The Silent Accused at Trial — Consequences of an Accused’s Failure to Give Evidence in Australia

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The silence of the accused . . . is a fact . . . which the jury must perceive, and which perceiving they can no more disregard than one can the light of the sun, when shining with full blaze on the open eye.¹

I. Introduction

The consequences which should result from an accused’s exercise of the right to silence at trial is a matter of controversy. As the above quote states, the exercise by an accused of that right cannot avoid being perceived and considered by the jury or other tribunal of fact in a criminal trial. It is argued by some that an accused’s silence at trial should not be used against them in any way.² Conversely traditional judicial opinion,³ and that of the Australian Law Reform Commission,⁴ has been that an accused’s silence at trial may be used against them in a limited way, and in limited circumstances.

The contentious questions of if, when, and how an accused’s silence at trial can be used against them were examined by the High Court in *Weissensteiner v The Queen.*⁵ To understand the High Court’s reasoning in *Weissensteiner,* this article first looks briefly at the origins and rationale of the ‘right to silence’. The inferences that may be drawn from a person’s silence, and the stance the High Court has taken with regard to protecting the pre-trial right to silence are then considered. The right to silence at trial, and particularly the decision in *Weissensteiner* is then examined, contrasting that decision with the approach of the High Court to the pre-trial right to silence. Finally the circumstances in which comments to a jury on an accused’s silence are appropriate are discussed.

II. Origins and rationale of the right to silence

It is generally accepted that the right to remain silent both before trial, and at trial, have their origins in the privilege against self-incrimination.⁶ By that privilege no person can be required to answer a question if the answer would have a tendency to expose that person to a criminal conviction, the imposition of a penalty or the forfeiture of an estate.⁷ The privilege against self-incrimination is itself commonly accepted to have had its origins in 17th century England, and to have developed as a result of the unjust methods of compulsory interrogation of accused persons then being used, particularly in the Star

3. For eg *Kops v The Queen* [1894] AC 650; *May v O’Sullivan* (1955) 92 CLR 654.
The privilege against self-incrimination developed to protect accused persons from compulsory interrogation, and from being forced to admit their guilt and thus convict themselves from their own mouths. This resulted in the non-compellability of the accused at trial, and due to the then prevailing wisdom that no party or person having an interest in the outcome of proceedings should give evidence, the accused was not a competent witness at all. Thus the 'right' to silence was compulsorily enforced. This remained the case in England until the Criminal Evidence Act 1898 (UK) was passed which made the accused a competent but not compellable witness. At around this time similar legislation was enacted by the Australian States.

The modern rationale for the privilege against self-incrimination is that of it being a human right, designed to protect the dignity of accused or suspected persons. It serves to protect individuals against the exercise of power by the State or its law enforcement officials. It is regarded as a fundamental bulwark of liberty (of the individual). In Environmental Protection Authority v Caltex a majority of the High Court held that the privilege against self-incrimination applies only to natural persons and does not extend to corporations. In that case Deane, Dawson and Gaudron JJ, whilst dissenting on this point, provide a useful discussion on the right to silence. They state that the right to silence actually expresses comprehensibly the rejection by the common law of inquisitorial procedures generally, and the accompanying principle that those who allege a crime must prove it themselves. In their opinion the right to silence is not just one right, but is a number of rights or immunities of differing scope. These include the general right all persons have not to answer questions (unless lawfully compelled to), the privilege against self-incrimination which provides an excuse not to answer questions even when lawfully compelled to, the rules which render inadmissible involuntary or unfairly obtained confessions, and the right of accused persons to refrain from giving evidence at all.

As Deane, Dawson and Gaudron JJ rightly point out, the right to silence properly understood derives its justification not solely by reference to the privilege against self-incrimination, but also by reference to the fundamental principle that the onus of proving criminal offences remains always on the prosecution and the accused cannot be compelled to assist it in any way. These principles are not only human rights designed to protect the liberty of the individual, but also are fundamental to our adversarial system of criminal procedure. However the different aspects of the right to silence have different justifications, and so it cannot be assumed that the reasoning behind one aspect applies to the others.

