

# CONSTITUTIONALLY HEEDING THE RIGHT TO SILENCE IN AUSTRALIA

ANTHONY GRAY\*

*Australian law continues to recognise exceptions to what is colloquially referred to as the right to silence, the most recent example of which is the Evidence Amendment (Evidence of Silence) Act 2013 (NSW). This article will consider whether arguments might be made that, at least in some contexts, infringement of the right to silence is contrary to the requirements of the Australian Constitution. Courts in other countries around the world have recognised the right to silence in circumstances where parliaments have purported to limit it. The application of their approaches to the Australian context will be considered, acknowledging jurisdictional differences where appropriate.*

## I INTRODUCTION

Debate about the extent to which a person, including a person accused of a crime, has a 'right' to withhold information when pressed to provide it is not new. The law has taken a number of different positions on this issue over the centuries.<sup>1</sup> It is understandable that law enforcement bodies might wish to see this right abrogated since it no doubt makes their job more difficult.<sup>2</sup> Some are quick to draw a conclusion that people only avail themselves of a right to silence if they 'have something to hide'.<sup>3</sup> However, it may be difficult to square departures from

\* Professor, University of Southern Queensland. Thanks to the anonymous referee and Dr Greg Taylor for helpful comments on an earlier draft, as well as the editorial team of the *Monash University Law Review*.

1 See, eg, *Cornwell v The Queen* (2007) 231 CLR 260, 272–83 (Gleeson CJ, Gummow, Heydon and Crennan JJ). See also E M Morgan, 'The Privilege against Self-Incrimination' (1949) 34 *Minnesota Law Review* 1; Gregory W O'Reilly, 'England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice' (1994) 85 *Journal of Criminal Law and Criminology* 402.

2 In *R v Ling* (1996) 90 A Crim R 376, Doyle CJ stated that '[i]t may be that the time has come for some limits to be placed upon the right of silence and for some obligation to be imposed upon the defence to join in the identification of and limiting of issues in criminal proceedings to an extent inconsistent with the maintenance of the right to silence': at 382. His Honour then referred to difficulties with workflow in the courts and the growing length of trials. Justice Davies, formerly of the Queensland Court of Appeal, has argued it was 'essential for the maintenance of public confidence in the law that the rule [not allowing inferences from silence] be abolished': Justice G L Davies, 'The Prohibition against Adverse Inferences from Silence: A Rule without Reason?' (Pt 2) (2000) 74 *Australian Law Journal* 99, 105. He claimed that the only rational basis for the right to silence was a distrust by judges of the capacity of juries, if evidence of silence were placed before them and comment by judge and counsel permitted, to draw sensible and unprejudiced inferences: Justice G L Davies, 'The Prohibition against Adverse Inferences from Silence: A Rule without Reason?' (Pt 1) (2000) 74 *Australian Law Journal* 26, 36.

3 One exponent was Jeremy Bentham, who wrote that 'between delinquency on the one hand, and silence under inquiry on the other, there is a manifest connexion; a connexion too natural not to be constant and inseparable': John Bowring (ed), *The Works of Jeremy Bentham* (Russell & Russell, 1962) vol 7, 446. For criticism of the exclusion of self-incrimination evidence which reflects utilitarian philosophy, see Jeremy Bentham, *Rationale of Judicial Evidence* (Garland Publishing, 1978) vol 5, 229–41. Justice Davies expressed agreement with the views of Bentham: Justice G L Davies, 'Justice Reform: A Personal Perspective' (1996) 15 *Australian Bar Review* 109, 118. See also Susan Easton, *The Case for the Right to Silence* (Ashgate Publishing, 2<sup>nd</sup> ed, 1998) ch 3.

the right to silence with other fundamental doctrines of the criminal law. The danger is, as always, that if we allow departures from fundamental principles in limited cases, there may be clamour for departure in more and more cases, until the very existence of the principle may itself be in doubt. Jurisdictions around the world have had to balance these competing issues and principles. As always, it is useful to see how they have done so. Care must always be taken to acknowledge the different constitutional and/or human rights settings in which such rulings have been made, in order to properly consider the extent to which the law of any particular country is or should be influenced by such developments.

We conveniently refer to the common law ‘right to silence’,<sup>4</sup> but this can mean different things to different people, and confusion may arise if we assume it has a common meaning. Different threads of the concept of the so-called right to silence were identified by Lord Mustill in the English case of *R v Director of Serious Fraud Office; Ex parte Smith* to include:

- (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
- (2) A general immunity, possessed by all persons or bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
- (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
- (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
- (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
- (6) A specific immunity (at least in certain circumstances ...), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.<sup>5</sup>

4 For the purposes of this article, I will not continue to place in inverted commas the phrase ‘right to silence’ because I make the point here that it is something of an umbrella principle referring to a range of different rights. In terms of the different rights referred to in *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1, 30–1 (Lord Mustill), my focus in this article is particularly on rights (1)–(3), but much of the article is also applicable to rights (4)–(6) and other associated rights.

5 Ibid. This passage was quoted with evident approval in *Environment Protection Authority v Caltech Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J) and in *RPS v The Queen* (2000) 199 CLR 620, 630 [22] (Gaudron ACJ, Gummow, Kirby and Hayne JJ).

I could add to this list other related strands, for example that any confession obtained from an accused be one that is given voluntarily, that the evidence used should be reliable, the court's discretion to discard the use of evidence where, in all the circumstances, it would be unfair to take it into account (including issues of prejudice), and a general public policy exclusion.<sup>6</sup> The court also has the inherent power to avoid abuse of process. Questions about the extent to which police administered a caution to the person interviewed about the fact that they need not cooperate, the consequences of answering questions and whether or not the conversation was being recorded, are also relevant.<sup>7</sup>

There are obviously close links between a right to silence and the presumption of innocence.<sup>8</sup> The rationale for these kinds of rules can also be sourced in the fact that the authorities have substantial resources at their disposal in prosecuting allegations, compared with those against whom such power might be exercised. This power imbalance can be used against the individual in terms of pressure to conform to the questioner's way of thinking. It is contrary to the investigator's interests to afford the right to silence, so rationally it cannot be expected the right will be extended to the person questioned in the absence of a legal requirement. Protection of the right to silence reflects a libertarian perspective that interferences with personal liberty must be confined within agreed limits, that many investigations surround alleged criminal activity, and that the consequences of proving criminal behaviour are often dire, including imprisonment for the accused. Respect for the dignity and privacy of individuals is also reflected in the principle.<sup>9</sup> There may be entirely valid reasons for silence

6 *R v Swaffield* (1998) 192 CLR 159, 188–9 (Toohey, Gaudron and Gummow JJ); *Tofilau v The Queen* (2007) 231 CLR 396, 402 (Gleeson CJ); *Ridgeway v The Queen* (1995) 184 CLR 19; *Bunning v Cross* (1978) 141 CLR 54; *Evidence Act 1995* (Cth) s 135; *Evidence Act 1995* (NSW) s 135; *Evidence Act 2008* (Vic) s 135; *Evidence Act 1977* (Qld) s 130; *Evidence Act 1929* (SA) s 34KD; *Evidence Act 1906* (WA) s 112; *Evidence Act 2011* (ACT) s 135. There is no specific provision in the Northern Territory evidence legislation.

7 *Carr v Western Australia* (2007) 232 CLR 138.

8 *Quinn v Ireland* (European Court of Human Rights, Fourth Section, Application No 36887/97, 21 December 2000) [40]. The presumption of innocence is protected by various international instruments: see *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(2) ('ICCPR'); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 11(1); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*'), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) art 6(2); *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') s 11(d); *New Zealand Bill of Rights Act 1990* (NZ) s 25(c).

9 See Andrew Ashworth, 'Self-Incrimination in European Human Rights Law — A Pregnant Pragmatism?' (2008) 30 *Cardozo Law Review* 751, 767–9; Mike Redmayne, 'Rethinking the Privilege against Self-Incrimination' (2007) 27 *Oxford Journal of Legal Studies* 209; Ian Dennis, 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-Incrimination' (1995) 54 *Cambridge Law Journal* 342, 348–53; Hamish Stewart, 'The Confessions Rule and the Charter' (2009) 54 *McGill Law Journal* 517; Simon Matters, 'Anything You Don't Say May Be Given in Evidence: Protecting the Interests of Justice or Emasculating a Fundamental Right?' (1997) 4(1) *Deakin Law Review* 49.

other than guilt.<sup>10</sup> Protection of the right rejects a utilitarian philosophy that in order to provide for a safer society, incursions on fundamental rights such as the right to silence are necessary, for the greater good.

An important preliminary question is whether, in examining the right to silence, the pre-trial investigative stage should be treated differently to the trial itself. I believe that the policy principles involved, such as the importance of presumption of innocence, power and/or information imbalances between the individual and the state, are the same, regardless of whether we are talking about a preliminary investigation that may or may not lead to a trial at a later time, or whether it is in the course of a trial. The stages are obviously linked, in that information gathered during the preliminary or investigatory stage will often be used at a later trial, if there is one. These factors convince me that it would be wrong to limit the application of the position that will be favoured here to the trial stage itself, just as it would be wrong to limit its application to the investigatory stage: non-availability of the right at either stage would compromise its availability at the other stage. For these reasons, the discussion below will be about both contexts, the investigatory stage and the trial stage, and I believe that the conclusions I reach should be applied in both cases.<sup>11</sup> There is High Court support for the proposition that the right to silence can apply to non-judicial proceedings,<sup>12</sup> and in the international cases discussed below, courts have applied the right to silence at both stages as part of a right to a fair trial/fair hearing, in both criminal and civil contexts.

Part II considers how the right to silence has been accepted and applied in Australian case law, and how it has been abridged by statute. Part III considers how the right has been interpreted and applied in overseas jurisdictions. Part IV suggests how the right should be interpreted in Australian law in future.

## II AUSTRALIAN CASE LAW ON THE RIGHT AND STATUTORY EXCEPTIONS

I summarise here the extent of Australian case law on the right to silence. It is considered necessary to do this in order to point out what I consider to be the deficiencies in the existing approach. I will then consider how various

10 These are well summarised in Law Reform Commission, *Criminal Investigation*, Report No 2 (1975) 65–6 [148]; J D Heydon, ‘Silence as Evidence’ (1975) 1 *Monash University Law Review* 53, 55.

11 As Leo puts it, ‘the legal rights that the adversary system seeks to protect at the trial stage of the criminal process may be rendered meaningless by what occurs at the pretrial stage’: Richard A Leo, *Police Interrogation and American Justice* (Harvard University Press, 2008) 37. Cf Mirko Bagaric, who claims that the right to silence pre-trial is a higher priority in terms of protection than the right to silence at trial: Mirko Bagaric, ‘The Diminishing “Right” of Silence’ (1997) 19 *Sydney Law Review* 366, 380. See also the judgment of Kiefel J in *X7 v Australian Crime Commission* [2013] HCA 29 (26 June 2013) which refers to the Australian criminal justice system as having an ‘adversarial and accusatorial’ nature: at [160]. This involves the onus of proof on the prosecution and requires that the prosecution ‘cannot compel the accused to assist it’: at [159]. Further, the accusatorial nature of the justice system, according to her Honour, involves ‘not only the trial itself, but also pre-trial inquiries and investigations’: at [160].

12 *Sorby v Commonwealth* (1983) 152 CLR 281, 309 (Mason, Wilson and Dawson JJ), 311 (Murphy J) (‘*Sorby*’).

Parliaments in Australia have used the less-than-watertight protection of this right to progressively erode the right in a range of contexts. I have given specific detail on this, because I seek to convey the number and range of ways in which this right is being eroded by successive Australian Parliaments.

