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Class 1 – Accusatorial Justice

Readings – Moodle (4-7, 10-14, 15-17, 19-21)

Right to Fair Trial

- Common law trial – process which prosecution seeks to prove guilt BRD, and in various ways the presumption of innocence manifests
- For defence, gaps in prosecution case are focal points
 - o No ultimate burden of proof but focus to raise reasonable doubt – focus on procedural truth (not objective truth) acknowledges that truth-seeking is an objective, but not a sole objective
- **Pearse v Pearse** – ‘[t]he discovery and vindication and establishment of truth are main purposes ... of the existence of Courts of Justice’
- Truth seeking is not without boundaries – truth is to be pursued with moderation, fairness and by fair means
- With adversarialism, the checks and balances created by parties’ self-interest to test and challenge opposing evidence works well if power imbalances are appropriately moderated
 - o Biggest threat is beguiling attraction for one (or both) of the ‘two prejudiced searchers’ being drawn into a battle vortex of win-at-all-costs
 - o Judges expected to ensure rules of process and evidence are followed and may seek clarification of witness testimony through questions, but **cannot raise new issues or cross-examine witnesses**
- In AUS – civil litigation is often ‘managed’ by a judicial officer from early on, issues are more likely to be isolated and narrowed and hearings are likely to be akin to the episodic classic inquisitorial process than the ‘main event’ common law tradition

Human Rights

- **Presumption of innocence** – applies unless and until a person is convicted
- **Rights to privacy** – no one can just march into a suspect’s house to search for evidence;
- **Rights to Silence** – no one can demand a suspect explain his or her whereabouts, motivations or feelings
- **Rights to liberty** – no one can detain or lock up a suspect because that is more convenient than allowing them to remain at large.
 - o **Privacy, Silence and Liberty are not absolute rights**
- The evolved common law jurisprudence of the right to a fair trial differs in shape and lacks the Clarity of Article 14 ICCPR
 - o 21st Century AUS very slowly made progress towards embracing legislated HR
- Article 14 ICCPR Incorporation in AUS – right to a fair trial
 - o Accused has right to know charges with sufficiency particularity to meet those charges
 - o Courts have an obligation to ensure that a fair trial is not impeded by the charging practices of the prosecution (for example, with inappropriate multiple or repetitive charges)
 - o Common law provides defendants with disclosure rights of the prosecution case
 - o No CL right to speedy trial but if delay prevents fairness it will be stayed
 - o Right to judge that acts impartially, with detachment and appropriately, who assists unrepresented litigants (who are not otherwise entitled to legal representation); and who directs the jury appropriately, including with respect to assessing certain evidence, particularly unreliable evidence
 - o Prosecution must act fairly in court, including putting the prosecution case fully
 - o Where accused to be tried on serious offence, court will stay proceedings unless there is legal representation
 - o Accused has right to interpreter if needed
 - o in exceptional circumstances, a court will quash a conviction if defence counsel is flagrantly incompetent

- Article 14 and common law share fact that right to a fair trial pivots upon the obligation to **be fair to the accused**
 - o Raises questions regarding witnesses and victims of crime – suffice to say that traditionally they have not been the beneficiary of procedural protections
 - o However recent movement to recognise that community standards require greater respect afforded to witnesses treatment in court

