

CITATION: *The King v PKC* [2026] NTCCA 1

PARTIES: THE KING

v

PKC

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF
THE NORTHERN TERRITORY

JURISDICTION: ON REFERENCE from the SUPREME
COURT exercising Territory jurisdiction

FILE NO: CA 7 of 2025 (22212202)

DELIVERED: 18 February 2026

HEARING DATE: 16 October 2025

JUDGMENT OF: Kelly, Brownhill & Huntingford JJ

CATCHWORDS:

EVIDENCE – Tendency and relationship evidence – Uncharged conduct in New South Wales – *Evidence (National Uniform Legislation) Act 2011*, ss 101 and 137 – Whether the words ‘danger of unfair prejudice to the defendant’ are capable of applying to prejudice to the accused in other criminal proceedings – Those words are not so capable.

EVIDENCE – Tendency and relationship evidence – Uncharged conduct in New South Wales – *Evidence (National Uniform Legislation) Act 2011*, ss 101 and 137 – Whether the words ‘danger of unfair prejudice to the defendant’ are capable of applying to forensic disadvantage in the form of affecting the accused’s decision whether or not to give evidence in the trial – The mere fact that admission of evidence of uncharged criminal conduct may bear on accused’s decision to give evidence and/or make that decision

more difficult because his evidence may be used against him in other criminal proceedings does not constitute ‘unfair prejudice’.

EVIDENCE – Common law privilege against self-incrimination – *Evidence (National Uniform Legislation) Act 2011*, s 128 – Effect on common law privilege against self-incrimination – By s 128(10), s 128 does not apply to evidence about uncharged conduct in New South Wales – No common law privilege against self-incrimination remains.

Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 2) [2018] FCA 1459; *Azzopardi v The Queen* (2001) 205 CLR 50; *Commissioner of the Australian Federal Police v Yang* [2023] VSCA 271; *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46; *Cooper v The King* [2022] NTCCA 16; *Cornwell v The Queen* (2007) 231 CLR 260; *Director of Public Prosecutions (ACT) v DL* (2018) 14 ACTLR 62; *Director of Public Prosecutions v Hague* [2018] VSCA 39; *Director of Public Prosecutions (Cth) v Jo* (2007) 176 A Crim R 17; *Director of Public Prosecutions v Mastalerz* [2024] ACTSC 30; *Director of Public Prosecutions v McGary (No 6)* [2024] ACTSC; *Environment Protection Authority v Wollondilly Abattoirs Pty Ltd* [2019] NSWCCA 312; *Hannes v Director of Public Prosecutions (Cth) (No 2)* (2006) 165 A Crim R 151; *Kaddour v The Queen* [2013] NSWCCA 243; *Papakosmas v The Queen* (1999) 196 CLR 297 ; *Lee v The Queen* (2014) 253 CLR 455; *McMahon v Gould* (1982) 7 ACLR 202; *Moore (a pseudonym) v The King* (2024) 98 ALJR 1119; *The King v Parkes* [2024] NSWSC 269; *The Queen v KQE* [2022] ACTSC 69; *The King v Silcock (No 2)* (2022) 15 QR 154; *The Queen v Bauer* (2018) 92 ALJR 846; *The Queen v Cook* [2004] NSWCCA 52; *The Queen v DL* [2018] ACTSC 28; *The Queen v RD* [2016] NSWCCA 84; *The Queen v SG* [2017] NSWCCA 202; *The Queen v Stott* [2019] ACTSC 272; *Strickland v Director of Public Prosecutions (Cth)* (2018) 266 CLR; *Western Australia v Scafetta* [2009] WADC 175; *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Yuill v Spedley Securities Ltd (in liq)* (1992) 8 ACSR 272; *Zhao & Anor v Commissioner of the Australian Federal Police* (2014) 43 VR 187, referred to.

Criminal Code 1983 (NT) ss 134(2), 192(3), 196(1), 408

Evidence (National Uniform Legislation) Act 2011 (NT) ss 12, 17, 55, 56, 101, 128, 137

REPRESENTATION:

Counsel:

Crown:	LJ Auld
Accused:	E Nekvapil SC with G Chipkin & T Clelland

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	K E Roussos and Associates

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v PKC [2026] NTCCA 1
No. CA 7 of 2025 (22212202)

BETWEEN:

THE KING

AND:

PKC

CORAM: KELLY, BROWNHILL & HUNTINGFORD JJ

REASONS FOR JUDGMENT
(Delivered 18 February 2026)

THE COURT:

[1] This is a referral from the Supreme Court to the Full Court pursuant to s 408 of the *Criminal Code Act 1983* (NT) (*‘Criminal Code’*). The referral seeks consideration and determination of the following questions:

1. Are the words ‘the danger of unfair prejudice to the defendant’ in ss 101 and 137 of the *Evidence (National Uniform Legislation) Act 2011* (NT) capable of applying to:
 - (a) prejudice to the accused in other criminal proceedings (whether existing or potential); or

(b) forensic disadvantage in the form of affecting his decision whether or not to give evidence in this trial?