### **A Australian Case Law on the Right to Silence**

The High Court of Australia has declared that it is a fundamental principle that the prosecution ‘cannot compel the accused to assist it in any way’,<sup>13</sup> recognising the right to silence is closely linked with the presumption of innocence and the onus of proof. Sometimes the Court has used the language of the ‘freedom to speak’ and that if such a right has been impugned, evidence obtained as a result may not be admitted. This occurred in *R v Swaffield*,<sup>14</sup> where an undercover police officer obtained a confession from an accused. A majority of the Court rejected the use of the evidence. For instance, the joint reasons stated:

In the light of recent decisions of this Court, it is no great step to recognise ... an approach which looks to the accused’s freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion ... the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted.<sup>15</sup>

It is not necessary to show the accused has made a conscious decision not to exercise their right to silence. In other words, they may give up their right to silence quite unwittingly. This has meant that the use of police deception in order to extract damning evidence from an accused has been indirectly validated by the acceptance of the evidence gained through such a process.<sup>16</sup> Evidence derived from a public conversation between police and an accused, in circumstances where the accused was not aware that the conversation was being recorded, has been admitted.<sup>17</sup>

13 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 527 (Deane, Dawson and Gaudron JJ).

14 (1998) 192 CLR 159, 202 (Toohey, Gaudron and Gummow JJ), 208–9 (Kirby J).

15 *Ibid* 202 [91]. The question arises, if the right to silence is such a fundamental principle, why the court insists it has a discretion to accept or not accept the evidence. It is argued later in this paper that the court must protect the right more strongly than this, by insisting on the right to a fair trial, and that such a right includes a right to silence, such that if the accused’s right to silence is infringed, the proceedings should be considered to be unfair. This in turn raises the question of whether the right is inviolable, or whether there are some extreme circumstances in which departures from the fundamental right to silence might be countenanced and, if so, what those circumstances might be.

16 *Tofilau v The Queen* (2007) 231 CLR 396. In this case, evidence of confessions made to undercover police officers who posed as criminals and told the accused that in order to join their group, they must make a full confession whereupon the ‘boss’ of the group would make the problem go away was permitted by the majority, with Kirby J dissenting.

17 *Em v The Queen* (2007) 232 CLR 67 (Kirby J dissenting). See also *Carr v Western Australia* (2007) 232 CLR 138, where the evidence of an accused’s admission, made while the accused was unaware that he was being recorded at the lockup, was held to be admissible by the majority, with Kirby J dissenting.

In *Hammond v Commonwealth*,<sup>18</sup> the High Court was faced with provisions in some ways very similar to the Commonwealth and state legislation alluded to above. Specifically, a provision of the *Royal Commissions Act 1902* (Cth) made it an offence for a witness before a Commission to refuse to answer questions put to them. A section of the Act precluded the use of the information provided by the witness in civil or criminal proceedings against them, apart from proceedings for a breach of the Act. The Victorian evidence legislation at the time (*Evidence Act 1958* (Vic)) also made it an offence for a person present before a board appointed by the Governor to refuse to answer a question relating to the inquiry. Again, the provision restricted the use to which the information provided under such compulsion could be used. Hammond had been summoned to appear at the Commission to answer questions about an alleged conspiracy. He declined to answer them on the basis he might incriminate himself. The Commissioner directed Hammond to answer the questions. Hammond, who had been charged with conspiracy offences shortly after the Commission had been established, successfully challenged in the High Court the validity of the Commission proceedings.

The Court enjoined the Commission proceedings. In the course of doing so, each judge commented adversely on the compulsive nature of the Commission proceedings and their implications for the privilege against self-incrimination. Gibbs CJ stated:

It would be necessary to find a clear expression of intention before one could conclude that the legislature intended to override so important a privilege as that against self-incrimination ... Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with ... It is true that the ... answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.<sup>19</sup>

Murphy J claimed that the privilege against self-incrimination was 'so pervasive' as to make it unnecessary for statutes requiring persons to answer questions to expressly refer to the right; and that it was 'presumed to exist unless ... excluded by ... unmistakable language'.<sup>20</sup> It was necessary to prohibit the Commission from ordering Hammond to answer questions which might tend to incriminate him '[t]o maintain the integrity of the administration of the judicial power of the Commonwealth'.<sup>21</sup> Similarly, Brennan J commented on the deep-rooted nature of the right, concluding that it was not to be thought that Parliament, in arming a Commission with powers, intended that the power might be exercised to deny fundamental principles in criminal justice like the privilege against self-

18 (1982) 152 CLR 188 ('*Hammond*').

19 Ibid 197–8. Mason J agreed with the reasons of Gibbs CJ: at 199.

20 Ibid 200.

21 Ibid 201.

incrimination.<sup>22</sup> Deane J said that the fact Hammond had been charged after refusing to answer questions amounted to ‘injustice and prejudice to the plaintiff’.<sup>23</sup>

The Commonwealth Parliament then amended the *Royal Commissions Act 1902* (Cth) to expressly state that during the Royal Commission proceedings, a person was not entitled to refuse or fail to answer questions on the ground that the answer might incriminate him. Lamentably (in my view), the High Court relented. A unanimous joint judgment of the High Court in *Sorby*<sup>24</sup> validated the amending provision. The ‘deep-rooted’ right, the ‘cardinal principle’,<sup>25</sup> did not survive a thirty-nine word amending provision.<sup>26</sup> One interesting point of disagreement in the case concerned the application of the privilege against self-incrimination in a case such as this where, unlike in *Hammond*, the relevant person had not been charged and matters were not before the court. Four members of the Court held that the privilege could apply to executive proceedings such as the one considered here, and that it was not confined to judicial proceedings.<sup>27</sup> A majority also discarded any link between the privilege against self-incrimination and the requirements of Chapter III of the *Australian Constitution*.<sup>28</sup>

On the question of the extent to which silence can be used to draw conclusions unfavourable to the accused at trial,<sup>29</sup> the High Court has generally taken the view that the judge or prosecutor should not suggest to the jury that the accused’s

22 Ibid 203.

23 Ibid 207.

24 (1983) 152 CLR 281.

25 Despite validating the amending provision expressly taking away the privilege against self-incrimination, Gibbs CJ stated that ‘It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt’: *Sorby* (1983) 152 CLR 281, 294.

26 The amending provision in *Sorby* was an example where parliament expressly excluded the privilege. This position is neatly summarised in J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2010) as ‘[w]here the parliamentary intention to exclude the privilege is clearly apparent from [Parliament’s] express words, or clearly implicit, the privilege will be excluded’: at 855 [25085].

27 *Sorby* (1983) 152 CLR 281, 309 (Mason, Wilson and Dawson JJ), 311 (Murphy J) *contra* 321 (Brennan J). In *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, Mason ACJ, Wilson and Dawson JJ stated that their Honours were ‘not prepared to hold that the privilege [was] ... incapable of application in non-judicial proceedings’: at 341. Murphy J found it applied to both judicial and non-judicial proceedings: at 346. Brennan J found it was confined to judicial proceedings: at 354–5. On a related matter, the High Court found that the common law immunity of legal professional privilege applied to preliminary investigations into a possible breach of competition law in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

28 Mason, Wilson and Dawson JJ found that ‘the privilege against self-incrimination is not an integral element in the exercise of the judicial power reposed in the courts by Ch III of the *Constitution*’: *Sorby* (1983) 152 CLR 281, 308. Gibbs CJ similarly said that ‘[t]he privilege against self-incrimination is not protected by the *Constitution*’: at 298.

29 Evidence statutes generally allow a judge to comment on the defendant’s failure to give evidence, but not to suggest that the defendant failed to give evidence because he or she is guilty. See, eg, *Evidence Act 1995* (Cth) s 20; *Evidence Act 1995* (NSW) s 20; *Evidence Act 2008* (Vic) s 20; *Evidence Act 2001* (Tas) s 20; and *Evidence Act 2011* (ACT) s 20. In South Australia, the prosecutor cannot make a comment about the defendant’s failure to give evidence: *Evidence Act 1929* (SA) s 18(1)(b). The main focus of this article is the right to silence at a stage prior to trial, although many of the principles applicable at that time would also be applicable during trial. Comparisons between the right pre-trial and during trial appear in Bagaric, above n 11; Scott Henchcliffe, ‘The Silent Accused at Trial — Consequences of an Accused’s Failure to Give Evidence in Australia’ (1996) 19 *University of Queensland Law Journal* 137.

silence may be used as evidence of guilt.<sup>30</sup> It has reiterated that ‘it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence’.<sup>31</sup> As indicated earlier, the High Court has recognised a broad discretion to discard evidence obtained in circumstances of general unfairness; this has included excluding evidence obtained after the person from whom it was taken indicated to authorities he did not wish to answer questions.<sup>32</sup>

In summary, the case law does not reveal that the right is strongly protected. A valid law of Parliament is effective, according to the High Court in *Sorby*, to abrogate the right. I point out now the ways in which various Parliaments in Australia have used this case law to progressively undermine the right to silence.

## B Statutory Abrogations

There has been a gradual departure from the common law right to silence in a range of Australian statutes. This led the Independent National Security Legislation Monitor to comment recently that given there were so many examples of statutory abrogation of the right, ‘the issue cannot be given top priority. It does seem as if the pass has been sold on statutory abrogations of this privilege’.<sup>33</sup>

No doubt, the right to silence is inconvenient to law enforcement authorities who sometimes struggle to obtain the necessary evidence to back their suspicions about wrongful activity. It makes their job much easier if suspects or witnesses become compelled to cooperate on pain of punishment, rather than remaining silent and forcing the prosecutors to prove their case by other means. There are utilitarian arguments that contend that in order to stop particular crimes, for example terrorism, unusual measures that remove fundamental rights are necessary and justified. This debate has also occurred in the context of the use of torture to obtain information that might, for instance, thwart a terrorist attack. Questions arise as to

30 *Petty v The Queen* (1991) 173 CLR 95, 99 (Mason CJ, Deane, Toohey and McHugh JJ). The Court was more equivocal in *Weissensteiner v The Queen* (1993) 178 CLR 217, where it was said that ‘silence in the face of an accusation when an answer might reasonably be expected can amount to an admission by conduct’: at 229 (Mason CJ, Deane and Dawson JJ). The Court also indicated that ‘failure to explain can amount to evidence’: at 245 (Gaudron and McHugh JJ). See also Elizabeth Stone, ‘Calling a Spade a Spade: The Embarrassing Truth about the Right to Silence’ (1998) 22 *Criminal Law Journal* 17; Barbara Ann Hocking and Laura Leigh Manville, ‘What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?’ (2001) 1 *Macquarie Law Journal* 63; Henchcliffe, above n 29; Bagaric, above n 11; Catherine Eakin, ‘RPS v R: The Resilience of the Accused’s Right to Silence’ (2000) 22 *Sydney Law Review* 669.

31 *RPS v The Queen* (2000) 199 CLR 620, 632 [27] (Gaudron ACJ, Gummow, Kirby and Hayne JJ). Cf *Weissensteiner v The Queen* (1993) 178 CLR 217, 229 (Mason CJ, Deane and Dawson JJ).

32 *R v Swaffield* (1998) 192 CLR 159; *R v Belford* (2011) 208 A Crim R 256. Cf *Em v The Queen* (2007) 232 CLR 67. See also *Evidence Act 1995* (Cth) s 135; *Evidence Act 1995* (NSW) s 135; *Evidence Act 2008* (Vic) s 135; *Evidence Act 1977* (Qld) s 130; *Evidence Act 1929* (SA) s 34KD; *Evidence Act 1906* (WA) s 112; *Evidence Act 2011* (ACT) s 135. There is no specific provision in the Northern Territory legislation.