Presuming innocence, the right to silence and accusatorial trials

- 2 core elements of the criminal justice system existing by virtue of the balance struck between the power of the state to prosecute and the position of the individual who stands accused – **Lee [2014]**
- Aspects of accusatorial trials
 - o **The Fundamental Principle** – “that the accusatorial nature of a criminal trial means that, under the common law, *the onus of proof is upon the prosecution to prove its case*” (CFMEU Case [2015] HCA 21, [36])
 - o **Companion Rule** – an accused person cannot be required to testify
- Major domain where accusatorial justice principles have been analysed involve criminal trials where the jury hear from a presiding judge or a prosecutor that an accused has an obligation that is in fact in breach of accusatorial principles
 - o *That the accused, in the police station, acted on legal advice and refused to answer police questions:*
 - In **Hogg** – White JA held no adverse inference could be drawn from the appellant’s refusal to answer police questions as the Crown did not cross-examine Hogg on his explanation (legal advice) for not answering police questions.
 - o *The fact that the accused person failed to testify:*
 - In **Azzopardi** – the trial judge was held to have crossed the line into inappropriate comment that failed to acknowledge the accused’s right to remain silent and to be presumed innocent when he told the jury that they might consider ‘the fact that the accused did not deny or contradict evidence about matters which were within his personal knowledge.
 - o *Suggesting to the jury to scrutinise the accused’s testimony closely:*
 - In **Robinson** – the trial judge was ruled to have breached the presumption of innocence when he suggested to jurors that they ‘might think that the greater the interest the more carefully you should scrutinise a witness’s evidence’, followed up by a direct reference to examine closely Robinson’s evidence:
 - o *Suggesting the accused would do anything you have to avoid conviction*
 - In **Wise v The Queen** – defendant’s explanation for what motivated his statement to police (fear of the Rebels Motorcycle Gang - “what would happen if I did speak”) and his inconsistent evidence in court where he was “on trial fighting – fighting for my life, really” was relied upon by the prosecutor in closing to the jury,
 - o *Suggesting the accused failed to offer an explanation for the prosecution allegations:*
 - In **Palmer** – HC held that the following cross-examination by the prosecution distracted from the jury’s fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt. It shifted the process from the prosecution bearing the burden of proof to a focus on the accused.
 - o *Suggesting the accused failing to call a witness:*
 - in **Dyers v The Queen** – where the prosecutor said to the jury, ‘My friends haven’t called Wendy Tinkler ... You may think that whoever Wendy is, that person cannot assist the defence case.’ The High Court held this breached accusatorial justice principles because (Gaudron and Hayne JJ (Kirby J and

Callinan J agreeing) “[n]ot only is the accused not bound to give evidence, it is for the prosecution to prove its case beyond reasonable doubt.”

- Second broad line of cases arise because the ideology of a commission inquiry, an inquisitorial-style process, is an investigative fact-finding body and as such clashes with the accusatorial ideology because a criminal defendant is forced to answer questions that traverse criminal charges awaiting trial
 - **X7 v Australian Crime Commission (ACC)**
 - X7, who had been charged and was awaiting trial on drug-related conspiracy offences, sought a declaration and injunctive relief claiming that the exercise of the Commission’s compulsory examination powers created an impermissible interference with his constitutional right to a fair trial under Chapter III, including s 80, of the Constitution. The High Court accepted the core of X7’s claims
 - ‘[n]o longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according *only* to the strength of the prosecution’s case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination
 - **Lee (No 1)**
 - Facing firearm and drug-related conspiracy charges
 - Lees resisted orders under the *Criminal Assets Recovery Act 1990* (NSW) made on behalf of the NSWCC, issued from the NSW Supreme Court required the Lees to be compulsorily examined on their financial affairs on oath before a Supreme Court Registrar.
 - The Lees unsuccessfully relied on **X7 v Australian Crime Commission** in their appeal to the High Court in **Lee (No 1)** – court rather considered different legislation from the X7 context – state rather than federal and personal examinations that were to be undertaken in the Supreme Court of New South Wales
 - Majority – the Court appeared to draw back from the breadth of their X7 judgment – held the Supreme Court powers to prevent unfairness were sufficient to protect the Lees’ accusatorial rights with Crennan J noting (at [151]) that the Supreme Court’s powers to control the examination could “prevent the prosecution from obtaining an unfair forensic advantage.”
 - Gageler and Keane JJ added (at [323]) that the impact of the compulsory examination should be assessed as a matter of “practical reality” and so while the ‘legal representatives would, of course, be prevented from setting up an affirmative case inconsistent with the evidence ... they would not be prevented from ensuring that the prosecution is put to proof or from arguing that the evidence as a whole does not prove guilt’.
 - Minority – (Hayne, Kiefel and Bell JJ) found that the legislature authorising the Lee’s compulsory examination had failed to express by words of clear intentment the abrogation or restriction of a fundamental right. Kiefel J added (at [212]) that to describe the effects of an examination as the loss of some forensic advantage in an accused person “tends to trivialise both them and the fundamental principle.”
 - **Lee (No 2)**