8 Id 137; See also Environment Protection Authority v Caltex Refining Company Pty Ltd (1993) 118 ALR 392, 404 per Mason CJ and Toohey J, 426 per Deane, Dawson and Gaudron JJ, 440 per McHugh J.
9 Williams, supra note 6, 630; See also Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 118 ALR 392, 404 per Mason CJ and Toohey J, 416 per Brennan J, 426 per Deane, Dawson and Gaudron JJ, 440 per McHugh J.
10 Environmental Protection Authority v Caltex Refining Co Pty Ltd (1993) 118 ALR 392, 404-405 per Mason CJ and Toohey J, 416 per Brennan J, 430-431 per Deane, Dawson and Gaudron JJ, 443 per McHugh J.
12 Environmental Protection Authority v Caltex Refining Co Pty Ltd (1993) 118 ALR 392 per Mason CJ, Brennan, Toohey and McHugh J.
13 Id 426-427.
14 Id 426. See also R v Director of Serious Fraud Office; Ex parte Smith [1993] AC 1, 30-31 per Lord Mustill.
15 This is provided for in legislation in all the States, Territories and the Commonwealth: Crimes Act 1958 (Vic), s 399(1); Evidence Act 1906 (WA), s 8(1); Evidence Act 1910 (Tas), s 85(4); Evidence Act 1929 (SA), s 18(1); Evidence Act 1939 (NT), s 9(1); Evidence Act 1995 (NSW), ss 12 and 17; Evidence Act 1995 (Cth), ss 12 and 17.
16 See also Environmental Protection Authority v Caltex Refining Co Pty Ltd (1993) 118 ALR 392, 406-407 per Mason CJ and Toohey J.
This point gains importance when one compares the High Court’s differing levels of protection of the pre-trial, and at trial, right to silence.

III. Uses of and inferences from an accused’s silence

Heydon has stated that there are three types of inferences, which I shall discuss shortly, which are capable of being drawn from an accused’s silence.\(^{18}\) These inferences are drawn as matters of logic and common sense, but are not necessarily permissible in law. It is submitted however that it is more useful, in considering an accused’s silence at trial, to describe silence as having two potential uses. Silence can either be used as evidence, or used to evaluate other evidence. If silence is used as evidence it will of course also be available to be used in the evaluation of other evidence. But alternatively silence may purely be used to evaluate other evidence, and not itself be used as evidence.

Heydon states silence may be used as evidence in two ways, both of which involve inferences amounting to implied admissions. Firstly, silence may be inferred to be an implied consent or agreement to something said by another when a denial would be expected if the statement was false. The silence is an implied admission that what is said is true. Secondly, silence may be taken as evidencing a consciousness of guilt. In this case a person remains silent, when one would expect a response, due to their knowledge of their guilt. The silence is used as a piece of conduct, and is itself evidence of guilt. Both of these inferences from silence are implied admissions, and the silence is itself used as evidence, though as Heydon explains there is a subtle distinction between them.\(^{19}\)

Alternatively, silence may be used only to evaluate other evidence. Used in this way, silence is not itself evidence, but is taken into account in determining whether or not to accept other evidence, or inferences arising from other evidence. In this case the effect of the silence of an accused is that it strengthens opposing evidence or inferences arising from that evidence. The inference from silence in these cases is that an accused’s evidence, if they had given it, would not have assisted them in rebutting the evidence of the prosecution, or the inferences that arise from it.

Matters such as the burden of proof always remaining on the prosecution, the privilege against self-incrimination, and the desire to minimise wrongful convictions have led to the courts, and sometimes legislatures, restricting the use to which an accused’s silence may be put. I now turn to consider these restrictions.

IV. The pre-trial right to silence

Substantial limits exist on the use of, and inferences that may be drawn from, an accused’s out of court silence. The use of pre-trial silence was dealt with by the High Court in *Petty v The Queen*\(^{20}\). The majority firstly reinforced the right of suspects to remain silent when questioned by persons in authority, stating: \(^{21}\)

> 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 majority held this meant that evidence of an accused’s silence was not admissible, and it could not be suggested by the prosecutor or judge that an accused’s exercise of the right of silence provided any basis for inferring a consciousness of guilt.\(^{22}\) Thus an

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\(^{19}\) *Id* 53-54.


\(^{21}\) *Id* 99 per Mason CJ, Deane, Toohey, and McHugh JJ.

\(^{22}\) *Ibid*
accused's pre-trial silence, when questioned by persons in authority, could not be used as positive evidence of anything. The majority also held that it should not be suggested that previous silence, about a defence raised at trial for the first time, provided any basis for inferring that the defence is a new invention or is thereby suspect or unreliable. This is the second use of silence, namely to assist in the evaluation of other evidence.

The majority of the High Court accepted there was a theoretical distinction between the two uses of an accused's pre-trial silence. However, they doubted that a jury would be able to understand the distinction, and thought it even less likely that a jury could observe it in practice. The majority went on to state:

And, what is of more importance, the denial of the 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 of silence. Such an erosion of the fundamental right should not be permitted.