33 Bret Walker, Australian Government, *Independent National Security Legislation Monitor Annual Report* (2011) 33. I interpret the words ‘cannot be given top priority’ to mean that Mr Walker does not suggest the court take a more robust approach in protecting the right against statutory incursion.



whether the end (proving that a particular person committed a crime) justifies the means (abrogation of fundamental rights like the right to silence).<sup>34</sup>

There are numerous examples of Australian statutes where the common law right to silence has been abrogated at a stage prior to any trial, as well as examples of its abrogation during a trial. It is worth setting these out in some detail, since there is no standard model apparent, and different issues are raised by the different approaches. This also gives us an idea of the scale of departure that has taken place; we are talking about numerous actual examples in many contexts, not isolated instances. Fears about the erosion of this fundamental right are not far-fetched or fanciful. The following paragraphs set out examples of such abrogations at a preliminary investigatory stage, and at trial. However as indicated, this formatting should not be taken to imply that I believe a different approach should be taken to the protection of the right to a fair trial/fair hearing at these two stages.

### **1 At a Preliminary/Investigatory Stage**

The most recent example of a statutory abrogation of the right to silence occurs in the new Australian workplace health and safety model laws.<sup>35</sup> Section 171 of the uniform legislation allows a workplace inspector to enter a workplace. For instance, under the NSW legislation, the inspector can require the production of documents and require answers to questions.<sup>36</sup> A person or organisation not complying with the inspector's requests can be fined up to \$10 000 or \$50 000 respectively, unless they have a reasonable excuse for non-compliance.<sup>37</sup> The Acts expressly state that the privilege against self-incrimination is not available as an excuse.<sup>38</sup> However, any information provided is not generally admissible as evidence against the person who provided it, unless the proceedings concern the alleged falseness of the answer or information given.<sup>39</sup> A warning must be given to the person or organisation about the inspector's powers under s 171, about the fact that a failure to comply with a request is punishable by a fine, and that the general privilege against self-incrimination is not available as a defence.<sup>40</sup> This example is somewhat atypical, in that it occurs in a context of corporate compliance, while the remaining examples take place in the context of proceedings against an individual. It is fair to suggest that the need for protection of this right might be thought to be stronger in the latter context, given that a body

34 It will be clear by the end of this article that I would not be prepared to abrogate fundamental rights like the right to silence based on an argument that such departures were necessary in order to obtain convictions.

35 *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (ACT); *Work Health and Safety (National Uniform Legislation) Act 2011* (NT). Other States have not yet implemented uniform legislation.

36 *Work Health and Safety Act 2011* (NSW) ss 171(1)(b)–(c).

37 *Ibid* s 171(6).

38 *Ibid* s 172(1).

39 *Ibid* s 172(2).

40 *Ibid* ss 173(1)(a)–(c).

corporate may be much better informed and resourced to defend their interests in such cases, compared with an individual.

In the security context, s 34L of the *Australian Security Intelligence Organisation Act 1979* (Cth) requires a person to appear for questioning once a warrant is issued or direction given under the Act. It is an offence, punishable by a maximum jail term of five years' imprisonment, to fail to do so.<sup>41</sup> A person must not fail to give any information, record or thing requested, if they have it.<sup>42</sup> It is specifically not a defence that the information or thing withheld would tend to incriminate the person.<sup>43</sup> However, that information, record or thing would not be admissible in evidence against the person in criminal proceedings (other than those for breach of that section).<sup>44</sup> Section 23(1) of the Act allows an authorised person to request information from the operator of an aircraft or vessel, in the form of documents or the answering of questions, relevant to the vessel or aircraft, voyage or passengers etc. The operator must comply,<sup>45</sup> on pain of penalty,<sup>46</sup> unless they have a reasonable excuse.<sup>47</sup> There are no express limits on the use to which information gleaned from such a process can be used. The *Crimes Act 1914* (Cth) contains some incursions on the privilege against self-incrimination in the security context.<sup>48</sup>

Section 30 of the *Australian Crime Commission Act 2002* (Cth) is similar in requiring the persons summoned to attend an examination. It is an offence not to attend, or to attend but fail to answer questions or produce requested documents.<sup>49</sup> This is punishable by a maximum of 200 penalty units or up to five years' imprisonment.<sup>50</sup> Subsection 5 does provide limits on the way in which such information can be used — it is generally not admissible against the person in criminal proceedings or those involving a penalty, other than

41 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34L(1).

42 *Ibid* ss 34L(2), (6). There is an evidentiary burden on the person affected to show that he or she does not have the relevant information, record or thing: ss 34L(3), (7). See also, in the context of documents thought to relate to terrorism or other serious offences, *Crimes Act 1914* (Cth) ss 3ZQN, 3ZQO.

43 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34L(8).

44 *Ibid* s 34L(9).

45 *Ibid* s 23(2).

46 *Ibid* s 23(3).

47 *Ibid* s 23(5). Similar provisions are found in *Crimes Act 1914* (Cth) s 3ZQM.

48 Section 3UC(1) of the *Crimes Act 1914* (Cth), in addition to the provisions noted above, allows police to ask an individual for their name and address, evidence of identity, and reason for being at a particular Commonwealth place. The officer must explain to the individual that the officer is authorised to make this kind of request, and that it may be an offence not to comply with the request: at s 3UC(2)(b). Failure to comply with the request is punishable by 20 penalty units unless there is reasonable excuse: at ss 3UC(2)(c)–(d), (3). Hindering a public official in the administration of their duties may be considered an offence under the *Criminal Code 1995* (Cth) s 149.1(1), which attracts a possible two year jail term. Otherwise, the *Crimes Act 1914* (Cth) requires officers generally to indicate to those it wishes to question that they have a general right to silence: at s 23F. It also reaffirms the general application of the 'right to silence': at s 23S. For discussion, see Sarah Sorial, 'The Use and Abuse of Power and Why We Need a Bill of Rights: The *ASIO (Terrorism) Amendment Act 2003* (Cth) and the Case of *R v Ul-Haque*' (2008) 34 *Monash University Law Review* 400; Jude McCulloch and Joo-Cheong Tham, 'Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror' (2005) 38 *Australian and New Zealand Journal of Criminology* 400.

49 *Australian Crime Commission Act 2002* (Cth) ss 30(1)–(2).

50 *Ibid* s 30(6).

confiscation proceedings or those relating to the alleged falsity of the information given. However, sub-s 5 is itself limited by sub-s 4 — in relation to an answer to a question, the person answering must have stated, before they provide the information, that they believe the answer might incriminate them.<sup>51</sup> In relation to a document provided, that section is limited to cases where the relevant document contains only information relating to the person's earnings through a business, and again only when they expressly state, before they provide the information, that they believe the document might incriminate them.<sup>52</sup> As a result, the limits on the use of incriminating information or documents against the person who provided such information or documents are very narrow.

Recently, in the case of *X7 v Australian Crime Commission*,<sup>53</sup> a majority of the High Court held that the *Australian Crime Commission Act 2002* (Cth) did not authorise the compulsory questioning of a person who had been charged with, but not tried for, an indictable Commonwealth offence where the questions related to that possible offence. The majority expressed concern that requiring a person to answer questions relevant to a pending charge would 'alter the process of criminal justice to a marked degree'<sup>54</sup> and 'fundamentally alter the accusatorial judicial process'.<sup>55</sup> It was irrelevant that the answers given by the accused to the questioners were inadmissible at the subsequent trial because the fact that the accused had been required to answer the questions would affect both the conduct of their defence at trial and the accusatorial nature of the subsequent trial.<sup>56</sup>

Various state anti-corruption bodies impose similar requirements. For instance, s 75 of the *Crime and Misconduct Act 2001* (Qld) allows the Chair of the Crime and Misconduct Commission to require a person to provide oral or written information relevant to a misconduct investigation that is within the person's possession, and/or produce documents that are within the person's possession. The person must comply, and the section makes no provision for a defence to non-compliance of reasonable excuse.<sup>57</sup> Very limited protections are given to the person involved — they do not, by complying with this requirement, put themselves in jeopardy of a prosecution on the basis of privacy or secrecy breach, and they incur no civil liability in respect of the information, thing or document provided.<sup>58</sup> Privilege is mentioned as a defence,<sup>59</sup> but the Act defines it in such a

51 Ibid s 30(4)(c).

52 Ibid ss 30(4)(b)–(c).

53 [2013] HCA 29 (26 June 2013).

54 Ibid [70] (Hayne and Bell JJ, with whom Kiefel J agreed).

55 Ibid [124] (Hayne and Bell JJ, with whom Kiefel J agreed).

56 Ibid [70]–[71] (Hayne and Bell JJ), [157] (Kiefel J).

57 *Crime and Misconduct Act 2001* (Qld) s 75(3). Non-compliance is punishable by up to 85 penalty units or one year's imprisonment.

58 Ibid s 75(4).

59 Ibid s 75(5)(a).

way — in terms of a misconduct investigation to which s 75 relates — to exclude from the definition the privilege against self-incrimination.<sup>60</sup>

The New South Wales anti-corruption legislation contains similar provisions, including a power vested in the Commission to require a public authority or public official to produce a document or documents, or statement of information.<sup>61</sup> It is an offence to fail to produce the document(s) or supply the requested information, unless there is a reasonable excuse.<sup>62</sup> Section 26 provides that statements of information, documents and things that tend to incriminate the person cannot be used in proceedings against the person, except proceedings for a breach of the Act, provided the person objects to production at the time. As with the Australian Crime Commission provisions, the self-incrimination protection applies only where the person expressly states at the time they wish to avail themselves of it.<sup>63</sup>

In Western Australia, the *Corruption and Crime Commission Act 2003* (WA) allows the Corruption and Crime Commission to issue a summons to a person, requiring them to attend at a certain time and to give evidence and/or produce documentation.<sup>64</sup> It is a contempt of the Commission, treated as equivalent as contempt of court, to fail to attend and give the required evidence, or to fail to produce the required document(s), without reasonable excuse.<sup>65</sup> Section 157 specifically states that it is not a reasonable excuse for failing to produce a document or thing that to do so would infringe the privilege against self-incrimination.<sup>66</sup>

## 2 At Trial Stage

If a trial is held, evidence legislation limits the privilege against self-incrimination in many ways. In relation to witnesses who are not the accused,<sup>67</sup> s 128 of the *Evidence Act 1995* (Cth) recognises the privilege to some extent.<sup>68</sup> It provides a

60 Ibid sch 2 (definition of 'privilege'). The definition of privilege differs according to whether the context is crime investigation, witness protection or confiscation proceedings (in which case privilege does include privilege against self-incrimination), or in the context of misconduct proceedings (in which case privilege does not include privilege against self-incrimination).

61 *Independent Commission against Corruption Act 1988* (NSW) ss 21–2.

62 Ibid ss 82–3.

63 Ibid s 26(2).

64 *Corruption and Crime Commission Act 2003* (WA) s 96. Further power appears in s 94(1) (to require a public authority or public official to produce a statement of information) and s 95(1) (to require a person to produce a record). Section 94(5) contains a limited recognition of the privilege against self-incrimination, stating that information derived from a public official pursuant to that section is not admissible against that person except with respect to contempt proceedings, proceedings for a breach of that Act, or disciplinary action.

65 Ibid ss 158–9.

66 Ibid s 157(a). It does not state, when considering whether a person has failed to attend and/or give evidence at a hearing pursuant to a s 96 summons, whether the defence of 'reasonable excuse' could include the privilege against self-incrimination.

67 Generally, an accused is not compellable and so not subject to the s 128 procedure. However, if they choose to give evidence, they generally waive privilege with respect to the offence with which they have been charged, but not generally others (subject to exceptions).

