to questions and allegations with such utterances as ‘I better not say anymore’,⁵¹ ‘I will not say I have and I will not say that I have not’⁵² and ‘I do not deny it and I do not admit it’,⁵³ rather the nowadays more common expression ‘no comment’ should not, it is submitted, be used to determine whether or not he was, in fact, exercising his right not to respond to particular questions or allegations. The right to silence must be exercised by non silence i.e. the interviewee expressing their desire in words not to talk to their police interrogators, and no magical incantation should prescribe to express that desire and exercise the right.⁵⁴ It should be emphasised that it is the right to silence that is at stake here, not the efficacy or otherwise of a particular verbal formulation. To argue otherwise, that something talismanic hangs on the precise choice of the words ‘no comment’, over and above other equally non committal responses (*vide* the selection of *Woon*’s utterances extracted above), would be to fall prey to extraordinary and unworldly pedantry. In a slightly different context, when one of the parties in *Yisreal v District Court of NSW*⁵⁵ argued before the New South Wales Court of Appeal that there was a distinction

⁵¹ *Woon v The Queen* (1964) 109 CLR 529, 530.

⁵² *Ibid* 531.

⁵³ *Ibid* 532.

⁵⁴ For a discussion of the use of the words ‘no comment’ in exercising the right to silence, see *Yisrael v District Court of NSW* (1996) 87 A Crim R 63, 67 (Meagher JA); see also 74 (Sheller JA).

⁵⁵ (1996) A Crim R 63.

between an ‘accused remarking ‘no comment’ and the accused uttering nothing at all’,⁵⁶ Meagher JA commented that ‘commonsense suggests that to make such a distinction is simply absurd, particularly in the context of police interrogation of a person who has just been arrested and would be unlikely to be thinking of such semantic technicalities’.⁵⁷ It is submitted that the same comment could be made about an attempt to draw a distinction between the literal use of the words ‘no comment’, and other verbal formulations, such as those uttered by Woon himself, which express an identical reluctance to respond to a police question or allegation, as an legitimate exercise of the right to pre-trial silence.

2. *The authority of Woon itself*

Lastly, and perhaps most tellingly, at Woon’s trial the trial judge acknowledged that Woon had exercised (selectively) his right to silence, and that such an exercise of the right to pre-trial silence was legitimate, in that no adverse inference could be drawn *per se* from it. As summarised by Kitto J:⁵⁸

The interrogations had been preceded by a clear statement to the applicant that he was not obliged to say anything. His Honour reminded the jury of this fact, and he made it clear to them, not only generally before he went through the evidence but again specifically *in relation to each answer which was or amounted to a refusal to answer, that [Woon] was within his rights in saying nothing and that no adverse inference could properly be drawn from refusals to answer. ...* If the jury had been left under the impression that they were entitled to draw inferences against the applicant from mere refusals to answer, or from statements that amounted only to refusals to answer, there would have been a serious fault to find with the charge.⁵⁹

⁵⁶ *Yisrael v District Court of NSW* (1996) 87 A Crim R 63, 67.

⁵⁷ *Ibid.*

⁵⁸ *Woon v The Queen* (1964) 109 CLR 529, 535.

⁵⁹ With respect, the above extract plainly contradicts the citation of *Woon* by Brennan and Toohey JJ in *Weissensteiner v The Queen* (1993) 178 CLR 217, 231 as an instance of a suspect not exercising their right of silence (emphasis added).

IV. THE DRAWING OF AN ADVERSE INFERENCE OF A 'CONSCIOUSNESS OF GUILT' WHERE A SUSPECT HAS SELECTIVELY EXERCISED THE RIGHT TO PRE-TRIAL SILENCE IS INCONSISTENT WITH THE HIGH COURT'S 1991 DECISION IN *PETTY AND MAIDEN*