The majority observed that to maintain the distinction, and use earlier silence to allow a jury to draw an adverse inference about the credibility of an accused's explanation at trial, would be to convert the right to silence into a source of entrapment. The use of the concept of entrapment by the majority is interesting. No doubt it arises because an accused person is 'read their rights' by police officers and told they have the right to remain silent, without being told what the consequences of exercising the right will be. If an accused exercises that right in reliance on the police caution, it seems unfair that the prosecution can later use this against them. Thus the majority appear to be saying that the right to silence means an accused's silence cannot be used against them for any purpose. It was this principle that some thought also could be applied to silence at trial.

The dissenting judgments in the case of Brennan and Gaudron also broadly supported the majority's position on the use of out of court silence of an accused person. Brennan J stated that a suspect's pre-trial right to remain silent when questioned by persons in authority prevented any adverse inference arising from its exercise. He then stated:

The rule is designed to prevent oppression by the police or other authorities of the State; it is not designed to preclude a jury from drawing inferences from silence when a response might reasonably have been expected, the response not being sought by or on behalf of a person in authority (Reg v Parkes (1976) 64 Cr App R 25). Sometimes an exercise of the right of silence may deprive a suspect of an opportunity to dispose of an adverse inference arising from other facts, for example, recent possession of stolen goods, but that is not to deny the right; the adverse inference in such a case is drawn not from the silence but from other facts (see Bruce v The Queen (1987) 61 ALJR 603).

As will be explained later, the above statement helps support a distinction drawn by a majority of the High Court as to the permitted uses of an accused's silence at trial. The justification for the pre-trial right to silence, to prevent oppression by the police or other authorities of the State, is not applicable to the right to silence at trial where an accused is assured of fair treatment.

23 Ibid
24 Id 101.
25 Ibid
26 Ibid
27 Id 106-107 per Brennan J, 128-129 per Gaudron J.
28 Id 106.
29 Id 107.
V. The right to silence at trial

An accused person's decision to remain silent at their trial may, as a matter of common sense, be used in either of the two ways previously discussed. However, an accused is only a competent witness, not a compellable one.\textsuperscript{30} Whilst as a matter of logic an accused's silence at trial could be used to infer guilt, the presumption of innocence (that is the burden of proof always being cast on the prosecution), provides strong support for the silence of an accused at their trial not amounting to evidence against them for this purpose.\textsuperscript{31} If an accused's silence can be used as evidence of guilt, then an accused has no real choice but to give evidence, and thus be effectively compellable and open to compulsory interrogation, with a resultant abrogation of the privilege against self-incrimination. In addition, at an accused's trial it is not as accurate to say they remain silent as it is to say they refrain from giving evidence. To infer guilt from an accused's decision not to give evidence seems unjust. There is a danger that a jury may give too much weight to this, and not focus on considering what positive evidence exists proving an accused's guilt.

Thus the courts have recognised that an accused person's silence at trial can only be used for limited purposes. It has been held that an accused's silence at trial does not amount to any type of implied admission or consent to statements made at their trial.\textsuperscript{32} Silence also cannot be used to infer a consciousness of guilt on an accused's part.\textsuperscript{33} The question of whether an accused's silence could be used in the second way previously discussed, namely to evaluate other evidence or inferences arising from other evidence was argued before the High Court for the first time in many years in \textit{Weissensteiner}.

(a) \textit{Weissensteiner} — background

The appellant was convicted of the murder of two persons, Bayerl and Zack, and the theft of a yacht owned by Bayerl. He had been employed by Bayerl and Zack to work on the yacht, and in November 1989 the yacht was sighted near Cairns with the appellant, Bayerl and Zack aboard. Bayerl and Zack were never seen again. The yacht was again sighted in Cairns Harbour in December 1989, but only the appellant was seen aboard. He then spent the next eight months cruising between various Pacific Islands. There was strong circumstantial evidence that Bayerl and Zack were dead, and that the appellant had murdered them and stolen the yacht. At his trial the appellant did not give evidence, but chose to remain silent.

In the course of his summing-up to the jury, the trial judge Moynihan J made the following comments about the appellant's silence at trial. He firstly instructed the jury that the Crown bore the onus of proving the guilt of the appellant beyond reasonable doubt, and that the appellant bore no onus to prove anything, was not obliged to give evidence, and that no inference of guilt could be drawn from his failure to do so. His Honour then pointed out that the consequence of the appellant not giving evidence was that there was no evidence from him, 'to add to, or explain, or to vary, or contradict the evidence put before you by the prosecution.'\textsuperscript{34} He then said:\textsuperscript{35}

Moreover, this is a case in which the truth is not easily, you might think, ascertainable by the prosecution. It asks you to infer guilt from a whole collection of circumstances. It asks you to draw inferences from such facts as it is able to prove. Such an inference may be more safely

\begin{itemize}
\item \textsuperscript{30} \textit{Supra} note 16.
\item \textsuperscript{31} E W Thomas, 'The So-Called Right To Silence' (1991) 14 \textit{New Zealand University Law Review} 299, 313-314.
\item \textsuperscript{32} \textit{Tumahole Bereng v R} [1949] AC 253, 270; \textit{Weissensteiner v The Queen} (1993) 178 CLR 217, 229.
\item \textsuperscript{34} \textit{Weissensteiner v The Queen} (1993) 178 CLR 217, 224.
\item \textsuperscript{35} \textit{Ibid}
\end{itemize}
drawn from the proven facts when an accused person elects not to give evidence of relevant facts which it can easily be perceived must be within his knowledge.