68 This is mirrored in *Evidence Act 1995* (NSW) s 128; *Evidence Act 2008* (Vic) s 128; *Evidence Act 2001* (Tas) s 128; *Evidence Act 2011* (ACT) s 128. The section was considered in *Cornwell v The Queen* (2007) 231 CLR 260.

certificate system when a witness refuses to answer a question on the ground that the answer may incriminate them.<sup>69</sup> If the court believes the concerns are reasonable, it can — if satisfied that the interests of justice require it — order the person to answer the question, on the basis that a certificate will be issued in relation to the evidence.<sup>70</sup> The effect of the certificate is that the evidence gained as a result, whether directly or indirectly, cannot generally be used against that person.<sup>71</sup>

Protection of the right is stronger in Western Australia. The *Evidence Act 1906* (WA) also provides that a witness may be compelled by the court to provide what would otherwise be incriminating evidence, if the judge issues a certificate precluding the use of the evidence against that person.<sup>72</sup> Evidence legislation also limits the extent to which the court or prosecutor can comment about the accused's failure to give evidence.<sup>73</sup>

Recently, the New South Wales Parliament passed the *Evidence Amendment (Evidence of Silence) Act 2013* (NSW). The Act amends the *Evidence Act 1995* (NSW) by inserting a new section, s 89A. This section applies in relation to criminal proceedings for serious indictable offences, and provides that 'unfavourable inferences may be drawn as appear proper' if, during official questioning, the defendant fails or refuses to mention something that the defendant could reasonably have been expected to mention in the circumstances at the time, and then seeks to rely on it later as part of their defence.<sup>74</sup> This inference can only be drawn if a timely caution has been given to the defendant by an investigating official who reasonably suspected the person had committed a crime, and the person was allowed the opportunity to obtain legal advice about the effect of

69 *Evidence Act 1995* (Cth) ss 128(3)(b), (5), (7)–(9).

70 *Ibid* ss 128(4), (5).

71 *Ibid* s 128(7). This is subject to an exception in relation to proceedings relating to the alleged falsity of the evidence given, for example a subsequent perjury charge.

72 *Evidence Act 1906* (WA) s 11. Section 8(1) confirms that the accused is not a compellable witness. In South Australia the accused is not required to testify, but can choose to do so: *Evidence Act 1929* (SA) s 18(1)(a). If the accused does testify, the prosecution may ask questions of the accused, to which the accused's answers may be incriminating.

73 See *Evidence Act 1995* (Cth) s 20; *Evidence Act 1995* (NSW) s 20; *Evidence Act 2008* (Vic) s 20; *Evidence Act 2001* (Tas) s 20; *Evidence Act 2011* (ACT) s 20. These sections allow a judge to comment about the failure of an accused to testify, but the judge cannot suggest it is because the accused is guilty. The judge can comment on a failure to testify by the defendant's spouse, parent or child but again cannot suggest this failure was due to the defendant's guilt. Exceptionally, if co-accused are involved, and one of the co-accused comments on the failure of the other or others to testify, the judge can comment. No specific mention is made in these Acts regarding whether the prosecutor can refer to such evidence, although s 55(2) defines 'relevant evidence' to include a failure to adduce evidence, and s 56 states that 'relevant evidence' is admissible. In South Australia and Western Australia, the prosecutor cannot comment on the failure of the accused to give evidence: *Evidence Act 1929* (SA) s 18(1)(b); *Evidence Act 1906* (WA) s 8(1)(c). The *Evidence Act 1977* (Qld) contains no express prohibition. See also *Cornwell v The Queen* (2007) 231 CLR 260.

74 *Evidence Act 1995* (NSW) s 89A, as inserted by *Evidence Amendment (Evidence of Silence) Act 2013* (NSW) sch 1.

failing or refusing to mention the fact.<sup>75</sup> These measures reflect populist responses to perceived problems with criminal activity, consistent with recent criminal justice trends such as criminalising association<sup>76</sup> and preventive detention.<sup>77</sup>

In summary, the existing case law does not provide a strong protection of the right to silence. It has been recognised as an important right, but liable to being overridden by legislation. Taking this cue, various Australian Parliaments have passed statutes in different fields which abridge the right to silence, at both the investigatory/preliminary stage, and the trial stage. Some statutes specifically limit the use to which information required to be given in such circumstances can be used against the person required to answer the question or provide the information; others only confer this protection when the person articulates an objection on self-incrimination grounds before providing it, while others do not limit how such information can be used. Sometimes, the defence of reasonable excuse is provided as a basis for non-compliance; sometimes it is not. Sometimes, this defence may include a self-incrimination argument; sometimes not. These Acts generally do not distinguish between the provision of information by way of document, and provision of information by way of oral evidence. Most of the contexts considered have involved proceedings against individuals, rather than corporations. The need for protection of the right to silence is considered greater in the context of an individual.

75 Ibid. This mirrors the changes made to United Kingdom law in 1994. However, those provisions are now subject to human rights provisions which expressly provide for a right to a fair trial, interpreted to include a right to silence, as we will see in Part III of the article. See *Human Rights Act 1998* (UK); *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the European Convention on Human Rights, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) art 6. The New South Wales changes would not apply to a person under the age of 18 or someone who is 'incapable of understanding the general nature and effect of a special caution': *Evidence Amendment (Evidence of Silence) Act 2013* (NSW) s 89A(5)(a). The Runciman Royal Commission, established by the United Kingdom government to consider the introduction of rules allowing adverse comments about the accused's silence, recommended against it:

The majority of us ... believe that the possibility of an increase in the convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent ... There are too many cases of improper pressures being brought to bear on suspects in police custody, even where the ... codes of practice have been supposedly in force, for the majority [of us] to regard this with equanimity.

See Royal Commission on Criminal Justice, Cm 2263 (1993) 54–5 [22]–[23] ('*Runciman Report*'). Despite these findings, the United Kingdom Parliament proceeded to allow adverse inferences to be drawn from silence, in the way the New South Wales provisions now propose.

76 See, eg, the anti-association legislation *Crimes (Criminal Organisations Control) Act 2009* (NSW), parts of which were successfully challenged on constitutional law grounds in *Wainohu v New South Wales* (2011) 243 CLR 181. See also the reintroduction of the offence of consorting in New South Wales with amendments to the *Crimes Act 1900* (NSW) in 2012: *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW). See generally Anthony Gray, 'Due Process, Natural Justice, Kable and Organisational Control Legislation' (2009) 20 *Public Law Review* 290; Anthony Gray, 'Constitutionality of Criminal Organisation Legislation' (2010) 17 *Australian Journal of Administrative Law* 213.

77 *Kable v DPP (NSW)* (1996) 189 CLR 51; *Fardon v A-G (Qld)* (2004) 223 CLR 575; Anthony Gray, 'Standard of Proof, Unpredictable Behaviour and the High Court of Australia's Verdict on Preventive Detention Laws' (2005) 10 *Deakin Law Review* 177.

### III HOW OTHER JURISDICTIONS HAVE APPLIED THE RIGHT TO SILENCE

It is useful to examine the way in which other jurisdictions have balanced the need for law enforcement authorities to have sufficient investigatory powers to do their job and the protection of civil liberties of individuals against undue interference by investigators. It is important to keep in mind that these decisions are based on a different constitutional and human rights context than that of Australia, and so appropriate care must be taken in transposing the results in such cases to the Australian context.

#### A Europe

The right to silence is not specifically referred to in the *European Convention on Human Rights* ('ECHR'). However, the European Court of Human Rights has confirmed that this right (and related rights) are 'generally recognised international standards which lie at the heart of the notion of a fair procedure [or fair trial] under Article 6' of the ECHR.<sup>78</sup> The privilege is expressly included in the *International Covenant on Civil and Political Rights*.<sup>79</sup>

A leading early European Court of Human Rights decision was *Funke v France*, where the Court invalidated customs regulations requiring a person to produce documents to investigators.<sup>80</sup> The accused faced a fine if he did not comply with demands to produce bank statements. He had not been charged with any offence at the time of the demands. Nevertheless, the Court found that ECHR art 6(1) had been breached; he had effectively been denied the right to remain silent and to not incriminate himself.<sup>81</sup> Although the right in ECHR art 6(1) is technically applicable when a person has been 'charged with a criminal offence', the Court has generally given this phrase a broad interpretation, to include an

78 *Murray v United Kingdom* [1996] I Eur Court HR 30, 49 [45]; K A Cavanaugh, 'Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom' (2002) 35 *Cornell International Law Journal* 491, 507; Mark Berger, 'Europeanizing Self-Incrimination: The Right to Remain Silent in the European Court of Human Rights' (2006) 12 *Columbia Journal of European Law* 339, 344; Mike Redmayne, 'English Warnings' (2008) 30 *Cardozo Law Review* 1047, 1058.

79 ICCPR art 14(3)(g). The Human Rights Committee has reminded signatories that under the requirements of art 14(3)(g) and other articles, deriving evidence from compulsion is 'wholly unacceptable': Human Rights Committee, *General Comment No 13: Article 14 (Administration of Justice): Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 21<sup>st</sup> sess (13 April 1984) [14]; Human Rights Committee, *Views: Communication No 588/1994*, 56<sup>th</sup> sess, UN Doc CCPR/C/56/D/588/1994 (22 March 1996) [8.7] ('*Johnson v Jamaica*'). In Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, 1950<sup>th</sup> mtg, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) [11], the Human Rights Committee notes that the presumption of innocence is 'fundamental' to the requirement that a trial be fair. See also Human Rights Committee, *General Comment No 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, 90<sup>th</sup> sess, UN Doc CCPR/C/GC/32 (23 August 2007) [30]. Clayton and Tomlinson discuss the presumption of innocence under the heading 'minimum standards of fairness in criminal proceedings': Richard Clayton and Hugh Tomlinson, *Fair Trial Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2010) 177. The presumption of innocence and the right to silence are obviously closely linked.

80 (1993) 256-A Eur Court HR (ser A) ('*Funke*').

81 *Ibid* 22 [44].

investigation that is preliminary to possible criminal charges later.<sup>82</sup> The test for the applicability of *ECHR* art 6(1) is whether that individual's situation has been 'substantially affected', rather than literally whether they have been charged.<sup>83</sup> *Funke* also demonstrates that it is not necessary that the person affected be liable to imprisonment for failure to comply in order that the protections exist, and that the right can include proceedings other than trial proceedings.

In *Funke*, the Court held that the right to silence was infringed despite the fact that documents, rather than oral evidence, were sought. This is slightly anomalous because, on most occasions, the Court has treated differently, on the one hand, evidence such as oral evidence from a person, and on the other, evidence which has an existence independent of the will of the person subject to the proceeding.<sup>84</sup> In this latter grouping, breath, blood, urine, hair, body tissue and voice samples are included.<sup>85</sup> The Court has often not been so concerned to preserve the privilege against self-incrimination in relation to provisions that might require a person to provide such physical evidence.<sup>86</sup>

An alternative argument is to hold, as the Court did in *Saunders*, that although a preliminary investigation may be 'inquisitorial' rather than judicial, it is the use of the evidence at the subsequent judicial proceeding, for instance when the person questioned in the inquisitorial proceedings is subsequently charged with a criminal offence, that attracts *ECHR* art 6(1).<sup>87</sup> In this case, the use of evidence derived from an inquisitorial investigation by inspectors was challenged. This was in the course of a case challenging the use of evidence on charges of breaches of company law derived from an inquisitorial investigation by inspectors. That law required, on pain of punishment for contempt, a person summoned to answer questions posed by investigators. The privilege against self-incrimination was not a defence. The Court found that *ECHR* art 6(1) had been infringed.<sup>88</sup>

The European Court of Human Rights has determined that the right to silence is not an absolute one,<sup>89</sup> and that primarily it is for national law to determine

82 Ibid 21–2 [43]–[44]. This point was also confirmed in *Murray v United Kingdom* [1996] I Eur Court HR 30, 54 [62] and *Saunders v United Kingdom* [1996] VI Eur Court HR 2044, 2064 [68] ('*Saunders*').

83 *Quinn v Ireland* (European Court of Human Rights, Fourth Section, Application No 36887/97, 21 December 2000) [41].

84 See, eg, *Saunders* [1996] VI Eur Court HR 2044.

85 Ibid 2064–5 [69]; *Jalloh v Germany* [2006] IX Eur Court HR 281, 316 [102].

86 *Saunders* [1996] VI Eur Court HR 2044, 2064–5 [69]; *Jalloh v Germany* [2006] IX Eur Court HR 281, 316 [102].

87 *Saunders* [1996] VI Eur Court HR 2044, 2064 [67].