- successfully appealed their convictions producing evidence revealing that the Commission had given to the prosecution team preparing to run the Lees' criminal trial the transcript (and associated compulsorily produced documents) from the compulsory NSWCC examination
- Unanimously held that the disclosure amounted to a removal of the privilege against self-incrimination and it "affected this criminal trial in a fundamental respect, because it altered the position of the prosecution vis-à-vis the accused"
- **Strickland (a pseudonym) et al v CDPP and ors**
 - HC restored primary judge order permanently staying proceedings on the basis that they constituted an abuse of process where, after refusing to answer police questions the three appellants had been compelled to divulge information during ACC examinations
 - Held that the special investigation of the appellants conducted by the ACC had been driven by the AFP for the purposes of its own criminal investigations – held unanimously that the ACC had acted unlawfully
 - Prosecution evidence against the appellants came directly from information obtained from the examinations. The majority of the Court based the stay order on the view that allowing the prosecution to proceed would bring the administration of justice into disrepute

The Right to Silence in Court

- Right to testify was optional and until the early 1990s an accused had the additional choice of making an unsworn (or dock) statement, preventing cross-examination – Dock statement abolished – Accused must choose between silence or giving sworn evidence (and the likelihood of cross-examination).
- Even accused who remain silent are not immune from discrediting evidence where their own prior representation is admitted into evidence
- Kirby J in **Dyers** – suggest that loss of dock statement has meant a reversion to the imbalance seen in 19th century where accused was not permitted to give sworn evidence
 - "In a sense, it has returned the criminal trial, in cases where the accused does not give evidence, to a position similar to that which pertained when the accused was incompetent and not compellable to give evidence on his own behalf. The trial, in such cases, is then starkly presented in its full accusatorial (ie non-adversarial) character. The prosecution is put to the proof. It is important in such circumstances that the reasoning appropriate to an adversarial civil trial should not undermine the accusatorial elements of a criminal trial. Otherwise the cards will be unduly stacked against the accused as the mind of the jury (or judge) is diverted to questions about a failure by the accused to give, or call, particular evidence."
- An accused is entitled to maintain their right to silence in court – however murkiness remains
 - **Weissensteiner** – where an accused is silent '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 [only] within the knowledge of the accused'
- In light of High Court cases repeatedly enforcing the fundamental principle and the companion rule, even though this court has not been over-ruled **Weissensteiner**, it seems there is very narrow scope for applying the inference suggested by the trial judge in Weissensteiner's trial.

Failure to testify and impermissible comment

- **S 17 UEA** – an accused is not even *competent* to testify as a witness for the prosecution. Nor can an 'associate defendant' (essentially a defendant charged in connection with facts giving rise to the offences charged, but not yet finalised) be compelled to testify for or against a defendant, irrespective of whether they are proceeded against jointly or separately.
 - **Kirk v Industrial Court (NSW)**

- By requiring a defendant to testify for the prosecution - is a substantial departure from the rules of evidence.
- Heydon J – observed that the error that occurred in the prosecutor calling Mr Kirk as its own witness was an error by oversight, not intent.
- Nevertheless, a jurisdictional error occurred