The appellant was convicted of the two murders and the theft of the yacht. His appeal against his convictions to the Queensland Court of Criminal Appeal was dismissed by majority.\(^{36}\) The appellant then appealed to the High Court.

(b) **Weissensteiner — High Court**

The High Court dismissed the appeal by majority (Mason CJ, Deane, Dawson, Brennan and Toohey JJ; Gaudron and McHugh JJ dissenting) and held that the trial judge had correctly directed the jury as to the use which could be made of the appellant’s silence at his trial. In their opinion the appellant’s right to silence at trial had not been improperly infringed. The majority opinions are contained in two separate joint judgments, which contain substantially the same reasoning.

The majority firstly considered what uses could as a matter of logic and common sense be made of an accused’s silence at trial. Brennan and Toohey JJ recognised that once an accused person was made a competent witness in their own defence, and juries became aware of this, ‘it was inevitable that they would take account of an accused’s failure to testify when his testimony might be expected to deny, explain or answer the case against him.’\(^{37}\) Their Honours stated however that an accused’s silence at trial could not be used as an admission or to infer guilt, and had no evidential value in itself.\(^{38}\) Mason CJ, Deane and Dawson JJ agreed that an accused’s failure to give evidence was not itself evidence.\(^{39}\) They also agreed that it was not an admission of guilt by conduct, or able to be used to infer guilt.\(^{40}\)

However, this does not mean that an accused’s silence at trial has no significance at all. The majority held that the silence could be used in evaluating other evidence, or inferences that arose from other evidence. Mason CJ, Deane and Dawson JJ explained the significance of a party’s failure to give or call evidence, in terms of the evaluation of evidence which is before a court, by reference to *Blatch v Archer* in which Lord Mansfield observed, ‘it is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.’\(^{41}\) This principle applies generally, and is not confined to the criminal law, but is a cornerstone of the adversarial system of justice. Mason CJ, Deane and Dawson JJ quoted from a number of earlier cases\(^{42}\) to support the following conclusion:\(^{43}\)

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\text{[I]t has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.}
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\(^{36}\) *Weissensteiner* (1992) 62 A Crim R 96 per Pincus and McPherson JJA; Shepherdson J dissenting.


\(^{38}\) *Id* 235.

\(^{39}\) *Id* 229.

\(^{40}\) *Ibid*

\(^{41}\) (1774) 1 Cowper’s Reports 63, 65; 98 ER 969, 970.

\(^{42}\) *R v Burdett* (1820) B & Ald 95, 161-162; *Reg v Kops* (1893) 14 LR (NSW) 150; *Kops v The Queen* [1894] AC 650; *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163; *Tumahole Bereng v The King* [1949] AC 253; *May v O’Sullivan* (1955) 92 CLR 654, 658-659; *Bridge v The Queen* (1964) 118 CLR 600, 615.

\(^{43}\) *Weissensteiner v The Queen* (1993) 178 CLR 217, 227-228.
An adverse inference may be drawn from an accused’s silence because accused persons are expected to give evidence to rebut inferences of guilt arising from the prosecution’s evidence if they are able to. A failure to do so suggests that they could not give evidence which would have had this effect. The inference is that an accused’s evidence, if they had given it, would not have assisted their case, and would not have contradicted the prosecution evidence or the inferences arising from that evidence. Brennan and Toohey JJ recognised this, stating:

[W]here the facts ... proved by the evidence can support an inference that the accused committed the offence charged and where it is reasonable to expect that, if the truth were consistent with innocence, a denial, explanation or answer would be forthcoming, the jury may take the accused’s failure to give evidence into account in determining whether the inference should be drawn.

Gaudron and McHugh JJ disagreed with the majority as to use which could be made of an accused’s silence at trial. They believed that the direction to the jury should not have focused on the appellant’s failure to give evidence, but rather on his failure to give an explanation of the events in question. In their opinion, a failure to give an explanation in certain circumstances, where it may validly be assumed an innocent person would offer an explanation, is conduct which proves or tends to prove guilty knowledge on the part of the accused, and is itself evidence. In these circumstances the silence is not ‘mere silence’ which is not evidence and from which no inference adverse to the accused may be drawn.