A. *Pre-Trial silence and Petty and Maiden*

In 1991 the High Court gave its most emphatic endorsement to the right to pre-trial silence in *Petty v The Queen; Maiden v The Queen* ('*Petty and Maiden*').⁶⁰ The appellants, Leslie Petty and Stephen Maiden had both proffered different accounts of their involvement in the killing of the deceased when interviewed: Petty inculpated Maiden and exculpated himself; Maiden inculpated Petty and downplayed his involvement in the killing.⁶¹ When giving evidence at their joint trial, both Petty and Maiden gave unsworn evidence that the killing was accidental, a version of events never proffered before trial, nor disclosed at committal in the cross examination of the chief Crown witness.⁶² Although *Petty and Maiden* is therefore not a case which, on its facts, raised the issue of the exercise of pre-trial silence,⁶³ all the presiding justices of the High Court save Dawson J⁶⁴ restated the central importance of the right to pre-trial silence as a 'fundamental rule of the common law'.⁶⁵

At Petty and Maiden's trial, the trial judge had expressed the view:

that there was an 'significant distinction' between inferring a consciousness of guilt from silence and denying credibility to a late defence or explanation by reason of earlier silence. His Honour suggested that in the first case there can be inferred an admission by reason of the consciousness of guilt whereas in the second case rejection of the defence or explanation has

⁶⁰ (1991) 173 CLR 95.

⁶¹ *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95, 114–15.

⁶² *Ibid* 116.

⁶³ As both Petty and Maiden had not exercised their right to silence at interview, but in fact had given exculpatory accounts of their own respective involvements in the killing of the deceased.

⁶⁴ I.e. Mason CJ, Deane, Toohey and McHugh JJ in a joint majority judgment; Brennan and Gaudron JJ in separate judgments.

⁶⁵ *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95, 99 (Mason CJ, Deane, Toohey and McHugh JJ).

no evidentiary value in itself, though its effect may be to leave the prosecution case unanswered, or at least not answered by that defence or explanation.⁶⁶

All justices of the High Court save Dawson J strongly disapproved of the drawing of this distinction between endorsing the right to pre-trial silence whilst at the same time upholding the permissibility of an adverse inference being drawn where a defence was first raised at trial.⁶⁷ In the words of Brennan J, the right to pre-trial silence 'is a 'right' which attracts an immunity from any adverse inference which might otherwise arise from its exercise'.⁶⁸ In their joint majority judgment, Mason CJ, Deane, Toohey and McHugh JJ observed:

An incident of the right to silence is that no adverse inference can be drawn against an accused person by reason of his failure to answer such questions or to provide such information. To draw such an inference would be to erode the right to silence or to render it valueless. ... We acknowledge that there is a theoretical distinction between the two modes of making use of the accused's earlier silence. *However we doubt that it is a distinction which would be observed in practice by a jury, even if they understand it. And, what is of more importance, the denial of credibility of that late defence or explanation by reason of the accused's earlier silence is just another way of drawing an adverse inference (albeit less strong than an inference of guilt) against the accused by reason of his or her exercise of the right to silence. Such an erosion of the fundamental right should not be permitted.*⁶⁹

B. 'Theoretical distinctions'

It is the author's contention that *Woon* draws a similarly fine, 'theoretical distinction' between upholding the right to pre-trial silence on the one hand, and permitting the drawing of adverse inferences when that right is exercised selectively on the other.

To illustrate the point, one need go no further than the facts of *Woon* itself. To direct a jury that the accused 'was within his rights in saying nothing and that no adverse inference could

⁶⁶ Ibid 100.

⁶⁷ Ibid 100–1 (Mason CJ, Deane, Toohey and McHugh JJ), 105 (Brennan J), 128 (Gaudron J), 120–2 (Dawson J).

⁶⁸ Ibid 106.

⁶⁹ Ibid 99–101 (emphasis added).

properly be drawn from refusals to answer⁷⁰ whilst also maintaining that '[the accused] answered some questions. He refused to answer others. In the result some of his answers appear evasive ... his answers to questions should be considered as a whole, and *in the context of his refusals to answer other questions*'⁷¹ begs the question: what is 'the context of his refusal to answer some questions' but a thinly veiled invitation to a jury to draw an adverse inference from the selective exercise of the right to silence?

