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PRINCIPLES

INTRODUCTION

Our criminal system is adversarial and accusatorial

Presumption of innocence – must be observed both in court processes AND in pre-trial processes. E.g. of pre-trial rights are: rights to privacy, right to silence, right to liberty

Kamisar (1965) describes police stations as the ‘gatehouse’ to the courtroom, ‘mansion’ or ‘temple’ where defendant’s rights are respected and justice is dispensed

Justice Gaudron in *Dietrich*: ‘the perfect investigation is impossible’

Australian Crime Commission is inquisitorial. However, Hayne and Bell JJ state that the Commission compels the defendant to give information which prejudices a defence to pending charges.

Kiefel J in *Lee v NSW Crime Commission (Lee No 1)* [2013] HCA 39:

- Fundamentally the system is accusatorial in nature – not inquisitive.
- The onus of proof in proving guilt rests solely upon the Crown, and the prosecution cannot compel the accused to assist it. (*Sorby v Cth*)
- The role of the jury in a trial is to establish consensus on whether the Crown has established its case beyond reasonable doubt (‘BRD’), indeed s 80 of the Const enshrines this position (following *R v Snow*)
- Suspects are also entitled to the right to silence – that is, the right not to incriminate themselves.
- The notion of a ‘fair trial’ is inherently difficult to define, however it largely could be said to include – the making available of all relevant evidence, so as to avoid surprise and make a comment upon it – NB: this cuts both ways, and the defence is obliged to bring forth any relevant evidence, alibi etc so that the Prosecution can comment.

The relevant provisions in the Evidence Act that protect these principles are:

- S 17(2): an accused person is not competent to give evidence as a witness for the prosecution (protecting the right to silence)
- S 139(1): evidence of a statement made by a person under arrest is taken to have been obtained improperly where the person was not cautioned
- S 141(1): provides that “the court is not to find the case of the prosecution proved unless it is satisfied that it has been *proved beyond reasonable doubt*”

AFP v Zhao [2015] HCA 5: Courts will not grant a stay of civil proceedings merely because related charges have been brought against a person and criminal proceedings are pending. To grant a stay, it must be apparent that the person whose property is in question is at risk of prejudice in the conduct of his/her defence in the criminal trial.

CFMEU v Boral Resources: A defendant cannot be required to testify.

Lee (No.1): The privilege against self-incrimination is reflects the long-standing antipathy of the common law to compulsory interrogations about criminal conduct – one which is also recognized in numerous international conventions/instruments.

SCREENING

In NSW, the standard for committing to trial is whether ‘there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence’ (s 64 of the *Criminal Procedure Act*)

CRIMINAL PLEADINGS

(*International Covenant on Civil and Political Rights*, Article 14(3)): In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him...'

PROSECUTORS PLEADINGS

This takes the form of a Court Appearance Notice. They define the factual and legal elements of the case (*Goldsmith v Sandilands*). Importantly though, they **create the boundaries that apply to the admissibility of evidence**.

AG (NSW) v Built NSW: Where the person authorized to commence proceedings mistakenly delegates their power.

AG (NSW) v Built NSW: Where they are not plead in accordance with the specific offence as enshrined by the statute.

Johnson v Miller; John L v AG (NSW); and s175(3) of the *CPA*): The “sufficiency of pleadings” as laid out by s11 of the *CPA* includes not just the legal elements of the statute but also the factual elements.

- The time
- The place
- The manner in which the alleged offence occurred.

(*Built NSW*): Pleading must have sufficient ‘clarity’ such that the accused knows the particular offence that they are being called to answer for.

Pleadings will be insufficiently clear (or ‘duplicitous’) where **the evidence reveals multiple offences in a charge**.

- Where duplicity is revealed in a pleading, the Crown must elect to amend the charge or limit the evidence appropriately.

DEFENDANTS PLEADINGS

Defendant’s pleadings in criminal cases are: guilty, not guilty, autrefois acquit, autrefois convict, pardon or demurrer.

Barbaro [2014] HCA 2: Even if a guilty plea has been agreed upon, the prosecution is not required, and is not permitted, to make such a statement of bounds to a sentencing judge.

DOUBLE JEOPARDY

“No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country” (*International Covenant on Civil and Political Rights*, Article 14).

The rule against double jeopardy is applied to prosecution, conviction and punishment

Reasons for the rule against double jeopardy (*Island Maritime Limited v Filipowski* [2006] HCA):

- It is in society’s interest that there be an end to litigation
- What is adjudicated is taken as the truth
- No one should twice be vexed for one and the same cause

DISCLOSURES

DPP DISCRETION

The DPP as the executive office that launches prosecutions for indictable offences on behalf of the Crown must use its discretion to shape its charges. The decision whether or not to proceed requires consideration of the interests of (using the *Guidelines for the Making of Decision in the Prosecution Process*):

- The victim
- The suspected offender
- The community at large

Likiardopoulos: The exercise of the DPP’s discretion is beyond the scope of the court’s review.