It is submitted that Gaudron and McHugh JJ’s use of silence at trial (when no explanation has been offered before trial) as evidence is, whilst logically permissible, dangerous and potentially makes an accused’s exercise of their right to remain silent fatal to their chances of acquittal. Gaudron and McHugh JJ would allow silence at trial, in certain unclear circumstances, to itself be part of the prosecution case and proof of guilt, and in effect compel an accused in these circumstances to give evidence or else be convicted. It is submitted the majority’s position on the use which can be made of an accused’s silence at trial is preferable to that of Gaudron and McHugh JJ. It is more certain in application, and strikes a more equitable balance by giving an accused the right to remain silent without the exercise of that right being almost inevitably fatal.

(c) When can an accused’s silence be used against them?

The majority in Weissensteiner held that an accused’s silence at trial could not be used against them in evaluating inferences arising from prosecution evidence in all circumstances. The preconditions on the use of an accused’s silence arise as a matter of logic and commonsense.

Firstly, an accused’s silence cannot be used to draw an adverse inference (of the type previously explained) unless the prosecution first proves sufficient facts from which an inference of guilt may be drawn. That is to say there must be a case to answer. This is because the adverse inference from an accused’s silence is used to strengthen inferences arising from the prosecution’s case — if the prosecution case standing alone cannot raise an inference of guilt, then an accused’s silence is irrelevant. An accused’s silence at trial is not evidence and cannot be used to fill any gaps in the prosecution case. This point makes it clear that there is no shifting of the onus onto the accused.

Secondly, it must be reasonable in the circumstances to expect that, if the truth were
consistent with innocence, a denial, explanation or answer would be forthcoming from the accused. Part of this second precondition is that there must be relevant facts which may be perceived to be within the knowledge of the accused.\textsuperscript{48} If it is not clear that an accused could give evidence that would offer an innocent explanation or rebut an inference of guilt arising from the prosecution's case, then their silence has no logical probative value.\textsuperscript{49} It is not reasonable to expect them to give evidence if they have no relevant evidence to give.

Another consideration in determining whether it is reasonable to expect an accused to give evidence, is whether they have reasons not to give evidence other than that their evidence would not assist their case. This must be considered before an adverse inference is drawn against an accused person because of their failure to testify.\textsuperscript{50} Obviously if an accused person fails to testify due to reasons other than that their evidence would not have assisted their case, their silence cannot logically found an adverse inference.

The above two preconditions on the use of an accused's silence at trial against them are the only ones identified by Brennan and Toohey JJ, and it is submitted are the only preconditions appropriate. Mason CJ, Deane and Dawson JJ accept the above two preconditions also, but appear to have added a third precondition that there must be facts peculiarly within the accused's knowledge.\textsuperscript{51} Whilst it is undoubtedly true that the silence of an accused will be of greater weight where it appears that he or she alone is able to explain the true facts surrounding a relevant issue,\textsuperscript{52} there is no logical requirement for this to be true before an adverse inference can be drawn. It is submitted this third factor goes only to the weight of the adverse inference, and is not necessary before the inference can be drawn. Similar to this factor is whether the truth is not easily ascertainable by the prosecution, but probably well known to the accused.\textsuperscript{53} These are matters involved in the weighing of evidence and inferences arising from evidence, but do not go to whether an accused's silence at trial can be used against them at all.

(d) But what about the right to silence?

The question that naturally arises, and was a central issue in \emph{Weissensteiner}, is whether the second type of use of an accused's silence at trial, namely in evaluating other evidence or inferences arising from other evidence, improperly infringes the right to silence. Counsel for the appellant in \emph{Weissensteiner} attempted to draw parallels between an accused's pre-trial right to silence, as vigorously defended by the High Court in \emph{Petty}, and an accused's right to silence at trial. As was earlier discussed, the High Court in \emph{Petty} held that the reasoning in \emph{Petty} was distinguishable with respect to an accused's pre-trial right to silence. Counsel for the appellant in \emph{Weissensteiner} attempted to draw parallels between an accused's pre-trial right to silence, as vigorously defended by the High Court in \emph{Petty}, and an accused's right to silence at trial. As was earlier discussed, the High Court in \emph{Petty} held that an accused's pre-trial silence could not be used to evaluate evidence given at trial. However, all seven justices of the High Court in \emph{Weissensteiner} held that the reasoning in \emph{Petty} was distinguishable with respect to an accused's silence at trial.