I have already posited that, with respect, Brennan and Toohey JJ are wrong when they characterise *Woon* as a case where the suspect did not exercise his right to silence. To return to the contentious passage in their Honours judgment in *Weissensteiner v The Queen*⁷² which cites *Woon* as its authority:

If a suspect does not exercise his right of silence but chooses to respond selectively to questions asked or allegations made, *his conduct (including his refusal to respond to particular allegations or questions)* is evidence to which the jury may have regard and from which, according to the circumstances, an inference may be drawn that he has a consciousness of guilt.⁷³

Their Honours' characterisation of a suspect's refusal to answer some questions as 'conduct' from which an adverse inference can be drawn is obfuscatory: for what is the suspect's inculpatory 'conduct' but a selective exercise of the right to silence, which, to repeat Brennan J's own words, is a 'right which attracts an immunity from any adverse inference which might otherwise arise from its exercise'?⁷⁴

The 'theoretical distinction'⁷⁵ between, on the one hand, using non responsive answers to give 'context' to responsive answers from which an inference can be drawn of consciousness of guilt, whilst at the same time not drawing an adverse inference from those responses which involve an exercise of the right to silence, is the sort of fine distinction that, to adopt the words of Professor

⁷⁰ *Woon v The Queen* (1964) 109 CLR 529, 535.

⁷¹ *Ibid* 542 (Windeyer J) (emphasis added).

⁷² (1993) 178 CLR 217.

⁷³ *Weissensteiner v The Queen* (1993) 178 CLR 217, 231 (emphasis added).

⁷⁴ *Petty v The Queen*; *Maiden v The Queen* (1991) 173 CLR 95, 106.

⁷⁵ *Ibid* 100.

Cross, amounts to ‘gibberish’.⁷⁶ Moreover, to adopt the concerns expressed *Petty and Maiden*, it is the sort of distinction which is highly unlikely to be understood by juries.

A further illustration of the chimerical fineness of the distinction is provided by the 1987 Victorian decision of *R v McNamara*.⁷⁷ In that case, the accused had selectively declined to respond to a number of police allegations, whilst in the course of the same interrogation making a number of admissions and false denials. The trial judge, in language entirely and flawlessly consistent with the words used by the High Court in *Woon* relevantly charged the jury as follows:

The law is that no adverse inference can be drawn from a refusal to answer any or all questions ... that refusal can in no way strengthen the Crown case, it can in no way be taken as some admission or as demonstrating some consciousness of guilt. ... But where a suspect, having been warned of his right to say nothing, elects to answer some questions and not others, his answers should be considered as a whole and in the context of his refusal to answer other questions. Those answers and the manner of his selectiveness would entitle you ... to hold that the interview in this case demonstrated a consciousness of guilt of the crime here charged.⁷⁸

Consistent with the arguments advanced in this article, and without the assistance of the ringing endorsement of the right to pre-trial silence articulated by the High Court a few years later in *Petty and Maiden*, McNamara’s counsel took issue with that direction and submitted before the Full Court of the Victorian Supreme Court that ‘these particular observations would, or reasonably could, have been taken by the jury as a qualification of his Honour’s direction that no adverse inferences could be drawn against the applicant from his refusal to answer the particular questions which he did refuse to answer’.⁷⁹

⁷⁶ See R Cross, ‘The Evidence Report: Sense or Nonsense’ [1973] *Criminal Law Review* 329, 333, referred to in *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95, 105.

⁷⁷ [1987] VR 855.

⁷⁸ *R v McNamara* [1987] VR 855, 867.

⁷⁹ *Ibid* 868.