2. If an accused person elects to give evidence, and is asked to give evidence to which s 128(10) of the *Evidence (National Uniform Legislation) Act 2011* (NT) applies, can they claim a common law privilege against self-incrimination in respect of that evidence?¹

[2] The facts comprising the factual basis for the purpose of the determination of these questions were contained in the reservation and are set out below.

[3] The accused stands charged on indictment of 13 offences allegedly committed against the complainant on four occasions during the period 20 June 2011 to 16 August 2011. In particular, he is charged with six counts of sexual intercourse without consent contrary to s 192(3) of the *Criminal Code* and one count of deprivation of liberty contrary to s 196(1) of the *Criminal Code*, with six counts of incest contrary to s 134(2) of the *Criminal Code* charged in the alternative to each of the s 192(3) charges.

[4] On 12 May 2025, the accused was arraigned and entered pleas of not guilty in respect of each charge. The evidence of the complainant is yet to be recorded, and a trial date is yet to be set.

[5] The Crown intends to rely on evidence of the accused's alleged sexual conduct against the complainant and her best friend in New South Wales

¹ By consent, and pursuant to s 408(6) of the *Criminal Code*, Kelly J amended the form of the question to that proposed by the accused at the hearing.

during the period 2003 to 2010 ('the alleged NSW offending') for tendency and relationship evidence purposes ('the tendency and relationship evidence').

- [6] In February 2022, following a referral from the Northern Territory Police Force, New South Wales Police opened an investigation in relation to the alleged NSW offending. On 14 March 2025, New South Wales Police confirmed that 'NSW Police holdings do not have any current investigations against [the accused] in relation to the alleged NSW offending; that the status of this investigation is currently suspended but will be reopened should the [complainant and her best friend] come forward to proceed'.
- [7] The alleged NSW offending, if charged and proven, would constitute a criminal offence or offences under the law of New South Wales.
- [8] The accused has not been charged with any offences relating to the alleged NSW offending, nor has he received an indemnity in respect of the alleged NSW offending.
- [9] If the accused were to give evidence at his trial, and were asked about the alleged NSW offending, he is unable to seek a certificate under s 128 of the *Evidence Act* by virtue of sub-section (10).

The approach to answering the reserved questions

- [10] It is appropriate to begin with Question 2, because the proper effect of s 128 of the *Evidence Act* is a relevant part of the context within which to consider Question 1.

Section 128, *Evidence Act*

- [11] Section 128 of the *Evidence Act* is in the following form.

128 Privilege in respect of self-incrimination in other proceedings

- (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:
 - (a) has committed an offence against or arising under an Australian law² or a law of a foreign country; or
 - (b) is liable to a civil penalty.
- (2) The court must determine whether or not there are reasonable grounds for the objection.
- (3) If the court determines that there are reasonable grounds for the objection, the court is to inform the witness:
 - (a) that the witness need not give the evidence unless required by the court to do so under subsection (4); and
 - (b) that the court will give a certificate under this section if:
 - (i) the witness willingly gives the evidence without being required to do so under subsection (4); or
 - (ii) the witness gives the evidence after being required to do so under subsection (4); and
 - (c) of the effect of such a certificate.

² The term 'Australian law' is defined to mean a law of the Commonwealth, a State or Territory, and refers to an Australian law (whether written or unwritten) of or in force in Australia: Dictionary.

- (4) The court may require the witness to give the evidence if the court is satisfied that:
- (a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country; and
 - (b) the interests of justice require that the witness give the evidence.
- (5) If the witness either willingly gives the evidence without being required to do so under subsection (4), or gives it after being required to do so under that subsection, the court must cause the witness to be given a certificate under this section in respect of the evidence.
- (6) The court is also to cause a witness to be given a certificate under this section if:
- (a) the objection has been overruled; and
 - (b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.
- (7) In any proceeding in a Territory court or before any person or body authorised by a law of the Territory, or by consent of parties, to hear, receive and examine evidence:
- (a) evidence given by a person in respect of which a certificate under this section has been given; and
 - (b) any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,
- cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.
- ...
- (8) Subsection (7) has effect despite any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned.
- (9) If a defendant in a criminal proceeding for an offence is given a certificate under this section, subsection (7) does not apply in a proceeding that is a retrial of the defendant for the same offence or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence.