Mason CJ, Deane and Dawson JJ distinguished \emph{Petty} simply on the basis that it involved the exercise of the pre-trial right to silence, as opposed to its exercise at trial.\textsuperscript{54} It is implicit from their judgment that they believed different considerations applied regarding the right to silence at trial, such that it was permissible in limited circumstances as previously discussed to allow an accused's silence to be used against them. They stated an accused should consider this possible consequence in deciding whether or not to exercise their right to silence at trial. In their opinion, 'it is not to deny the right; it is merely to recognise

\textsuperscript{49} \textit{Weissensteiner v The Queen} (1993) 178 CLR 217, 229.
\textsuperscript{50} Id 228 per Mason CJ, Deane and Dawson JJ.
\textsuperscript{51} \textit{Ibid}
\textsuperscript{52} \textit{Neilan} (1991) 52 A Crim R 303, 311.
\textsuperscript{53} \textit{May v O'Sullivan} (1955) 92 CLR 654, 658.
\textsuperscript{54} \textit{Weissensteiner v The Queen} (1993) 178 CLR 217, 228.
that the jury cannot, and cannot be required to, shut their eyes to the consequences of exercising the right. 55 Thus they recognise that the exercise by an accused of their right to silence at trial may have a cost, but believe the cost is justified if the silence has probative evidentiary weight. 56

Brennan and Toohey JJ distinguish Petty even more convincingly. They recognise that the right to silence is not just one right, but has a number of different aspects with different origins and purposes as previously discussed. 57 Therefore the rationale behind, and protection given to, the pre-trial right of silence does not automatically apply to another aspect of that right, namely silence at trial. For this reason there is no logical inconsistency between the different approaches taken to the right to silence in Petty and Weissensteiner, as has been suggested by some. 58 As Brennan and Toohey JJ recognise, Petty involved the responses of a suspect to inquiries by police, not the non-exercise by an accused of their statutory right to testify in their own defence. As they say: 59

The former cases [including Petty] relate to the responses of a suspect to the performance of an executive function in circumstances where the suspect's rights are not immediately amenable to judicial protection; the present case relates to the course of proceedings directly under judicial control.

It is submitted that this factor, which is also implicit in the judgment of Mason CJ, Deane and Dawson JJ, is the basis on which the reasoning in Petty is distinguishable from that in Weissensteiner. The High Court's lack of trust in the police and other persons in authority, to ensure fairness to a suspect or accused person, resulted in strong protection of the pre-trial right to silence in Petty. However, different considerations apply when the prosecution has proved that an accused has a case to answer, and a judicial officer is presiding at the trial to ensure fairness to the accused. In these circumstances, the use of an accused's silence at their trial to assist in the evaluation of other evidence or inferences arising from other evidence is not unfair, provided their silence has logical evidentiary significance.

VI. Comments on an accused's silence at trial
(a) Who may comment?

The legislation in Australia which makes an accused person a competent but not compellable witness, also generally makes provision about who is permitted to comment on an accused's failure to give evidence. Different provisions exist in the various State, Territory, and Commonwealth legislation. In Victoria 60 and the Northern Territory 61 both the prosecution and the trial judge are prohibited from commenting upon an accused's failure to testify. However this does not mean that an accused's silence at trial has no relevance, only that it cannot be commented on. The jury, judge (if the trial is by judge alone), or appeal court may still take an accused's silence at trial into account in the way permitted by the High Court in Weissensteiner. 62

55 Id 229.
56 Compare this approach with the United States' approach in Griffin v California (1965) 380 US 609. There the majority of the US Supreme Court held that any comment by a trial judge on an accused's exercise of their right to silence at trial was unconstitutional and impermissible if it imposed a cost on the accused.
57 Weissensteiner v The Queen (1993) 178 CLR 217, 231. See also R v Director of Serious Fraud Office; Ex parte Smith [1993] AC 1, 30-31 per Lord Mustill.
60 Crimes Act 1958 (Vic), s 399(3).
61 Evidence Act 1939 (NT), s 9(3).
In Western Australia, Tasmania, South Australia, New South Wales and the Australian Capital Territory only the prosecution is prohibited from commenting on an accused's failure to testify, and the trial judge may make whatever comments are appropriate in the circumstances. A similar provision is contained in the new Commonwealth Evidence Act 1995. However that provision explicitly provides that a trial judge in commenting on a defendant's silence, 'must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.' The intention behind this provision was to restate the common law practice regarding comments by trial judges, confirmed by the majority in Weissensteiner. The Commonwealth provision does not allow silence at trial to be used as evidence, or to be used to infer guilt, but does allow silence to be used in the evaluation of other evidence or inferences arising from other evidence. Finally, in Queensland both the prosecution and the trial judge may comment on an accused's failure to testify at their trial.

(b) When are comments on an accused's silence at trial appropriate?