88 Ibid 2066–7 [74]–[76]. The Court also clarified that the privilege against self-incrimination did not extend to material which had an existence independent of the will of the suspect, such as breath, blood, bodily tissue or urine samples: at 2064–5 [69]. In addition, the Court held the privilege against self-incrimination applied to evidence that was incriminating in either a direct or indirect way: at 2065 [71]. The case of *Kansal v United Kingdom* (2004) 39 EHRR 31 involved similar facts where an examination by the Official Receiver required, on pain of fine or imprisonment, questions to be answered (subject to a reasonable excuse defence). The Court found the provisions to be incompatible with art 6(1): at 650 [29]. See also *Shannon v United Kingdom* (2006) 42 EHHR 31.

89 *Adetero v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 46834/06, 20 April 2010) [47].



rules regarding the admissibility of evidence.<sup>90</sup> While a conviction can not be based solely or mainly on the accused's silence, the Court has determined that an accused's silence may be relevant where the situation calls for an explanation from them, in assessing the strength of the prosecution case.<sup>91</sup> All circumstances must be considered in determining whether the drawing of adverse inferences from silence is compatible with *ECHR* art 6(1), including in what circumstances an inference can be drawn,<sup>92</sup> the weight given to them by national courts in assessing the evidence, and the 'degree of compulsion' involved.<sup>93</sup> The 'weight of the public interest in the investigation and punishment of the [relevant] offence', and the 'existence of any ... safeguards in the procedure', have also been considered.<sup>94</sup> Prosecutor arguments that departures from the privilege against self-incrimination are justified or proportionate to dealing with threats to national security and terrorism have not convinced the court.<sup>95</sup> Proportionality between the alleged justification for the imposition on the right to silence and the extent of interference with the right will be considered.<sup>96</sup>

The extent to which the person had access to legal advice at the time they chose to remain silent is also relevant — specifically, the court has confirmed it is perfectly understandable that a person may choose not to answer police questions when their legal adviser is not present.<sup>97</sup> It is also understandable that a person has

90 *Jalloh v Germany* [2006] IX Eur Court HR 281, 313–14 [94].

91 *Averill v United Kingdom* [2000] VI Eur Court HR 203, 222–3 [51]; *Adetoro v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 46834/06, 20 April 2010) [48].

92 The narrower the imposition on the right to silence, the more likely it is to be valid. An example is s 172(2) of the *Road Traffic Act 1988* (UK), which requires a person to identify the driver of a vehicle alleged to have been involved in illegal activity. This provision has been upheld despite the objection that it infringes the privilege against self-incrimination, because it only permits one question to be asked, and it applies only in the context of a narrow range of offences: *Brown v Stott* [2003] 1 AC 681, 710; *O'Halloran v United Kingdom* (2008) 46 EHRR 21, 416 [62]–[63]. There is also some suggestion in these cases that if an individual 'chooses' to embark on a particular activity, such as driving, they agree to statutory rules regarding that activity, including a requirement that drivers of a vehicle identify the owner if called upon to do so, or to stop for a random breath test.

93 *Murray v United Kingdom* [1996] I Eur Court HR 30, 49 [47]; *Adetoro v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 46834/06, 20 April 2010) [49]; *Tabbakh v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 40945/09, 21 February 2012) [26]. The degree of compulsion involved was particularly important in *Jalloh v Germany* [2006] IX Eur Court HR 281, where the accused was held down while drugs were administered to him so that he would regurgitate contents of his system, suspected to include illegal drugs. The Court found that such a procedure did infringe the accused's privilege against self-incrimination: at 320 [122]–[123].

94 *Jalloh v Germany* [2006] IX Eur Court HR 281, 319 [117]. Ashworth suggests that where the privilege against self-incrimination is abrogated, the penalty should take into account that fact: Ashworth, above n 9, 770.

95 *Quinn v Ireland* (European Court of Human Rights, Fourth Section, Application No 36887/97, 21 December 2000) [57]–[58]. See also *Tabbakh v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 40945/09, 21 February 2012).

96 *Brown v Stott* [2003] 1 AC 681, 709–10 (Lord Steyn).

97 *Averill v United Kingdom* [2000] VI Eur Court HR 203, 221–2 [49]. This does not mean, of course, that an assertion of a right to silence when a person's legal representative is present is unacceptable: at 221–2 [49].

relied on advice from their legal representative not to answer questions asked,<sup>98</sup> and summing up directions should not overlook this.<sup>99</sup>

## B North America

In Canada, the right to silence is implicit in s 7 of the *Canadian Charter of Rights and Freedoms* as being one of the ‘principle[s] of fundamental justice’,<sup>100</sup> as well as specifically in ss 11(c) and 13. The Supreme Court of Canada has called the right to silence the ‘chief’ right of the accused.<sup>101</sup> The Court has emphasised the core of the right as requiring that a detained person choose whether to make a statement to authorities or not.<sup>102</sup> It can be consistent with such a requirement that police are persistent with their questioning, even after the accused has indicated they do not wish to answer questions.<sup>103</sup> The Court has confirmed the application of the rule at a time prior to the court hearing.<sup>104</sup>

The Supreme Court of Canada considered the compatibility of antitrust law provisions requiring a corporation and some of its officers to attend a hearing with the right to silence in *Thomson Newspapers Ltd v Director of Investigation and Research*.<sup>105</sup> A person who refused to attend such a hearing could be punished for an offence against the antitrust provisions. Evidence obtained through such a process was not generally admissible against that person in subsequent proceedings.

*Thomson* is not entirely satisfying as judicial authority since only five judges sat rather than nine, reducing the precedential value of the decision. However, of these, two found that the proceedings were inconsistent with the right to silence provided for in the *Canadian Charter of Rights and Freedoms*, and a third judge

98 See, eg, *Condrón v United Kingdom* [2000] V Eur Court HR 1, 22–3 [60]. In this case, the person questioned was apparently under the influence of drugs at the time.

99 *Beckles v United Kingdom* (2003) 36 EHRR 13.

100 *Hebert v The Queen* [1990] 2 SCR 151, 154.

101 *Ibid* 176 (Dickson CJ, Lamer, La Forest, L’Heureux-Dubé, Gonthier, Cory and McLachlin JJ). The right to silence reflects the common law rules of voluntariness and the privilege against self-incrimination: at 164.

102 *Ibid* 176. In this case, the accused’s appeal was allowed. Hebert had been arrested and charged with robbery. At the police station, he indicated he did not wish to make a statement. Subsequently, police placed an undercover police officer in the accused’s cell. The accused made admissions to the undercover officer, which formed most of the basis of the case against him. The Supreme Court held that the use of the evidence was contrary to the *Canadian Charter* requirements: at 186–7.

103 *Singh v The Queen* [2007] 3 SCR 405. In this case the accused eventually made admissions to police, after stating on eighteen previous occasions that he did not wish to answer questions. A bare majority of the Court found the right to silence had not been infringed (McLachlin CJ, Bastarache, Deschamps, Charron and Rothstein JJ, with Binnie, LeBel, Fish and Abella JJ dissenting).

104 *Hebert v The Queen* [1990] 2 SCR 151. Dickson CJ, Lamer, La Forest, L’Heureux-Dubé, Gonthier, Cory and McLachlin JJ stated ‘the relationship between the privilege against self-incrimination and the right to silence at the investigational phase is equally clear. The protection conferred by a legal system which grants the accused immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory’: at 174. Wilson J commented to the same effect: at 190–1. Sopinka J stated that ‘[t]he right to remain silent ... must arise when the coercive power of the state is brought to bear against the individual’, including during pre-trial procedures: at 201.

105 [1990] 1 SCR 425 (*Thomson*).

found against the accused because he had apparently challenged the wrong section.<sup>106</sup> In so doing, that third judge found it arguable that the section was inconsistent with s 7 of the *Canadian Charter of Rights and Freedoms*, violating a fundamental principle of justice, and he suggested that at most, he might declare invalid the power to punish a silent interviewee for contempt.<sup>107</sup> Having acknowledged this, then, dissident Wilson J found that the right to silence applied to the antitrust proceedings although technically it was an investigatory rather than prosecutorial step.<sup>108</sup> To do otherwise would render the protection vulnerable. The fact that the provision did not allow the prosecutor to generally use the evidence obtained through such inquiry against the person who provided the information was not sufficient, because it could be used to obtain other evidence, which could then incriminate that person and be used against them.<sup>109</sup> Sopinka J agreed with these findings, and would also have found the antitrust provisions invalid. However, he drew a distinction between the compelling of oral testimony and the compelling of documentary evidence, finding the former invalid, but the latter valid.<sup>110</sup> According to Sopinka J, the right to silence should not be limited to cases where police are asking the questions; the underlying principle is that it is meant to protect against state investigators — often, but not limited to, police.<sup>111</sup>

The Fifth Amendment to the *United States Constitution* states that in a criminal case no person shall be compelled to be a witness against themselves.<sup>112</sup> In the United States, the right to silence was emphatically asserted in the celebrated decision of *Miranda v Arizona*.<sup>113</sup> Warren CJ noted:

the privilege against self-incrimination — the essential mainstay of our adversary system — is founded on a complex of values ... All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a ‘fair state-individual balance’, to require the government ‘to shoulder the entire load’ ... to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of

106 Ibid 444 (Lamer J).

107 Ibid 430, 444 (Lamer J). Lamer J did not eventually do so, for other reasons: at 445.

108 Ibid 461.

109 Ibid 482.

110 Ibid 607–9.

111 Ibid 603. Of the majority, La Forest J did not think the right to silence should apply to the antitrust proceedings, since they were inquisitorial in nature rather than judicial and did not involve the determination of criminal liability: at 541–2. La Forest J was satisfied with the provisions limiting the use to which such evidence could be put against the person providing the information: at 546. L’Heureux-Dubé J was similarly satisfied: at 585. La Forest J was concerned with the derivative use argument raised by the dissenters, but found the solution to this in the general discretion reposed in the trial judge to exclude evidence on the basis of prejudice or policy: at 559–61.

112 *United States Constitution* amend V. The protection applies at both federal and state level: see *Dickerson v United States*, 530 US 428 (2000).

113 384 US 436 (1966) (*‘Miranda’*).

compelling it from his own mouth ... In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will'.<sup>114</sup>

In *Miranda*, a majority of the United States Supreme Court held that the *United States Constitution* required someone under 'custodial interrogation'<sup>115</sup> to be warned, prior to questioning, that they had a right to remain silent, that any statement made may be used in evidence against them, and that they had a right to legal representation, either retained or appointed.<sup>116</sup> The Court referred to the privilege against self-incrimination as the 'essential mainstay of our adversary system'.<sup>117</sup> The Court went further than previous cases in positively requiring the investigating authority to inform the person affected of those rights. It did this because otherwise inquiries regarding what an individual person did or did not know about their rights in any given case would be speculative. It was necessary to counteract the pressure that the person detained for questioning would typically be under.<sup>118</sup>

The United States Supreme Court has struck down as being inconsistent with the privilege comment by the trial judge that the jury could take into account a failure of the defendant to deny or explain evidence or facts that they could reasonably be expected to deny or explain.<sup>119</sup> The privilege applies in any proceedings, civil or criminal, investigatory or adjudicatory.<sup>120</sup> In determining what level of immunity from prosecution might be sufficient to be consistent with Fifth Amendment requirements, the Court initially took a very broad view, stating that the person subjected to the questioning would have to be given absolute immunity against future prosecution for the offence to which the question relates.<sup>121</sup> Subsequently it has been deemed sufficient that the person asked the question not have the information they supplied, or information derived from it, being used against them in a subsequent proceeding.<sup>122</sup> The person detained needs to express that he or she wishes to remain silent and/or does not wish to talk with authorities; a failure to express anything is not enough to render further police questioning unconstitutional.<sup>123</sup> A distinction has been made between testimony, for which the protection is available, and 'real or physical evidence'. As a result it is not

114 Ibid 460.

115 Ibid 444. 'Custodial interrogation' means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way'.

116 Ibid.

117 Ibid 460.

118 Ibid 469.

119 *Griffin v California*, 380 US 609 (1965).