- So despite the fact that during a group crime, other offenders were able to accept lesser offences not related to murder, Mr Likiardopoulos could not successfully appeal that he could not be guilty of murder.
- There is a traditional acknowledgement of professional distance between the bench and the prosecutor. The court must maintain the reality and perception of the impartiality of the judicial process.

PROSECUTORS' DISCLOSURE OBLIGATIONS

Those prosecuting on behalf of the community are not entitled to act as if they were representing private interests in civil litigation. The prosecution's suppression of credible evidence tending to contradict evidence of guilt militates against the basic element of fairness in a criminal trial. (Murphy J in *Lawless*)
 The fruits of investigation are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done (*R v Stinchcombe* CCA).
 The danger of the adversarial system is that the system is based on 'two prejudiced searchers' (Devlin)

NSW BAR ASSOCIATION RULES RULE 86	A prosecutor must disclose to the opponent as soon as practicable all material available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocent of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person
NSW BAR ASSOCIATION RULES RULE 87	A prosecutor who has decided not to disclose material to the opponent under Rule 86 must consider whether: (a) the charge against the accused to which such material is relevant should be withdrawn; and (b) the accused should be faced only with a lesser charge to which such material would not be so relevant

CRIMINAL PROCEDURE ACT 1986 S 141 MANDATORY PRE TRIAL DISCLOSURE	<p><u>141 Mandatory pre-trial disclosure</u></p> <p>(1) After the indictment is presented or filed in proceedings, the following pre-trial disclosure is required:</p> <ul style="list-style-type: none"> (a) the prosecutor is to give notice of the prosecution case to the accused person in accordance with section 142, (b) the accused person is to give notice of the defence response to the prosecution's notice in accordance with section 143, (c) the prosecution is to give notice of the prosecution response to the defence response in accordance with section 144. <p>(2) Pre-trial disclosure required by this section is to take place before the date set for the trial in the proceedings and in accordance with a timetable determined by the court.</p> <p>Note : Practice notes issued by the court will guide determinations of the timetable for pre-trial disclosures and related matters.</p> <p>(3) The court may vary any such timetable if it considers that it would be in the interests of the administration of justice to do so.</p> <p>(4) The regulations may make provision for or with respect to the timetable for pre-trial disclosure.</p>
CRIMINAL PROCEDURE ACT 1986 S 142: PROSECUTION'S NOTICE	<p>(1) For the purposes of section 141 (1) (a), the prosecution's notice is to contain the following:</p> <ul style="list-style-type: none"> (a) a copy of the indictment, (b) a statement of facts, (c) a copy of a statement of each witness whose evidence the prosecutor proposes to adduce at the trial, (d) a copy of each document, evidence of the contents of which the prosecutor proposes to adduce at the trial, (e) if the prosecutor proposes to adduce evidence at the trial in the form of a summary, a copy of the summary or, where the summary has not yet been prepared, an outline of the summary, (f) a copy of any exhibit that the prosecutor proposes to adduce at the trial,

	<ul style="list-style-type: none"> (g) a copy of any chart or explanatory material that the <u>prosecutor</u> proposes to adduce at the trial, (h) if any expert witness is proposed to be called at the trial by the <u>prosecutor</u>, a copy of each report by the witness that is relevant to the case, (i) a copy of any information, document or other thing provided by <u>law enforcement officers</u> to the <u>prosecutor</u>, or otherwise in the possession of the <u>prosecutor</u>, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the <u>accused person</u>, (j) a list identifying: <ul style="list-style-type: none"> i. any information, document or other thing of which the <u>prosecutor</u> is aware and that would reasonably be regarded as being of relevance to the case but that is not in the <u>prosecutor</u>'s possession and is not in the <u>accused person</u>'s possession, and ii. the place at which the <u>prosecutor</u> believes the information, document or other thing is situated, (k) a copy of any information in the possession of the <u>prosecutor</u> that is relevant to the reliability or credibility of a prosecution witness, (l) a copy of any information, document or other thing in the possession of the <u>prosecutor</u> that would reasonably be regarded as adverse to the credit or credibility of the <u>accused person</u>, (m) a list identifying the statements of those witnesses who are proposed to be called at the trial by the <u>prosecutor</u>.
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<p>CRIMINAL PROCEDURE ACT 1986</p> <p>S 144: PROSECUTION RESPONSE TO DEFENCE RESPONSE</p>	<p>For the purposes of section 141 (1) (c), the notice of the prosecution response to the defence response is to contain the following:</p> <ul style="list-style-type: none"> (a) if the <u>accused person</u> has disclosed an intention to adduce expert evidence at the trial, notice as to whether the <u>prosecutor</u> disputes any of the expert evidence and, if so, in what respect, (b) if the <u>accused person</u> has disclosed an intention to tender any exhibit at the trial, notice as to whether the <u>prosecutor</u> proposes to raise any issue with respect to the continuity of custody of the exhibit, (c) if the <u>accused person</u> has disclosed an intention to tender any documentary evidence or other exhibit at the trial, notice as to whether the <u>prosecutor</u> proposes to dispute the accuracy or admissibility of the documentary evidence or other exhibit, (d) notice as to whether the <u>prosecutor</u> proposes to dispute the admissibility of any other proposed evidence disclosed by the <u>accused person</u>, and the basis for the objection, (e) a copy of any information, document or other thing in the possession of the <u>prosecutor</u>, not already disclosed to the <u>accused person</u>, that might reasonably be expected to assist the case for the defence, (f) a copy of any information, document or other thing that has not already been disclosed to the <u>accused person</u> and that is required to be contained in the notice of the case for the prosecution.
<p>ODPP GUIDELINES</p> <p>GUIDELINE 18: DISCLOSURE</p>	<ul style="list-style-type: none"> • Prosecutors are under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecutor which can be seen on a sensible appraisal by the prosecution: <ul style="list-style-type: none"> ○ To be relevant or possibly relevant to an issue in the case; ○ To raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; and/or ○ To hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two situations. • The prosecution duty of disclosure does not extend to disclosing material: <ul style="list-style-type: none"> ○ relevant only to the credibility of defence (as distinct from prosecution)