In Queensland, Western Australia, Tasmania, South Australia, New South Wales, the Australian Capital Territory and the Federal Courts, where comments are not prohibited, the question arises as to when comments to a jury on an accused's silence at trial are appropriate. It is a misdirection for a trial judge to instruct a jury to use an accused's silence in circumstances where it is not appropriate, and usually this is sufficient to invalidate a conviction. Any comments must be in terms of the legally permissible inferences that may rationally and logically be drawn from an accused's failure to testify.

As previously discussed, the preconditions to an accused's silence at trial being used against them, and comments being made thereon, are firstly that the prosecution must establish there is a case to answer, and secondly it must be reasonable in the circumstances to expect that, if the truth were consistent with innocence, a denial, explanation or answer would be forthcoming. Whether or not this second precondition is satisfied, and comments are appropriate, depends on the particular facts of the case, some examples of which appear below.

Firstly, if it is apparent there are other reasons for an accused not testifying, other than that their evidence would not have assisted their case, then an accused's silence is of no probative value at all and no comment should be made. Thus in a case where an accused is suffering from a mental abnormality or other disability preventing them from giving evidence no comment should ordinarily be made. Where an accused has given an explanation before trial and that explanation is in evidence, their failure to testify will

63 Evidence Act 1906 (WA), s 8(1)(c).
64 Evidence Act 1910 (Tas), s 85(8).
65 Evidence Act 1929 (SA), s 18(1)(II).
66 Evidence Act 1995 (NSW), s 20.
67 Evidence Act 1995 (Cth), s 20(2).
68 Evidence Act 1995 (Cth), s 20(2).
69 Ibid.
71 It is worth noting that the majority's reasoning and approach in Weissensteiner (1993) 178 CLR 217, was the same as that approved by the Australian Law Reform Commission in 1987 and now legislated for by the Commonwealth Parliament in the Evidence Act 1995 (Cth).
usually be of less significance, and a comment may not be appropriate. Similarly, where the defence has adequately presented their case through evidence given by witnesses other than the accused, it may not be appropriate to make a comment. If an accused does have a case to answer, but the prosecution case is still a weak one, then an accused may be justified in remaining silent and relying on the burden of proof cast on the prosecution. In these cases no comment should be made.

Examples of when a comment should be made include cases where an accused does not dispute the facts proved, but alleges an innocent explanation for them. Here the failure to give evidence about the innocent explanation justifies a strong comment being made. Similarly in a case where the mental state of an accused (that is, intention, recklessness, or knowledge) is in issue, the accused's failure to give evidence may be taken into account by the jury to more safely draw an adverse inference from the evidence about the accused's state of mind.

Another example is if it appears that an accused alone is able to explain the true facts, then their silence is of considerable weight, and a strong comment is justified. Whether or not an accused is represented by counsel may also be relevant in deciding whether it is appropriate to comment on an accused's silence. An unrepresented accused may not understand the strength of the case against them, or the effect of their not giving evidence. It appears however that an accused would have to be extremely deficient in understanding before this becomes relevant, and in the ordinary case the fact an accused is unrepresented will not be important. Finally, no comment on an accused's silence should be made unless there are relevant facts which may be perceived to be within the knowledge of the accused. Thus when an accused's defence is a total denial of all involvement in a crime, and the prosecution case does not clearly establish their involvement to such an extent as to call for an innocent explanation if one exists, no comment should be made.

(c) Circumstantial evidence cases

It may be said that the most familiar example of when an accused's silence at trial has been used against them is in cases proved by circumstantial evidence, particularly where it may reasonably be inferred that the truth would be well known to the accused, but they decline to explain or place a different complexion upon the prosecution evidence. In circumstantial evidence cases, provided the two preconditions as previously discussed are met, an accused's silence at trial allows an inference of guilt from the facts which are proven to be more safely drawn. This was precisely the situation in Weissensteiner.

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75 R S O'Regan 'Adverse Inferences from Failure of An Accused Person to Testify' [1965] Criminal Law Review 711, 716.
77 Ibid. See also R v Bathurst [1968] 2 QB 99.
80 R v Sparrow [1973] 2 All ER 129. However a contrary view was expressed in R v Hocking [1988] 1 Qd R 582, 593 and Kanaveilomani (1994) 72 A Crim R 492, 509. This was based on the belief that an accused is not the best person who could give evidence of their state of mind, and that an accused's state of mind is not peculiarly within their own knowledge. These propositions and the reasoning in these two cases is difficult to accept.
83 See Karounos v R (1995) 77 A Crim R 479 where the South Australian Court of Criminal Appeal did not attribute any significance to the fact an accused was unrepresented in a long and complex case.
(d) Direct evidence cases