120 *McCarthy v Arndstein*, 266 US 34, 40 (1924).

121 *Counselman v Hitchcock*, 142 US 547, 586 (1891).

122 *Kastigar v United States*, 406 US 441, 460 (1972). The prosecution would bear the burden of establishing that the evidence they proposed to use in a subsequent proceeding against the person questioned was derived from a legitimate source wholly independent of the compelled testimony. Further, use and derivative use immunity is sufficient; it does not matter that the person questioned might suffer personal odium or disgrace from having to answer the questions: see *Brown v Walker*, 161 US 591 (1896).

123 *Berghuis v Thompkins*, 130 S Ct 2250 (2010), but precise words are not required: *Quinn v United States*, 349 US 155 (1955).

a breach of the Fifth Amendment to extract physical evidence, such as blood from the accused, without their consent.<sup>124</sup> However, sometimes the privilege has extended to protecting a person from having to produce private papers.<sup>125</sup>

In contrast to Europe where, as indicated, arguments that an exception to the right to silence in the context of terrorism have not been accepted,<sup>126</sup> the Burger Court in *New York v Quarles* recognised an exception to *Miranda* requirements where public safety considerations outweighed the right of the person questioned to remain silent.<sup>127</sup> Much of the recent controversy surrounding *Miranda* has been in the context of investigation and prosecution of possible terrorist offences, and whether the *Quarles* exception should be applied in such situations,<sup>128</sup> whether a new exception is called for,<sup>129</sup> or whether *Miranda* should be applied in its original form, regardless of the context of the particular alleged crime being investigated.<sup>130</sup> Exceptions have been legislated.<sup>131</sup> The Supreme Court has often

124 *Schmerber v California*, 384 US 757 (1966).

125 *Boyd v United States*, 116 US 616 (1886); *United States v Hubbell*, 530 US 27 (2000). There is a vast literature on the United States jurisprudence. See, eg, Ronald J Allen and M Kristin Mace, 'The Self-Incrimination Clause Explained and its Future Predicted' (2004) 94 *Journal of Criminal Law and Criminology* 243; Harvey Gee, 'In Order to Be Silent, You Must First Speak: The Supreme Court Extends *Davis's* Clarity Requirement to the Right to Remain Silent in *Berghuis v Thompkins*' (2011) 44 *John Marshall Law Review* 423; Michael S Pardo, 'Self-Incrimination and the Epistemology of Testimony' (2008) 30 *Cardozo Law Review* 1023; Daniel J Seidmann and Alex Stein, 'The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege' (2000) 114 *Harvard Law Review* 430.

126 *Quinn v Ireland* (European Court of Human Rights, Fourth Section, Application No 36887/97, 21 December 2000) [57]–[58]; *Tabbakh v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 40945/09, 21 February 2012).

127 467 US 649, 655–6 (1984).

128 See, eg, *United States v Khalil*, 214 F 3d 111 (2<sup>nd</sup> Cir, 2000), where the Court of Appeals allowed statements of the accused to be admitted in the context of alleged terrorism offences, despite their being made prior to a *Miranda* warning; Joanna Wright, 'Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception' (2011) 111 *Columbia Law Review* 1296. In HR Res 1413, 111<sup>th</sup> Congress (2010) a member of the United States House of Representatives proposed a resolution stating that investigations of alleged terrorism offences may fall within the *Quarles* exception to *Miranda*, such that the warning would not be necessary. A similar proposal appeared in the Questioning of Terrorism Suspects Act of 2010, HR 5934, 111<sup>th</sup> Congress (2010), though this proposal was not enacted. The latter proposal also included a 'suggestion' that the results of overseas questioning not be rendered inadmissible due to failure to observe *Miranda* requirements, provided the confession was voluntary and reliable. Obviously, the United States observes a strict separation of powers, and it is doubtful that such a statement would influence the Court one way or the other on this issue.

129 Mark A Godsey, 'Miranda's Final Frontier — The International Arena: A Critical Analysis of *United States v Bin Laden*, and a Proposal for a New *Miranda* Exception Abroad' (2002) 51 *Duke Law Journal* 1703. The Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, HR 4892, 111<sup>th</sup> Congress (2010) calls for an exception to *Miranda* where 'high value' enemy detainees are being questioned. This proposal has not yet been enacted.

130 Amos N Guiora, 'Relearning Lessons of History: *Miranda* and Counterterrorism' (2011) 71 *Louisiana Law Review* 1147. See, eg, in *United States v Moussaoui*, 365 F 3d 292 (4<sup>th</sup> Cir, 2004), the Court of Appeals affirmed the supremacy of Fifth Amendment rights over government claims that evidence should not be revealed, contrary to general due process expectations.

131 *National Defense Authorization Act for Fiscal Year 2010*, Pub L No 111-84, § 1040, 123 Stat 2190, 2454 (2009) prohibits the giving of a *Miranda* warning to a foreign national captured or detained outside the United States as an enemy belligerent. The constitutional validity of this section is not known, given that the Supreme Court has found that the *Miranda* warning is a constitutional requirement: see *Dickerson v United States*, 530 US 428 (2000). Such rights have been extended in court decisions to interrogations outside the United States: *United States v Bin Laden*, 132 F Supp 2d 168 (SD NY, 2001).

insisted, even in the context of alleged terrorism offences, that due process be accorded to those involved.<sup>132</sup> As the joint reasons in *Hamdi v Rumsfeld* noted:

It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.<sup>133</sup>

This discussion should not be taken to imply that the American system of protecting the right to silence is perfect. Criticism of the American approach, largely beyond the purposes of this paper, would include questioning why the accused needs to positively assert the right, rather than it being the default position, whether an exception to its requirements should apply in cases of public safety, and the argument that it should apply to interrogation of suspects abroad by American authorities. The distinction between physical evidence on the one hand, and verbal testimony on the other, can be questioned. Leo, amongst others, has highlighted weaknesses of the *Miranda* protection, concluding that despite that protection, 'American police regularly rely on psychological interrogation techniques that involve deception, trickery, and manipulation'.<sup>134</sup>

This brief outline of the international jurisprudence supports the discussion of the history of the right in showing the fundamental nature of the right to silence in various common law jurisdictions, courts' rejection of the idea that a failure to give evidence can be used to draw inferences, the precise scope of the right, that the person must articulate that they wish to exercise the right, its application in so-called extreme contexts such as terrorism, and in Europe, that the right to silence has been expressly connected with the right to a fair trial and/or fair procedure. This is particularly important to the Australian context where, as will be seen in the following part, our courts have recognised a constitutional right to fair trial or fair procedure. Through this means, it can be argued that the *Australian Constitution* recognises a right to silence, as part of the right to a fair trial/fair process. This is a novel argument that to the author's knowledge has not been developed elsewhere, so it is considered worthy of extended treatment.

132 *Boumediene v Bush*, 553 US 723 (2008); *Rasul v Bush*, 542 US 466 (2004); *Hamdi v Rumsfeld*, 542 US 507 (2004).

133 542 US 507, 532 (2004) (Rehnquist CJ, O'Connor, Kennedy and Breyer JJ, in conclusions with which Souter and Ginsburg JJ concurred). *Miranda* requirements are also applied in respect of interrogations by American officers of non-Americans abroad: *United States v Bin Laden*, 132 F Supp 2d 168 (SD NY, 2001).

134 Leo, above n 11, 11. *Miranda* is largely irrelevant to modern American police interrogation because detectives typically minimise and blow past the warnings in a moment: at 37.

#### IV THE CONSTITUTIONAL PROTECTION OF THE RIGHT TO A FAIR TRIAL OR FAIR PROCESS

Five members of the High Court of Australia in the landmark decision of *Dietrich v The Queen*<sup>135</sup> found that the right to a fair trial was fundamental to the Australian legal system.<sup>136</sup> Some of them based this right on the implicit requirements of Chapter III of the *Australian Constitution* which established the judicial branch of government.<sup>137</sup> Members of the Court also alluded to the Court's inherent power to stay proceedings to prevent what would otherwise be an abuse of process.<sup>138</sup> This was in the course of rejecting an argument that an accused had a right to publicly funded legal representation. However, the Court found that, unless exceptional circumstances existed, courts should generally adjourn proceedings against an accused charged with a serious offence who through no fault of their own was not able to obtain legal representation — until such representation is available.<sup>139</sup> This would usually be necessary to ensure the accused obtained a fair trial.

In reaching this conclusion, members of the High Court referred liberally to international materials in determining the content of a fair trial, including art 14 of the *International Covenant on Civil and Political Rights*,<sup>140</sup> and American Bill of Rights case law on the meaning of a fair trial.<sup>141</sup> There is ample precedent for international materials being used to help interpret the requirements of the *Australian Constitution*. A leading example appears in the judgment of Kirby J in *Al-Kateb v Godwin*:

the complete isolation of constitutional law from the dynamic impact of international law is neither possible nor desirable today. That is why national courts, and especially national constitutional courts such as this, have a duty, so far as possible, to interpret their constitutional texts in a way

135 (1992) 177 CLR 292, 311 (Mason CJ and McHugh J), 326 (Deane J), 353 (Toohey J), 362 (Gaudron J) (*Dietrich*). See also *Jago v District Court of New South Wales* (1989) 168 CLR 23, 29 (Mason CJ), 56 (Deane J), 72 (Toohey J), 75 (Gaudron J).

136 *Dietrich* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J), 326 (Deane J), 353 (Toohey J), 362 (Gaudron J). These concepts would be encapsulated by the American concept of 'due process', but the Australian courts are yet to formally accept that the notion of due process is or should be considered to be implicit in Australia's constitutional arrangements: Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205; Janet Hope, 'A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System' (1996) 24 *Federal Law Review* 173.

137 *Dietrich* (1992) 177 CLR 292, 326 (Deane J), 362 (Gaudron J). My reading of the joint judgment of Mason CJ and McHugh J, and that of Toohey J (these being the other judges who accepted the notion of a fair trial) does not disclose the basis on which they found such a right. The judges did in their reasons refer to international materials concerning the right to a fair trial, including the *ICCPR* and *Canadian Charter of Rights and Freedoms*: at 300 (Mason CJ and McHugh J), 359–61 (Toohey J). None of these judges disagreed with the express view of Deane and Gaudron JJ that the right to a fair trial was constitutionally entrenched.

138 *Ibid* 298 (Mason CJ and McHugh J).

139 *Ibid* 315 (Mason CJ and McHugh J), 337 (Deane J), 356–7 (Toohey J).

140 *Ibid* 300 (Mason CJ and McHugh JJ), 360 (Toohey J).