The Full Court accepted that submission as correct, citing *Woon* as an authority for their position (!), stating:

There is nothing in the judgments of Kitto J or Taylor J in *Woon's Case* to suggest the manner of an accused person's selectiveness ... can legitimately be used as demonstrating a consciousness of guilt, and the observations of Windeyer J at page 542 strongly suggest that in his opinion they cannot be. For Windeyer J said: 'The Supreme Court said that his answers to questions were 'selective'. They were. But he had been told he need not answer any questions unless he wished to do so'.⁸⁰

With respect to the Full Court, it is precisely the selectiveness of *Woon's* responses from which the adverse inference against him of a consciousness of guilt is effectively drawn.⁸¹ This is recognised by Windeyer J and forms the basis of his 'misgivings'⁸² about *Woon's* predicament. For Windeyer J, following on from the portion of his judgment extracted in *McNamara*, went on to state:

[Woon] answered some questions. He refused to answer others. *In the result some of his answers appear evasive ...* but could the fact that he carefully chose the questions he would answer justify an inference of his participation in the crime which he stood charged?⁸³

C. 'Consciousness of guilt' — A stronger inference than the inference disallowed in *Petty and Maiden*

It should be noted that the adverse inference against the accused erroneously permitted by the trial judge in *Petty and Maiden*, that

⁸⁰ Ibid 868.

⁸¹ The same misreading of *Woon* appears in the 1993 decision of the NSW Court of Criminal Appeal in *R v Towers* (Unreported, NSW CCA, 7 June 1993) which cites *R v McNamara* with approval: ('[T]he trial judge did err in instructing the jury that they were entitled to infer consciousness of guilt from the selective answers given by the appellant to police questions. Such a direction is not supported by anything in *Woon v R* ... *If the jury are not entitled to draw adverse inferences from an exercise of the right to silence the position should be no different when the right has been exercised selectively*'). (emphasis added). For a further critique of the decisions in *McNamara* and *Towers*, see J White, 'Silence is Golden? The significance of Selective Answers to Police Questioning in New South Wales' (1998) 72 *Australian Law Journal* 539.

⁸² *Woon v The Queen* (1964) 109 CLR 529, 541.

⁸³ Ibid 542 (emphasis added).

of denial of credibility to a late defence, is a much weaker adverse inference than the inference of a ‘consciousness of guilt’ as deployed in *Woon*.⁸⁴ It is difficult to differentiate between an incidental finding that the accused has evinced a ‘consciousness of guilt’, and an ultimate finding that the accused is, in fact, guilty of the crime for which they are standing trial: once a jury determines that the accused has displayed a ‘consciousness of guilt’ in their answers to police questions, there is a danger of a de facto reversal of the onus of proof, in that having determined that there was a consciousness of guilt, the onus then falls upon the accused to establish that they are not so guilty of the offence with which they are charged.⁸⁵ The majority of the High Court in *Petty and Maiden* had little difficulty forbidding the denial of credibility to a late defence, as eroding the right to pre-trial silence. Surely the much stronger inference of a consciousness of guilt in selectively answering police questions poses an even greater threat to that right?

D. Policy Considerations underlying *Petty and Maiden* and their application to selective ‘no comment’ interviews

To deny the legitimacy of the selective refusal to answer police questions, by allowing the drawing of inferences adverse to those who do so, is contrary to the conception of the balance of power between individual and state underpinning the right to both pre and at trial silence, ‘that those who allege the commission of a crime should prove it themselves’.⁸⁶ It is arguably inconsistent with the burden of proof in criminal prosecutions lying on the Crown.⁸⁷

It would erode the right to pre-trial silence if the interviewee who answered seemingly innocuous questions and then chose to proffer ‘no comment’ responses to other, potentially more

⁸⁴ *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95, 101 (Mason CJ, Deane, Toohey and McHugh J).

⁸⁵ For judicial criticism of the expression ‘consciousness of guilt’, see *Zoneff v R* (2000) 200 CLR 234, 259–66 (Kirby J); see also *R v Franklin* (2001) 3 VR 9, 42–54 (Ormiston J).

⁸⁶ *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 532 (Deane, Dawson and Gaudron JJ).