The use of an accused’s silence at trial in a prosecution case proved by direct evidence seems to be more controversial. Before Weissensteiner there were a number of cases in which the Queensland Court of Criminal Appeal held that no comment to the jury on an accused’s silence was appropriate in direct evidence cases.86 It is submitted however that there is no logical reason to distinguish between using an accused’s silence at trial against them depending on whether the case involves direct or circumstantial evidence. The use of, and comment upon, an accused’s silence at trial in a case proved by direct evidence, has now been accepted by majority in Weissensteiner.87 The High Court approved of the following comments of Windeyer J in Bridge v The Queen.88

A failure to offer an explanation does not of itself prove anything. Nor does it, in any strict sense, corroborate other evidence. But the failure of an accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true. That is to say a failure to deny or explain may make evidence more convincing, but it does not supply its deficiencies.

Mason CJ, Deane and Dawson explicitly support this reasoning and go on to say, ‘doubts about the reliability of witnesses . . . may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it.’89 The accused’s silence at trial is still only used to evaluate other evidence led at trial, and is not evidence itself and is no admission of guilt, or something from which a consciousness of guilt can be inferred. Additionally, an accused’s silence can only be used, and comments on the silence made, if the two preconditions previously discussed have been satisfied, as otherwise the silence is of no probative value.

The use of an accused’s silence at trial in evaluating direct evidence given at their trial has been accepted in jurisdictions other than Queensland.90 Since Weissensteiner the Queensland Court of Appeal has re-examined the use of, and comments on, an accused’s silence at trial in direct evidence cases. In R v Van Wyk the Court of Appeal unanimously held that comments on an accused’s silence at trial are as appropriate in direct evidence cases, as in circumstantial evidence cases, provided the two preconditions previously discussed are met such that the silence is capable of assisting the jury in the evaluation of the evidence before it.91 It is submitted this decision was plainly correct.

Unfortunately a differently constituted Court of Appeal, by majority, took a contrary view in the later case of R v Kanaveilomani.92 The reluctance to allow comments on an accused’s silence at trial, in terms of its use in evaluating other direct evidence, stems from fears that this could have the practical effect of forcing an accused to give evidence,93 that it might divert a jury from properly scrutinising the evidence given,94 and that it might induce the jury to overlook the onus of proof which remains on the prosecution.95 But

86 R v Whinfield (Unreported, Queensland Court of Criminal Appeal, 16 September 1986); R v Fellowes [1987] 2 Qd R 606; R v Hocking [1988] 1 Qd R 582.
87 (1993) 178 CLR 217, 227 per Mason CJ, Deane and Dawson JJ, 235 per Brennan and Toohey JJ.
88 (1964) 118 CLR 600, 615.
89 Weissensteiner v The Queen (1993) 178 CLR 217, 227. See also 235-236 per Brennan and Toohey JJ where it is implicit, if not explicit, that they support the use of silence to evaluate a prosecution case proved by direct evidence.
91 Unreported, Queensland Court of Appeal, 16 December 1993.
93 Id 509 per Lee J.
94 Ibid.
95 Id 497 per Macrossan CJ.
these considerations apply equally to circumstantial evidence cases, so they cannot justify a contrary result with respect to direct evidence cases.

It is submitted that accused persons are given an unwarranted advantage if their silence cannot be commented on to the jury, even though it is logically relevant in evaluating the evidence that has been given. A majority of the Queensland Court of Appeal has now reverted to the view adopted in *R v Van Wyk* in the most recent case of *R v Demeter*, and held that comments may be made on an accused’s silence in direct evidence cases if the silence is logically probative in evaluating the evidence. It is submitted this is correct and the previous distinction drawn between circumstantial and direct evidence cases should be ignored.

VII. Conclusion

When *Weissensteiner* was before the Queensland Court of Criminal Appeal, McPherson JA noted that in practice, comments on the use a jury may make of an accused’s silence were relatively uncommon in Queensland. This has also been true across Australia generally. It is submitted that the practice has been uncommon because of trial judges being too cautious and tending not to comment on an accused’s silence at trial even when it was appropriate. If an accused’s silence at trial does have probative value, in that it may assist a jury in evaluating other evidence or inferences which arise from other evidence, then comments on the use the jury may make of the silence should be given, in those jurisdictions where they are permitted. A criminal trial is not a handicap race — if comments that are favourable to the prosecution are appropriate, they should be made.

The majority of the High Court in *Weissensteiner* have confirmed the significance of an accused’s silence at trial, and identified when and what comments are appropriate on that silence. It is likely that in the majority of both direct and circumstantial evidences cases in which an accused does not give evidence, comments on the significance of this will be appropriate. With the High Court’s guiding reasons and stamp of approval for this practice, it is submitted that it is likely comments on an accused’s silence at trial will become more common in the future.

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