141 *Ibid* 300–2 (Mason CJ and McHugh J), 333, 337 (Deane J), 359–61 (Toohey J), 370–1 (Gaudron J).

that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms.<sup>142</sup>

It is true that since the *Dietrich* decision, there have not been any High Court cases which have applied the express concept of the right to a fair trial, at least in those terms, though opportunities to do so have arisen. In response, however, firstly the decision has never been overruled. Secondly, we have seen since the *Dietrich* decision the development of a substantial jurisprudence on Chapter III of the *Australian Constitution*, and in particular the need for the judiciary to be, and to be *seen* to be, independent of the other arms of government. Furthermore, that jurisprudence tells us that public confidence in the independence of the judiciary not be undermined, and that courts not be given powers that would require or allow it to engage in activities contrary to traditional notions of judicial process.<sup>143</sup> While these decisions are not expressly based on notions of a fair trial per se, the reasoning is often highly analogous to fair trial reasoning. To my knowledge, the judges themselves have not made this connection, but in the examples given in the forthcoming paragraphs, there can be seen clear similarities in sentiment from current members of the High Court on the issue of the extent to which fairness is a constitutionally enshrined requirement of a court, such that the *Dietrich* precedent is considered to reflect an abiding principle. These examples tend to counter any suggestions that proponents of a constitutionally mandated right to fair process are simply arguing that what they do not like is unconstitutional.<sup>144</sup>

For example, in the *International Finance Trust* decision, Gummow and Bell JJ, in striking down the provisions on the so-called *Kable* principle, discuss how the court is conscripted for a process requiring mandatory *ex parte* sequestration of property upon mere suspicion, with no requirement of full disclosure, and a reverse onus. They concluded this involved the court in an activity ‘repugnant in a fundamental degree to the judicial process as understood and conducted throughout Australia’.<sup>145</sup> This led to their conclusion that the legislation was unconstitutional. Another way of expressing this would have been to say that these features of the proceedings meant that the proceeding was not a ‘fair’ one; in other words, the result and the reasoning is similar to what would have occurred if the *Dietrich* notion of a fair trial had been applied. A court asked

142 (2004) 219 CLR 562, 624 [175] (citations omitted). For recent examples of where the High Court has made extensive use of international materials in interpreting constitutional requirements, see: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; *Roach v Electoral Commissioner* (2007) 233 CLR 162. There is significant academic commentary: see, eg, Hilary Charlesworth et al, *No Country is an Island: Australia and International Law* (UNSW Press, 2006); Hilary Charlesworth et al, ‘Deep Anxieties: Australia and the International Legal Order’ (2003) 25 *Sydney Law Review* 423; Hilary Charlesworth, ‘Dangerous Liaisons: Globalisation and Australian Public Law’ (1998) 20 *Adelaide Law Review* 57.

143 See, eg, *Kable v DPP (NSW)* (1996) 189 CLR 51; *South Australia v Totani* (2010) 242 CLR 1 (‘*Totani*’); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (‘*International Finance Trust*’).

144 It is also worth remembering the famous dicta of Marshall CJ in *Marbury v Madison*, 5 US 137 (1803) (‘*Marbury*’) that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is’: at 177. The decision in *Marbury* was referred to by Fullagar J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262–3.

145 *International Finance Trust* (2009) 240 CLR 319, 367 [98].



or required to act in ways antithetical to the judicial process is being asked to conduct an unfair trial.

Even more direct evidence is found in the judgment of French CJ in *Totani*, another in this line of cases. In *Totani*, French CJ repeatedly used the word ‘fairness’ in considering the requirements of the system of courts for which Chapter III provides.<sup>146</sup> He indicated that fairness is a defining characteristic of courts.<sup>147</sup> His judgment in *International Finance Trust* similarly refers to requirements of ‘fairness’ in invalidating, as contrary to Chapter III of the *Constitution*, provisions requiring substantial departure from typical judicial process.<sup>148</sup>

Perhaps the best example of my argument appears in the recent High Court decision in *Wainohu v New South Wales*.<sup>149</sup> In this case, French CJ and Kiefel J referred to procedural fairness as being a defining characteristic of a court.<sup>150</sup> Gummow, Hayne, Crennan and Bell JJ expressly agreed with comments by Gaudron J in an earlier case that confidence in judicial officers depended on their acting ‘in accordance with fair and proper procedures’.<sup>151</sup> Heydon J assumed these statements were correct, for the purposes of argument.<sup>152</sup> Further, in the recent case of *Assistant Commissioner Condon v Pompano Pty Ltd*,<sup>153</sup> Gageler J concluded that Chapter III of the *Australian Constitution* mandated the observance of procedural fairness as an ‘immutable characteristic’ of every Australian court.<sup>154</sup> It can be argued that the right to silence is an aspect of procedural fairness. In one respect, these recent sentiments are slightly broader than those expressed in *Dietrich*, since they focus on fair process, rather than fair trial. Obviously, this avoids arguments that the right to fairness is or should be somehow limited to whatever is considered to be a criminal process.<sup>155</sup>

<sup>146</sup> *Totani* (2010) 242 CLR 1, 43.

<sup>147</sup> *Ibid* 43 [62]: ‘courts of the States continue to bear the defining characteristics of courts and, in particular ... fairness’. French CJ referred to ‘fairness’ as an essential characteristic of courts: at 45 [66]. His Honour also referred to ‘procedural fairness’ as being ‘central to the judicial function’: at 47 [69]. In the Full Court of South Australia decision in *Totani v South Australia* (2009) 105 SASR 244, Bleby J, with whom Kelly J agreed, referred in his reasons for invalidating the legislation to the fact that the control order regime denied ‘the right to a fair hearing’: at 283 [167]. In *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, 447, Fry LJ spoke of fairness as characteristic of proceedings in courts. See also *Nicholas v The Queen* (1998) 193 CLR 173, 208–9 (Gaudron J).

<sup>148</sup> (2009) 240 CLR 319. French CJ explained that the section was invalid because it ‘restrict[ed] the application of procedural fairness in the judicial process’: at 338 [4]. His Honour also stated that ‘[p]rocedural fairness ... lies at the heart of the judicial function’: at 354 [54].

<sup>149</sup> (2011) 243 CLR 181 (*‘Wainohu’*).

<sup>150</sup> *Ibid* 208 [44].

<sup>151</sup> *Ibid* 225 [94], quoting *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 22 (*‘Wilson’*). In *Wilson* (1996) 189 CLR 1, Gaudron J noted ‘the effective resolution of controversies which call for the exercise of the judicial power of the Commonwealth depends on public confidence in the courts in which that power is vested. And public confidence depends on ... [the courts] acting openly, impartially and in accordance with fair and proper procedures’: at 22.

<sup>152</sup> *Wainohu* (2011) 243 CLR 181, 239–40.

<sup>153</sup> (2013) 87 ALJR 458.

<sup>154</sup> *Ibid* 500 [194].

<sup>155</sup> The author does not suggest that the concept of fairness should be confined to the criminal context, and certainly the view internationally, evidenced by the European and American case law, does not support any suggestion that fairness is somehow a concept confined to criminal proceedings, and not required of a civil proceeding.

So, whilst I concede that the High Court has not applied the *Dietrich* principle expressly in subsequent cases, I argue that in the development of the so-called *Kable* principle,<sup>156</sup> a close analogy is apparent in at least some of the applications of the *Kable* doctrine, such that the principle that the *Australian Constitution* enshrines a right to a fair trial remains current law.

### **A The Right to Silence as Part of the Right to a Fair Trial**

I argue here that part of the constitutional right to a fair trial/fair process that the High Court first recognised in *Dietrich*, and which appears in cases like *Wainohu*, *Totani* and *International Finance Trust*, is the right to silence. This does not seem to be a radical proposition, given that the European Court of Human Rights has said that the right to silence is fundamental to a fair trial/fair process required by art 6 of the *ECHR*,<sup>157</sup> the Canadian Supreme Court has found that it is part of ‘fundamental justice’ required by s 7 of the *Canadian Charter of Rights and Freedoms*,<sup>158</sup> the United States Supreme Court has declared it to be an ‘essential mainstay’ of the adversarial system to which Australia also adheres,<sup>159</sup> and the High Court of Australia has itself declared it to be a deep-rooted right and cardinal principle. Further, in the famous United States case in which the right was emphatically asserted, *Miranda*, the Court linked the right with the right to counsel. The High Court has accepted that the right to a fair trial will often include access to counsel.<sup>160</sup> In *Dietrich*, Mason CJ and McHugh J expressly referred with evident approval to art 14 of the *ICCPR* in elaborating on the requirements of a fair trial.<sup>161</sup> Article 14(3)(g) of the *ICCPR* refers expressly to the privilege against self-incrimination, requiring that a person not be compelled to testify against themselves or to confess guilt, as one of the minimum guarantees in a criminal proceeding.

The Australian Independent National Security Legislation Monitor recently highlighted the issue of the possible inconsistency between the abrogation of the privilege against self-incrimination in Australian law and international law:

156 This is the principle that a court must not be given powers such as would cause an outsider to consider that the court’s independence was being compromised, or which undermine public confidence in the judiciary as a repository of judicial power. The precise facts involved a law allowing a court to order an offender (named in the enabling legislation) to be incarcerated for a further period beyond his originally allotted sentence if they were satisfied that it was more likely than not that he would reoffend. Ordinary rules of evidence were not applicable, and the legislation confirmed that, in making its decision, the most important factor for the court to consider was the need for community protection. By a majority of 4:2, the High Court struck out the legislation as being constitutionally invalid, contrary to the separation of powers for which Chapter III of the *Australian Constitution* provided: *Kable v DPP (NSW)* (1996) 189 CLR 51.

157 *Murray v United Kingdom* [1996] I Eur Court HR 30.

158 *Hebert v The Queen* [1990] 2 SCR 151.

159 *Miranda*, 384 US 436, 460 (1966) (Warren CJ, for the majority).

160 *Dietrich* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J), 332 (Deane J), 361–2 (Toohey J), 369 (Gaudron J).

161 (1992) 177 CLR 292, 300.

It is a large question, that ought not simply go by assumption, whether these provisions [abolishing the privilege against self-incrimination] are consistent with Australia's international human rights obligations.<sup>162</sup>

The Report adds that because such abrogations are frequently given effect in Australia

the issue cannot be given top priority. It does seem as if the pass has been sold on statutory abrogations of this privilege.<sup>163</sup>

This author does not 'buy the pass', and submits that the Australian High Court should not buy the pass. The fact that Parliaments have 'pushed the envelope' in this regard does not make it constitutionally valid or consistent with international law. The American courts have been instructive in this regard, upholding fundamental human rights principles even in the extreme context of terrorism. It is submitted that an Australian court should take a similar perspective.

I summarise here in bullet point form the propositions contained in my argument:

- The majority of the High Court judges in *Dietrich* accepted that the Australian legal system guaranteed a right to a fair trial, some of whom based the right expressly on the *Constitution*;
- Subsequent High Court jurisprudence has emphasised that courts cannot be given powers, or use procedures or processes, that would undermine public confidence in the judiciary and/or require a court to act in a non-judicial manner and/or lack procedural fairness;
- Examples of occasions where the Court has found a breach of these requirements have involved legislation requiring a court to order further incarceration of a named individual if satisfied on the balance of probabilities they might reoffend if released, reverse onus provisions, mandatory sequestration of property based upon mere suspicion, and lack of specificity of allegations of wrongdoing;
- Courts in comparable countries have included the right to silence in the right to a fair trial/fair process, and there is no good reason why the Australian 'right to a fair trial/fair process' should somehow be different from the United States, Canadian or European right to fair process; and
- The High Court should recognise that legislation abrogating the right to silence does or may infringe the constitutional right to a fair trial/fair process in Australia.

<sup>162</sup> Walker, above n 33, 33. Earlier in the Report, Walker claims that to suggest that such abrogations of the privilege against self-incrimination were in principle inappropriate would be 'absurd': at 27. With respect, the author disagrees. Encouragingly for my argument, Kiefel J recently in *X7 v Australian Crime Commission* [2013] HCA 29 (26 June 2013), after re-stating that the onus of proof was on the prosecution and that the prosecution could not compel the accused to assist it, stated: 'the common law principle is fundamental to the system of criminal justice administered by courts in Australia, which, as Hayne and Bell JJ explain, is adversarial and accusatorial in nature ... the concept of an accusatorial trial where the prosecution seeks to prove its case to the jury has a constitutional dimension': at [159]–[160].

<sup>163</sup> Walker, above n 33, 33.

I have emphasised here what might be considered to be quite a non-contentious point because there is no Australian authority that has established that the right to silence is protected by the right to a fair trial/fair process established by the *Australian Constitution*.<sup>164</sup> Indeed, there are precedents to the contrary. Australian precedents to which I have previously alluded have indicated that although the court will presume that an act is not intended to alter fundamental common law rights like the privilege against self-incrimination, if the intention of Parliament is clear enough, the right would have to yield to Parliament's will. The decisions in *Hammond* and *Sorby* are clear evidence of that philosophy in this context. However, such cases were decided before the High Court's decision in *Dietrich* recognising a constitutional right to a fair trial and the development of the *Kable* doctrine, and it is submitted that their ongoing correctness must for that reason be in doubt. They are not considered to hinder the argument pressed here.