- (10) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:
- (a) did an act the doing of which is a fact in issue; or
 - (b) had a state of mind the existence of which is a fact in issue.
- (11) A reference in this section to doing an act includes a reference to failing to do an act.

Notes for section 128

- 1 *Bodes corporate cannot claim this privilege. See section 187.*
- 2 *Clause 3 of Part 2 of the Dictionary sets out what is a civil penalty.*
- 3 ...
- 4 *Subsections (8) and (9) were inserted as a response to the decision of the High Court of Australia in *Cornwell v The Queen* (2007) 271 CLR 260.*

Question 2 – Common law privilege against self-incrimination

[12] The decision of the High Court in *Cornwell v The Queen*³ explains that historically at common law, parties to legal proceedings were generally not competent witnesses: they could not testify on their own behalf or otherwise, even if they wanted to.⁴ That position was altered in the United Kingdom by the *Criminal Evidence Act 1898* (UK).⁵

[13] Section 1 of that Act provided that every person charged with a criminal offence was competent to give evidence in their own case. Section 1(a) of that Act provided that a person charged with an offence could not be called

3 *Cornwell v The Queen* (2007) 231 CLR 260 ('*Cornwell*').

4 *Cornwell* at [32] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

5 *Cornwell* at [31], [32], [38]-[54].

as a witness except on their own application. Section 1(e) provided that an accused who gave evidence could be asked any question in cross-examination notwithstanding that it would tend to incriminate him in relation to the charged offence and s 1(f) provided that he was not to be asked or required to answer any question tending to show that he or she had committed or been convicted of or charged with any other offence, unless the proof of that was admissible evidence to show that he was guilty of the charged offence, or had given evidence of his good character.

[14] After that Act was enacted in the United Kingdom, Australian legislation was introduced to adopt, or altered to conform to, the model of that Act.⁶ First, through provisions similar to s 1(e) of that Act, accused persons could be asked any question in cross-examination notwithstanding that it would tend to incriminate them of the offence charged,⁷ and secondly, through a regime generally similar to s 1(f) of that Act.⁸

[15] Thus, by those statutory changes to the common law, an accused became competent to give evidence and their common law privilege against self-incrimination was removed if they chose to give evidence, both in relation to the charged offence and in relation to other offending if that was admissible in order to prove the charged offence.

⁶ *Cornwell* at [37].

⁷ *Cornwell* at [55], referring to legislation in all Australian States and Territories, including s 9(7) of the *Evidence Ordinances 1939* (NT).

⁸ *Ibid.*

- [16] When that Australian legislation was replaced by the uniform evidence law in various jurisdictions, the previous statutory position was retained. By s 12 of the *Evidence Act*, a person is competent to give evidence and compellable to do so except that, by s 17, a defendant in a criminal proceeding is not competent to give evidence as a witness for the prosecution. Further, s 128(10) of the *Evidence Act* excludes from the application of s 128 the giving of evidence by a defendant in a criminal proceeding, being evidence that the defendant: (a) did an act the doing of which is a fact in issue; or (b) had a state of mind the existence of which is a fact in issue.
- [17] In *Cornwell*, the High Court held (at [84]) that these words in the equivalent of s 128(10) of the *Evidence Act* are not limited to direct evidence that the defendant did the act or had the state of mind; they extend also to the giving of evidence by the defendant of facts from which the doing of the act or the state of mind can be inferred. The High Court held (at [30]-[31]) that where an accused gives evidence, it is a matter for his counsel what questions are asked in chief, following which they are obliged to answer any relevant questions in cross-examination and (at [58]) that the accused's privilege against self-incrimination is abolished so far as matters of fact tending to criminate the accused and so far as matters of fact relevant to facts in issue.
- [18] On the basis of the High Court's decision in *Cornwell*, we consider that the answer to Question 2 is 'No'. That is because no common law privilege against self-incrimination applies to the giving of evidence by an accused that the accused did an act the doing of which is a fact in issue or had a state

of mind, the existence of which is a fact in issue. That is, no common law privilege against self-incrimination applies to evidence that falls within s 128(10) of the *Evidence Act*.

Sections 101 and 137, *Evidence Act*

[19] Sections 101 and 137 of the *Evidence Act* are in the following form.