All UEA jurisdictions, excepting Victoria

- **S 20 UEA** – limits the comments that can be made during the trial with respect to an accused who exercises their right to silence – seeks to prevent comment that suggests the accused's failure to testify was because the accused was guilty, or believed that they were.
 - Expressly only applies to indictable offences
 - distinguishes between three quite different perspectives – comments on an accused's silence by a *co-accused*, a *judge* and a *prosecutor*:
 - the co-accused has no fetters on their comments about another accused's silence in court;
 - the judge can comment on an accused's failure to give evidence, but cannot suggest that such failure implies guilt, or belief of guilt, on the accused's part (**UEA, s 20(2)**);
 - the prosecutor cannot comment at all on an accused's silence.
 - **s 20(3) UEA**
 - Provision is made with respect to comment regarding the lack of testimony from a near relative (spouse, de facto partner, parent or child) of the accused
- With respect to a co-accused, the majority in **Azzopardi**
 - That a co-accused may [wish to suggest silence is suggestive of guilt] ... is hardly surprising. If only one of two accused persons gives evidence at their joint trial, it is inevitable that the accused who has given evidence will want to urge the jury to contrast that with the course taken by the other accused. It is well-nigh inevitable that in urging that the evidence given by the accused demonstrates innocence, the suggestion will be made, explicitly or implicitly, that the co-accused stayed silent because, unlike the accused who did give evidence, he or she was guilty.
 - If this occurs, inevitably a judge will then address, by way of comment, matters raised by the co-accused if they offend the terms and spirit of s 20 – **UEA s 20(5)**

The accused's post offence conduct – flight, threats, concealment and lies

- **Zoneff:**
 - 'Lies, or suggested lies, are no strangers to criminal trials. The very nature of such proceedings makes it common, particularly where the accused gives evidence, that claims and counterclaims about lies will arise for the jury's consideration. This has long been so.'
- A lie may amount to an admission against interest by revealing what is described in the law as consciousness of guilt, but only if it is deliberate, a clear lie that is concerned with a material issue and which can constitute evidence of consciousness of guilt only if the jury is satisfied that it was told because the accused knew the truth would implicate them in the commission of the offence
- **Zoneff:**
 - Explaining the direction a jury should receive if evidence of an accused's lie is in evidence:
 - You have heard a lot of questions, which attribute lies to the accused. You will make up your own mind about whether he was telling lies and if he was, whether he was doing so deliberately. It is for you to decide what significance those suggested lies have in relation to the issues in the case but I give you this warning: ***"do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt"*** – **Edwards**

- **R v Cook**
 - Where the purpose of such evidence is to show consciousness of guilt, evidence of flight from the scene of the crime, of concealing potentially inculpatory matters, or of threatening someone who might reveal such matters engages the same legal principles, requiring a judicial direction that cautions the jury in finding of a consciousness of guilt: namely that '[t]he flight (or lie) may only be used as evidence of a consciousness of guilt of the offence charged where the jury is satisfied that it points unequivocally to consciousness of guilt of that offence and not some other offence or discreditable conduct
- **Judge should direct the jury to appreciate that this conduct might be motivated by panic, to protect someone else, or from fear of unjust accusation, or of a shameful revelation (but not the crime charged) – A direction should be given whenever there is a real danger that the jury might treat potentially inculpatory post-offence conduct as conclusion of guilt without considering innocent explanations**
- **R v Baden-Clay**
 - Prosecution claimed Baden-Clay murdered his wife in a domestic violence scenario, the jury returned a guilty verdict.
 - On HC appeal, evidence of Baden-Clay's post-offence concealment and lies played a significant role in the Court returning the verdict to murder – Baden-Clay had falsely denied his ongoing affair, had checked with his girlfriend as to whether she had revealed their affair to police, and warned her to offence or discreditable conduct'. 'lie low'.
 - According to the High Court, these acts 'were all capable of being regarded by the jury as evidencing a strong anxiety to conceal from police the existence and true nature of his affair with Ms McHugh.
 - This anxiety could reasonably be seen as indicative that, in his mind, the affair and the killing were inter-related, and that the killing was not an unintended, tragic death of his wife, but an intentional killing'
 - The court pointed out at [74] that there 'may be cases where an accused goes to such lengths to conceal the death or to distance himself or herself from it as to provide a basis on which the jury might conclude that the accused had committed an extremely serious crime and so warrant a conclusion beyond reasonable doubt as to the responsibility of the accused for the death and the concurrent existence in the accused of the intent necessary for murder' leading to the conclusion at [76] that '**[i]t was open to the jury ... to regard the lengths to which the respondent went to conceal his wife's body and to conceal his part in her demise as beyond what was likely, as a matter of human experience, to have been engendered by a consciousness of having unintentionally killed his wife**'.
- **Lane**
 - Trial for the murder of a baby Tegan, that she had secretly given birth to in 1996. Tegan's whereabouts were unknown. It became clear that Keli Lane had also given birth, secretly to two babies in 1995 and 1999
 - When settling the adoption arrangements for the last-born baby, adoption agency personnel became aware of the 1996 birth – accused lied on various occasions when asked to explain the baby's absence – explained Tegan lived with a "family in Perth" with no contact
 - Trial judge refused to give *Zonnet* direction on the grounds that the prosecution case that these were clear lies was 'bootstrap argument upon bootstrap argument
 - CCA – accepted that there may be an innocent explanation for Lane's statements, even if they were lies.
 - For example, with the 'Perth couple lie', it may be that Lane was seeking to discourage any delay in the adoption of her newborn third child but the court concluded that there was evidence to enable the jury to conclude beyond reasonable doubt that these lies were potentially evidence of consciousness of guilt (and not just limited to a matter relevant to Lane's credibility).