My suggestion is that the Australian legislation alluded to in Part II of this article must, to the extent that it infringes the right to silence, be closely scrutinised to assess its compatibility with the right to a fair trial/fair procedure. It is conceded that this right is not absolute, so some interferences with the right to silence may be acceptable.<sup>165</sup> The sophisticated approach taken by the European Court of Human Rights is worth considering here, taking into account a number of issues in weighing up the right to silence with competing values.<sup>166</sup>

It might be objected that in each of the Australian Acts referred to earlier, the demand for information occurs at an investigatory or preliminary stage of proceedings, such that the right to silence is not applicable, because it applies (constitutionally) to a 'trial', in the words of the majority in *Dietrich*. There are several points to note by way of response. Firstly, at least some Australian judges,<sup>167</sup> as well as overseas courts,<sup>168</sup> have found that the right to silence does

164 The only reference (oblique, at that) in any judgment to this appears in the decision of Kirby J (dissenting) in *Carr v Western Australia* (2007) 232 CLR 138, 172, where his Honour refers to the need for the prosecution to prove its case. His Honour suggests that this requirement 'may even be implied in the assumption about fair trial in the federal *Constitution*': at 172. There are obviously very close links between the presumption of innocence and the privilege against self-incrimination. However, the author has not found a case where Kirby J specifically stated that the privilege against self-incrimination was part of the right to a fair trial provided for in the *Australian Constitution*.

165 The Australian courts may like to consider whether there should be separate treatment for oral testimony and physical records, as occurs in the United States in particular and to some extent in Europe, and whether it is relevant to take into account whether the information had an existence independent of the person being asked to provide it. Examples would include evidence derived from body tissue, urine, blood, breath etc. Similarly, information with little or no potential to incriminate the person, such as their name and address, might be able to be lawfully demanded by police.

166 As earlier discussed, these include the circumstances in which the implication could be drawn, the weight given to the evidence, degree of compulsion, public interest in the investigation and prosecution of those kinds of cases, proportionality, safeguards built-in to the procedure, whether the activity the subject of the questioning was an activity that the person chose voluntarily to participate in and so may have acquiesced in a limiting of their rights in that limited context, whether the person was legally represented at the hearing, and, perhaps, that the penalty for breach specifically take into account the fact that a fundamental right was taken away.

167 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 341 (Mason ACJ, Wilson and Dawson JJ), 346 (Murphy J), 354–5 (Brennan J dissenting).

168 *Murray v United Kingdom* [1996] I Eur Court HR 30; *Funke* (1993) 256-A Eur Court HR (ser A); *Thomson* [1990] 1 SCR 425; *Miranda*, 384 US 436 (1966); *McCarthy v Arndstein*, 266 US 34, 40 (1924).

extend to the investigatory stage, since it is sufficiently proximate to possible subsequent proceedings which would involve a 'trial' or at the very least a further 'process'.<sup>169</sup> I have earlier alluded to academic commentary pointing out that strong protection of fair process rights would be undermined if confined to any actual court proceedings, and that they must for the sake of efficacy extend to the earlier investigatory stage, because of the possible influence of what may have happened during the investigatory stage on the subsequent stage. Second, in recent cases such as *Wainohu*, *Totani* and *International Finance Trust*, the Court has emphasised the need for fairness of process, in the context of the requirements of Chapter III of the *Constitution*. As indicated above, this is wider than the concept of a fair trial, for two reasons — firstly, it can embrace subsequent proceedings that are identified as civil in nature; and secondly, it might be extended to a consideration of the process by which the evidence the court is being asked to consider was obtained.

An alternative response is to say that while the questioning might be permitted and those proceedings not stayed per se, the actual use of the information obtained as a result of 'forced' answering at any subsequent proceeding could be challenged on the basis that the use of such evidence would infringe the right to a fair trial, or fair process.

As indicated, the Australian Acts differ in the extent to which the information gained by such proceedings may be used against the person. However, even those that offer the strongest protection to the use of that information do not forbid the use of information derived from the information provided, as the United States Supreme Court has required.<sup>170</sup> It is difficult to justify requirements in some of the Australian Acts that the person being questioned must actually assert their objection to the information being provided on self-incrimination grounds prior to actually handing over the information, in order that the use immunity apply. This assumes a level of knowledge of the law, and an ability and willingness to assert rights in a difficult situation that seems unrealistic, especially when there is no guarantee that a lawyer acting for the person will be present.

To the extent that the Acts under question expressly deny the applicability of the privilege against self-incrimination, this is not thought to be a bar to a court finding that admission of such evidence would infringe a constitutional right to a fair trial/fair procedure. Legislation must yield to the *Australian Constitution*, in the event of incompatibility. On several recent occasions the High Court of Australia has struck down processes created by statute that the Court deemed to be unfair on the basis that they were contrary to the requirements of Chapter III of the *Australian Constitution* in that they asked or required the court to act in a

169 This might overcome the argument that since the right to a fair trial or process is derived from Chapter III of the *Australian Constitution*, its application is limited to what occurs in a court. It would mean that the right to fair process could apply at this investigatory stage, even if no subsequent court proceeding did occur. Either the potentiality of a further court proceeding, or the fact that the investigatory stage was a 'process' to which the requirement of constitutional fair process attached, would be sufficient for the constitutional protection to apply at that preliminary stage.

170 *Kastigar v United States*, 406 US 441 (1972).

non-judicial manner, and undermined public confidence in the judiciary and the separation of powers for which the *Australian Constitution* provides.<sup>171</sup>

The High Court often resorts to the principle of legality in order to protect common law principles,<sup>172</sup> so that in the event of ambiguity in legislation, the legislation is presumed not to have been intended to interfere with fundamental common law rights, such as the right to silence. However, as demonstrated by a recent High Court decision,<sup>173</sup> the principle may be considered a reasonably frail shield in terms of rights protection because, if the intention of Parliament is sufficiently clear, the common law principle must yield. This is why the question of the constitutional status of the right to fair trial/fair process, including the right to silence, is so important, and why we cannot rely on the existing common law power to ensure fair trials. Acts discussed above in the context of both preliminary/investigatory processes and trials explicitly abrogate the right to silence, rendering (at least according to the current High Court)<sup>174</sup> the common law protection otiose. Obviously, it would be otherwise if the protection were constitutionally mandated.

## **B Examples of the Application of the Favoured Principle**

It may be useful to finish with some concrete examples of laws that would be challengeable if the High Court were to accept that the constitutional principle of a fair trial/fair process included a right to silence. Assume for instance, to take an issue currently in the news, that the Australian Crime Commission contacts a football player, requiring them to attend an examination in relation to an investigation into drugs in sport. The Commission may make the player aware that it is an offence not to attend, or to attend but fail to answer questions or provide requested documents. The Commission may not inform the player that if they wish to assert any privilege against self-incrimination, the Act requires the person to expressly state so before providing the information. The player may not be legally represented and may make some statements that are against their own interests, or the interests of others. They may make a mistake in relation to information they provide to the authorities, because of the stressful situation

171 *Wainohu* (2011) 243 CLR 181; *Totani* (2010) 242 CLR 1; *International Finance Trust* (2009) 240 CLR 319.

172 *Potter v Minahan* (1908) 7 CLR 277; *Momcilovic v The Queen* (2011) 245 CLR 1; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.

173 *Momcilovic v The Queen* (2011) 245 CLR 1, 51 [53] (French CJ): 'The concept of the presumption of innocence is part of the common law of Australia, subject to its statutory qualification or displacement in particular cases'. French CJ then notes 'that protective operation [of the common law] is ineffective against the clear language of s 5': at 52 [55].

174 This rider is necessary, because some argue that legislation inconsistent with fundamental common law rights is or may be invalid for that reason: see Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240; Michael Wait, 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 *Federal Law Review* 57; Justice John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158; Anthony Gray, 'The Common Law and the Constitution as Protectors of Rights in Australia' (2010) 39 *Common Law World Review* 119.

they are in, the speed with which the process is occurring, the unfamiliarity of the process to them and the dire consequences of non-compliance, perhaps lack of education, and perhaps the lack of legal advice available to them, particularly for example where they are not at that time an elite athlete or with an elite club.<sup>175</sup>

The argument is that it would be an unfair process to use information garnered through such means in relation to a possible later prosecution against that individual, or others about whom that individual provided information, because of the circumstances in which that information was proffered. Nothing in the *Australian Crime Commission Act 2002* (Cth) would prevent any of the above from occurring, and the Act expressly states that the privilege against self-incrimination has limited application, only where the person states that they wish to claim that privilege prior to giving the information. A court may read this provision to mean that if the individual did not express this wish upfront, Parliament's intention was that the privilege should not apply. If they interpreted the Act in such a way, the judge would probably find the Act overrode any common law right to silence. As a result, a constitutional basis of the right would be necessary to prevent this occurrence.

Another example would be, in relation to the current New South Wales proposal allowing inferences to be drawn at trial from silence at the investigatory stage, where the defendant fails or refuses to mention something that they ought reasonably have been expected to mention at the time, then seeks to rely on it later. Say for instance that a person accused of murder is asked by police at the police station why they committed the crime. The person refuses to answer, because they are in a mentally precarious state. They may not have a legal representative with them during questioning, because the proposal requires only that the person be allowed an opportunity to obtain advice. The accused might well decline that opportunity, for various reasons. In fact, the accused committed the murder against an adult who he claims sexually abused him, raising a possible partial defence.<sup>176</sup> Prosecutors might argue that this was something that the accused ought reasonably have been expected to mention during official questioning, such that the accused's failure to do so at that time should be used to infer that he is lying now when he argues at trial that this occurred, to assist the prosecutor in meeting their legal onus of proof. A constitutional basis of the right to silence as part of a right to a fair trial/fair process is necessary to prevent these kinds of criminal law evidentiary provisions from being applied.

175 If the player were in the elite category or with an elite club, it is considered more likely that the club would provide the player with legal representation and/or advice about how to respond to the summons from the Australian Crime Commission.

176 The availability of such a defence will vary across jurisdictions, with some states having abolished the provocation defence.

## V CONCLUSION

Australian legislatures continue to impinge on the right to silence, a right with a long heritage and which was only recognised after centuries of competing philosophy. The rationale for the retention of the right to silence is as applicable today as it ever was. Consistent with the presumption of innocence, with liberal values, and in recognition of the power that government has over the individual, it is for the government to prove the truth of an accusation it makes. An individual should not be required to assist the government to make its case, on pain of punishment. Yet this is what current Australian provisions do at the pre-trial stage, and to some extent at trial.

I have argued that the right to silence should be recognised as part of the right to a fair trial/fair procedure which was considered as a constitutional requirement by the Australian High Court in *Dietrich* and more recently in *Wainohu*, and that this right should extend to pre-trial proceedings as well as at trial, to give it substance. Existing limits on the use to which compelled evidence may be put in later proceedings fall short of what is acceptable, bearing in mind the standards created by the American courts. The European Court of Human Rights has reinforced the right, albeit not absolute, of a person to not provide information to authorities, as part of the fundamental right to a fair process.

I would also favour a more nuanced approach to the right in Australia, taking into account the kinds of factors to which the European courts have alluded, in assessing the extent of the right in a given case. Specifically, factors such as the extent to which the person had legal advice, or the opportunity to obtain legal advice at the time, the circumstances in which an inference might be drawn, the extent of limitations on the use of 'compelled' testimony, the weighting to be given to the person's silence and/or how it is used, the degree of compulsion involved, and the existence of any safeguards on the obtaining of such evidence would all be relevant. However, the existence of the right cannot be made to depend, as some of the Australian Acts suggest, on whether the person affected happens to mention it before providing the information. This approach protects those who are extremely well-informed of their rights, or those with a quick minded legal representative, and compromises those who are most vulnerable.