⁸⁷ For a discussion of the relationship between the right to silence and the burden of proof in criminal cases, see J Hunter et al, above n 4, 616–7.

incriminating questions, was exposed to the risk of an inference of a consciousness of guilt at trial: to apply the words of Mason CJ, Deane, Toohey and McHugh JJ in *Petty and Maiden*, it would ‘convert [the right to pre-trial silence] to a source of entrapment’.⁸⁸ What is to be made, for example, of the not uncommon situation where a suspect is interviewed about a number of different offences and makes admissions with respect to all except one of those offences, and then answers ‘no comment’ to the questions relating to the offence for which she ultimately pleads not guilty and stands trial? Where does a court practically draw the line between a ‘substantively’ ‘no comment’ interview, from which on the authority of *Petty and Maiden*, no adverse inference can be drawn, and a ‘selective’ ‘no comment’ interview, from which an adverse inference can be drawn?

E. A comparison with the High Court’s treatment of lies in *Edwards v The Queen*

It is interesting to compare the severe restrictions that were placed by the High Court on the use of lies to prove guilt in its 1993 decision in *Edwards v The Queen*⁸⁹ with the relative freedom that a jury is invited to draw inferences with respect to selective answering of questions in accordance with *Woon*. In *Edwards* the majority justices held that:

[I]n any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to constitute an admission against interest. And the jury should be instructed that they may take the lie into account only if they are satisfied ... that it reveals a knowledge of the offence ... and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence. ... Moreover, the jury should be instructed that there are reasons for the telling of a lie apart from the realisation of guilt ... a lie may be told ... to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission.⁹⁰

⁸⁸ *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95, 101.

⁸⁹ (1993) 178 CLR 193.

⁹⁰ *Edwards v The Queen* (1993) 178 CLR 193, 210–11 (Deane, Dawson and Gaudron JJ).

In the majority's view, the reason for this comprehensive and mandatory warning was the recognition 'that there is a risk that, if the jury are invited to consider a lie told by an accused, they will reason that he lied simply because he is guilty unless they are appropriately instructed with respect to these matters'.⁹¹

Notwithstanding whatever directions that a jury may be given that no adverse inference is drawn from silence,⁹² their conclusions about the significance of the accused's selective answering of questions, particularly when invited to infer a 'consciousness of guilt', are analogous to the dangers that can flow from a jury reasoning from the fact that an accused had lied that the accused must therefore be guilty.⁹³ There is no fundamental public policy consideration operating to protect lying; there is, however, a fundamental public policy consideration underlying an suspect's election not to respond to certain police questions, as an exercise of the right to silence.

F. 'Body Language'

There are additional problems in founding a inference beyond reasonable doubt of a consciousness of guilt based on selective answering of questions when the jury is only confronted with an audio tape of the interview. As numerous psychologists have observed, most communication is non verbal.⁹⁴ It would be extremely dangerous for a jury to infer consciousness of guilt based solely on words the accused has said while being unaware of the such other vital aspects of communication such as the suspect's 'body language', facial expressions, etc.

⁹¹ Ibid 211 (Deane, Dawson and Gaudron JJ).

⁹² For a brief discussion of the efficacy of jury directions generally, see *Zoneff v R* (2000) 200 CLR 234, 260–2 (Kirby J).

⁹³ See, eg, *Edwards v The Queen* (1993) 178 CLR 193, 211 (Deane, Dawson and Gaudron JJ).

⁹⁴ As captured by the popular expression 'body language'; see, eg, A Pease, *Body Language* (Camel Publishing, 1981). At least the concerns expressed by Windeyer J in *Woon* about not knowing the tone of voice in which Woon's responses were uttered (109 CLR 529, 542) have been allayed by the modern practice of audio recording; perhaps the proliferation of video recording of records of interview will similarly allay concerns about 'body language'.