- Thus, the *Zoneff* direction could be given by the trial judge.

In Class Slides – Sections 17 & 20

UEA s 17

- (1) This section applies only in a criminal proceeding.
- (2) A defendant is **not competent** to give evidence as a witness for the prosecution.
- (3) An associated defendant is not compellable to give evidence for or against a defendant in a criminal proceeding, unless the associated defendant is being tried separately from the defendant.
- (4) If a witness is an associated defendant who is being tried jointly with the defendant in the proceeding, the court is to satisfy itself (if there is a jury, in the jury's absence) that the witness is aware of the effect of subsection (3).
- **Associated defendant is defined** in Part 1 the Dictionary.
 - o associated defendant, in relation to a defendant in a criminal proceeding, means a person against whom a prosecution has been instituted, but not yet completed or terminated, for—
 - o (a) an offence that arose in relation to the same events as those in relation to which the offence for which the defendant is being prosecuted arose, or
 - o (b) an offence that relates to or is connected with the offence for which the defendant is being prosecuted.

UEA s 20

- (1) This section applies only in a criminal proceeding for an indictable offence.
- (2) The judge or any party (other than the prosecutor) may comment on a failure of the defendant to give evidence. However, unless the comment is made by another defendant in the proceeding, the comment 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.
- (3) The judge or any party (other than the prosecutor) may comment on a failure to give evidence by a person who, at the time of the failure, was—
 - o (a) the defendant's spouse or de facto partner, or
 - o (b) a parent or child of the defendant.
- (4) However, unless the comment is made by another defendant in the proceeding, a comment of a kind referred to in subsection (3) must not suggest that the spouse, de facto partner, parent or child failed to give evidence because—
 - o (a) the defendant was guilty of the offence concerned, or
 - o (b) the spouse, de facto partner, parent or child believed that the defendant was guilty of the offence concerned.
- (5) If—
 - o (a) 2 or more persons are being tried together for an indictable offence, and
 - o (b) comment is made by any of those persons on the failure of any of those persons or of the spouse or de facto partner, or a parent or child, of any of those persons to give evidence,
 the judge may, in addition to commenting on the failure to give evidence, comment on any comment of a kind referred to in paragraph (b).

Cases before and after s 20

- **Before s20 - *Weissensteiner v R* (1993) 178 CLR 217**
 - o In certain exceptional circumstances adverse inferences can be drawn from the silence of an accused. The exceptional circumstances are basically limited to situations where an accused fails to provide an explanation to a strong circumstantial case where only they can provide an explanation.
- **After s20 - *Dyers v The Queen* (2002) 210 CLR 285**
 - o The TJ said to the jury: "you are not entitled to speculate on what the witness might have said if the witness had been called". He also said that they were "entitled to draw