	<p>witnesses;</p> <ul style="list-style-type: none">○ relevant only to the credibility of the accused person;○ relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false; or○ of which it is aware concerning the accused's own conduct to prevent an accused from creating a trap for himself or herself, if at the time the prosecution became aware of that material it was not seen as relevant to an issue in the case or otherwise disclosable pursuant to the criteria above.
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- The inequality of resources as between the Crown and the accused is 'ameliorated by the obligation on the part of the prosecution to make available all material which may prove helpful to the defence' (*McIlkenny* (1991) Cr App R).

DEFENCE DISCLOSURE OBLIGATIONS

- The presumption of innocent and the fundamental principles of accusatorial justice sit uncomfortably with placing legal demands on the defence to assist the prosecution.
- The rationale for defence disclosure is that it will assist enhancing efficiency both during the trial and also in having defendants plead before trial.
- Breach of disclosure obligations will result in s 146 of *CPA* (see p. 33-4)

<p style="text-align: center;">CRIMINAL PROCEDURE ACT 1986</p> <p style="text-align: center;">SECTION 146: SANCTIONS FOR NON-COMPLIANCE WITH PRE-TRIAL DISCLOSURE REQUIREMENTS</p>	<ol style="list-style-type: none"> (1) Exclusion of evidence not disclosed The court may refuse to admit evidence in proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with requirements for pre-trial disclosure imposed by or under this Division. (2) Exclusion of expert evidence where report not provided The court may refuse to admit evidence from an expert witness in proceedings that is sought to be adduced by a party if the party failed to give the other party a copy of a report by the expert witness in accordance with requirements for pre-trial disclosure imposed by or under this Division. (3) Adjournment The court may grant an adjournment to a party if the other party seeks to adduce evidence in the proceedings that the other party failed to disclose in accordance with requirements for pre-trial disclosure imposed by or under this Division and that would prejudice the case of the party seeking the adjournment. (4) Application of sanctions Without limiting the regulations that may be made under subsection (5), the powers of the court may not be exercised under this section to prevent an accused person adducing evidence unless the prosecutor has complied with the requirements for pre-trial disclosure imposed on the prosecution by or under this Division. (5) Regulations The regulations may make provision for or with respect to the exercise of the powers of a court under this section (including the circumstances in which the powers may not be exercised).
<p style="text-align: center;">CRIMINAL PROCEDURE ACT 1986</p> <p style="text-align: center;">SECTION 146A: DRAWING INFERENCES IN CERTAIN CIRCUMSTANCES</p>	<ol style="list-style-type: none"> (1) This section applies if: <ol style="list-style-type: none"> a. the accused person fails to comply with the requirements for pre-trial disclosure imposed by or under this Division on the accused person, or b. the accused person is required to give a notice under section 150 (Notice of alibi) and fails to do so. (2) If this section applies: <ol style="list-style-type: none"> a. the court, or any other party with the leave of the court, may make such comment at the trial as appears proper, and b. the court or jury may then draw such unfavourable inferences as appear proper. (3) A person must not be found guilty of an offence solely on an inference drawn under this section. (4) Subsection (2) does not apply unless the prosecutor has complied with the requirements for pre-trial disclosure imposed by or under this Division on the prosecution. (5) This section does not limit the operation of section 146.