V. WOON WOULD HAVE BEEN ACQUITTED HAD HIS TRIAL BEEN HELD TODAY

If one proceeds on the basis that no adverse inference of a consciousness of guilt should have been permitted to be drawn from Woon's selective exercise of his right to pre-trial silence, what remains of the evidence against him? There are his admissions about lying about his acquaintance with the co accused Radcliffe,⁹⁵ and his sending of telegrams to Radcliffe under a false name,⁹⁶ little else.⁹⁷

Of the five High Court justices who heard the appeal and unanimously refused special leave,⁹⁸ only Windeyer J expressed some reservations about the correctness of the Victorian Court of Criminal Appeal's decision to refuse leave to appeal.⁹⁹ While concurring with his brethren that the application for special leave to the High Court should be dismissed on the basis that there was 'no misdirection by the learned trial judge'¹⁰⁰ and that (citing *Craig v The King* (1933) 49 CLR 429) 'this Court ought not to interfere with the course of criminal justice unless it is shown that exceptional and special circumstances exist, and that substantial and grave injustice has been done'¹⁰¹, he observed that:

[Woon] seems to have been cautious and astute. I entirely agree that his answers to questions should be considered as a whole, and in the context of his refusal to answer other questions ... [but that] *taken literally the inferences are equivocal. They could be expressions of surprise that his participation in the crime had been disclosed by his confederates, or they could be expression of surprise at the suggestion that they should have falsely implicated him.*¹⁰²

Referring then to Woon's initial false denial that he knew Radcliffe, he observed:

⁹⁵ *Woon v The Queen* (1964) 109 CLR 529, 532.

⁹⁶ *Ibid.*

⁹⁷ *Ibid* 542.

⁹⁸ *I.e.* Kitto, Taylor, Menzies, Windeyer and Owen JJ.

⁹⁹ *Ibid* 541.

¹⁰⁰ *Ibid* 540.

¹⁰¹ *Ibid.*

¹⁰² *Ibid* 542 (emphasis added).

They were certainly capable of leading to an inference that [Woon] and Radcliffe were engaged in some secret enterprise. But it seems to me that showing that there was an association — and, let be assumed, a guilty association — between Woon and Radcliffe does not really show that Woon was a participant, either as a principal or accessory, in the break in, entering and stealing from the bank. ... They were certainly capable of leading to an inference that [Woon] and Radcliffe were engaged in some secret enterprise. But it seems to me that showing that there was an association — and, let be assumed, a guilty association — between Woon and Radcliffe does not really show that Woon was a participant, either as a principal or accessory, in the break in, entering and stealing from the bank.¹⁰³

It is the author's contention that the better view of selective answers of questions is that it is a type of circumstantial evidence. This is distinctly preferable than the tortured process of reasoning which suggests that through a selective answering of questions there is an implied admission by conduct as to the truth of the allegations contained in those questions.¹⁰⁴ Given what the High Court has said about the permissible use of circumstantial evidence in *Chamberlain v The Queen (No.2)*¹⁰⁵ and *Shepard v The Queen*¹⁰⁶ where such evidence constitutes an 'indispensable link in a chain of reasoning towards an inference of guilt'[as was the case in *Woon*],¹⁰⁷ and in *Edwards v The Queen*¹⁰⁸ about the use that can be made of an accused's lies,¹⁰⁹ it is submitted that the insufficiencies in the evidence lead against Woon would preclude the issue of Woon's guilt or innocence going to the jury.¹¹⁰ Simply put, there is a reasonable explanation for the

¹⁰³ Ibid 542–3 (emphasis added).

¹⁰⁴ For a discussion of this point, see A Palmer, 'Guilt and Consciousness of Guilt' (1997) 21 *Melbourne University Law Review* 95, 97–9.

¹⁰⁵ (1984) 153 CLR 521.

¹⁰⁶ (1990) 170 CLR 573.

¹⁰⁷ *Shepard v The Queen* (1990) 170 CLR 573, 579 (Dawson J); see also *Edwards v The Queen* (1993) 178 CLR 193, 204–5 (Brennan J).

¹⁰⁸ (1993) 178 CLR 193.

¹⁰⁹ See, in particular, *Edwards v The Queen* (1993) 178 CLR 193, 201–2 (Brennan J). For a further discussion of the standard to be applied to a lie as evidence when it forms an indispensable link in the chain of proof, see J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004) 448.

¹¹⁰ A view apparently shared by Palmer: see Palmer, above n 104, 107.

evidence consistent with the innocence of the accused of the crime as charged which cannot be discounted: that of a non specific guilty association with Radcliffe, and a reluctance to inculpate himself further with respect to that non specific guilty association. As noted by Windeyer J:

The evidence admissible against Woon may support an inference that Radcliffe and he were partners in a criminal enterprise. But does it support a conclusion that, beyond a reasonable doubt, Woon was a participant in *this* crime? I doubt this.¹¹¹

VI. HOW SHOULD COURTS DEAL WITH SELECTIVE ‘NO COMMENT’ INTERVIEWS?

A. *Selective ‘no comment’ interviews — A suggested approach*

Consistent with the arguments advanced above, I suggest the following approach should be taken courts to selective ‘no comment’ interviews:

1. The suspect’s ‘no comment’ responses, and those responses that can be fairly characterised as ‘no comment’ responses (which characterisation may be the subject of some preliminary argument between prosecution and defence),¹¹² should be identified and excised from the record of interview as being of no evidentiary value, unless the exclusion of those responses ‘would result in a distorted or unreal version of the interrogation being placed before the jury, and ...

¹¹¹ *Woon v The Queen* (1964) 109 CLR 529, 543 (emphasis added).

¹¹² Of course, it goes without saying that other responses of the suspect under police interrogation which amount to relevant false denials, admissions or lies (Cf ‘no comment’ responses), should remain in the record of interview, subject to any residual discretion to exclude based on unfairness (i.e. ‘the Christie discretion’: see *R v Christie* [1914] AC 545), and the jury should be directed as to the permissible inferences which can be drawn from those false denials, lies and admissions.

any unfair prejudice [to the suspect] could be removed by a proper warning from [the trial judge]'.¹¹³

2. If the process described at (1) above results in some obvious editing of the record of interview, as to the balance of the record of interview the jury should be directed that portions have been excised and that they are not to speculate on what might have contained in those excised portions, but to confine their deliberations to the evidence before them.¹¹⁴
3. There should never be a charge to a jury which permits the jury to draw an adverse inference of a consciousness of guilt from a suspect selectively exercising their right to pre-trial silence, as such a charge is inconsistent with the right to pre-trial silence as a 'fundamental right' as construed by the High Court in *Petty and Maiden*.

Ironically, although one can draw a stark comparison between the High Court's emphatic endorsement of the right to pre-trial silence in *Petty and Maiden* in Australia and the position in the United Kingdom since the passage of the *Criminal Justice and Public Order Act* (UK) in 1994,¹¹⁵ it is in the United Kingdom, pre 1994, that one finds an instance of what is in my submission the correct approach being taken to selective 'no comment' interviews.

In the United Kingdom, unfettered by the precedent of *Woon*, the Court of Appeal (Criminal Division) stated in at least one case unambiguously that no adverse inference can be drawn from the fact that a suspect does not answer some questions put to them by the police. In *R v Henry*¹¹⁶ the appellant gave an interview to the

¹¹³ From *R v McNamara* [1987] VR 855, 865; see also *R v Franklin* [1998] VSC 217, [4]; *R v Roba* (2000) 110 A Crim R 245, 249; *R v Bruce* [1988] VR 579, 594 (Gray J).

¹¹⁴ A direction along similar lines to the direction now required about the failure of an accused to provide evidence supporting an alibi: see, *Dyers v The Queen* (2002) 210 CLR 285, 296 (Gaudron and Hayne JJ).

¹¹⁵ The UK Act allows the court 'to draw whatever inferences appear proper' from the accused's silence, inter alia, where the accused fails to mention during questioning or upon charge any fact which he or she later relies on in his or her defence at trial, or where the accused fails to account for his or her presence at a particular place: see *Criminal Justice and Public Order Act 1994* (UK) ss 34 and 37 respectively.

¹¹⁶ [1990] *Crim LR* 574.

police which was described in the following terms by the trial judge: ... ‘most of the questions he gave answers to. Some of the questions he said: “Nothing to say”. To others of the questions he said: “I’m not saying; you find out”’. With respect to that interview, the trial judge then directed the jury as follows:

Where a suspect adopts that line: answering many of the questions but to some saying: ‘I am not saying you find out’, a jury is entitled to draw inferences, if it thinks it right to do so, from the fact that while being prepared to answer certain questions, other questions he refuses to answer.

The UK Court of Appeal, citing a judgement of Viscount Dilhorne in *R v Gilbert* 66¹¹⁷ ‘that to invite a jury to form an adverse opinion against an accused man on account of his exercise of his right to silence is a misdirection’¹¹⁸ came ‘unhesitatingly to the conclusion that the trial judge was in error in suggesting that the jury in this case could draw any inferences from the fact that some of the questions had not been answered’.

VII. FINAL REFLECTIONS ON *WOON* — A GUILTY MAN WALKS FREE?

On reading *Woon*’s evasive answers to police questions, one may be left with the lingering suspicion that the conclusion reached in this article, that the question of *Woon*’s guilt or innocence should never have been left to a jury, would have resulted in a guilty man going free.¹¹⁹ My response to that concern is twofold: (i) there is crucial difference between evidence which points to disreputable or even criminal conduct, and evidence which may be sufficient to prove beyond a reasonable doubt an accused person’s guilt of a specific offence the subject of a criminal charge; and (ii) the erosion of the right to pre-trial silence sought to be permitted by *Woon* leads to sloppy police investigation and

¹¹⁷ Cr App Rep 237, 244.

¹¹⁸ Of course a position now overruled by statute in the UK: see above n 115.

¹¹⁹ *Woon* was ‘a well known crook’ and ‘a bit of a bloody liar’ at least in the opinion of one of the most eminent Victorian lawyers of the era, Sir John Starke: see, J Faine, *Taken on Oath: A Generation of Lawyers* (Federation Press, 1992) 49.

preparation of prosecution cases which increase the risk of a miscarriage of justice.¹²⁰

On the latter point, let me return to the facts of *Woon* one last time and extract a small illustration. One of the issues in Woon's trial was whether Woon was in Melbourne at various times relevant to the commission of the offence as alleged by the prosecution. On that issue, the following was put to the accused Woon in the course of the second police interrogation:

(Q): You were seen by one of our detectives at the Melbourne Airport last November, is that right?

(A): I will not answer that question.¹²¹

The above was put before the jury, along with, of course, the general direction that they could use 'such answers as [Woon] chose to give ... for the purpose of seeing whether they revealed a consciousness on the part of [Woon] that he was guilty of the crime about which he was being questioned'.¹²² No independent evidence was lead by the Crown at trial to prove the allegation that Woon had been seen at Melbourne Airport at the relevant time. The conjunction of both the unproved allegation being put, and the judicial invitation to infer a consciousness of guilt based on the suspect's pattern of responses to those allegations and questions, had the potential to engender enormous prejudice against Woon at trial. Adopting the approach suggested in this article, the question and answer extracted above would both have to be excised from the transcript, as in effect a 'no comment' response, and therefore an instance of the suspect selectively exercising their right to pre trial silence. Assuming that the allegation was relevant to the Crown's case, the prosecution would then be forced to prove the allegation by other, admissible evidence.¹²³ It is submitted that this is a distinctly preferable

¹²⁰ Incompetent police investigation has been identified as one of the chief factors in wrongful convictions: see, P Wilson, 'Miscarriages of Justice in Serious Cases in Australia' in K Carrington, M Dever, R Hogg, J Bargaen and A Lohery (eds), *Travesty! Miscarriages of Justice* (1991) 9.

¹²¹ *Woon v The Queen* (1964) 109 CLR 529, 532.

¹²² *Ibid* 535.

¹²³ Similarly, no evidence was lead at trial linking the £8000 of bank notes admittedly in Woon's possession in his safe deposit box with the specific notes stolen from the bank: see *Woon v The Queen* (1964) 109 CLR 529, 542.

course: it is consonant with the onus of proof in criminal prosecutions and is far more protective of both the right to pre-trial silence and the accused's right to a fair trial.