101 Further restrictions on tendency and coincidence evidence adduced by prosecution

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence outweighs *the danger of unfair prejudice to the defendant*.
- (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
- (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by *the danger of unfair prejudice to the defendant*.

Question 1: ‘The danger of unfair prejudice to the defendant’

[20] Question 1 was framed to ask if the italicised words in ss 101(2) and 137 above are *capable* of applying to the matters referred to in paragraphs (a) and (b) to ensure that the question reserved under s 408 of the *Criminal*

Code is a question of law. So framed, Question 1 addresses the scope of the statutory provisions rather than their application to the tendency and relationship evidence in the present case. The facts set out in the reference are, however, relevant to the determination of the questions of law reserved.

[21] The Crown argued that: (a) the text, context and purpose of ss 101 and 137 of the *Evidence Act* establish that the words ‘the danger of unfair prejudice to the defendant’ refer only to prejudice in and of the proceeding in which the evidence is adduced by the prosecutor; and (b) authority establishes that the words ‘the danger of unfair prejudice to the defendant’ do not refer to the effect that the admission of evidence about uncharged criminal conduct may have on the accused’s forensic decision as to whether or not to give evidence at trial.

[22] The accused argued that the text of ss 101 and 137, read with its purpose and the consequences of his preferred construction, is broad enough to refer to prejudice arising in some criminal process outside of the criminal trial in which the evidence is sought to be adduced. Reliance was placed on the High Court’s decisions in *X7 v Australian Crime Commission*⁹ and *Commissioner of the Australian Federal Police v Zhao*.¹⁰ We will return to these authorities later.

⁹ *X7 v Australian Crime Commission* (2013) 248 CLR 92 (‘X7’).

¹⁰ *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 (‘Zhao’).

Text, context and purpose of ss 101 and 137

- [23] In their terms, according to their ordinary meaning, the words ‘prejudice to the defendant’ are broad enough to refer to prejudice arising in any form, in any context and from any matter, whether internal or external to the proceedings in which the evidence is sought to be adduced. A construction that broad is unlikely to have been intended by the legislature.
- [24] The word ‘unfair’ confines the breadth of those words. It is self-evidently referring to and drawing on the fundamental right of an accused to have, and the fundamental duty of a trial judge to ensure, a fair *trial*.¹¹
- [25] That is clear support for the proposition that the words ‘unfair prejudice to the defendant’ refer to prejudice arising in the trial in which the evidence is sought to be adduced.
- [26] Consistent with that proposition, the words ‘to the defendant’ identify the affected person by reference to their status as the defendant in the criminal proceeding the subject of the provision – the criminal proceeding in which the evidence is sought to be adduced.
- [27] The accused argued that the words ‘the defendant’ are capable of being construed as referring to a person in their capacity as a person subject to a criminal process outside of the criminal trial in which the evidence is sought to be adduced, including an investigation, potential prosecution and

¹¹ *Papakosmas v The Queen* (1999) 196 CLR 297 at [91] per McHugh J; *The Queen v Bauer* (2018) 92 ALJR 846 at [73] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.

potential trial for alleged uncharged acts. The difficulty with that proposition is that a person suspected of having committed uncharged acts, who is or may be the subject of investigation and potential prosecution is not a ‘defendant’. That term is commonly understood to refer to a respondent to a judicial process which has been commenced against them.

[28] Support for the proposition that the words ‘unfair prejudice to the defendant’ refer to prejudice arising in the trial in which the evidence is sought to be adduced is also found in the task to which the provisions are directed – the admissibility of evidence in a criminal trial. As the diagram in the Introductory Note to Chapter 3, headed ‘Admissibility of evidence’, sets out, the starting point for the admissibility of evidence is whether the evidence is relevant. As s 55(1) provides, the evidence that is relevant *in a proceeding* is evidence that, if it were accepted, could rationally affect the assessment of the probability of the existence of a fact in issue *in the proceeding*. Further, as s 56(1) provides, except as otherwise provided by the *Evidence Act*, evidence that is relevant *in a proceeding* is admissible *in the proceeding*.

[29] The proposition that ss 101 and 137 have within their scope prejudice occurring outside of the criminal proceeding in which the evidence is sought to be adduced is counter-intuitive and sits uncomfortably with the language of those provisions and the overarching purpose of Chapter 3.

[30] The intended purpose of s 137 was to help provide a fair trial by excluding evidence which, while relevant, may be misused by the tribunal of fact and ‘prejudice’ was intended to refer to damage to the accused’s case in some unacceptable way, such as by provoking some irrational or emotional response or giving evidence more weight than it should have.¹²

[31] Both ss 101(2) and 137 have been construed consistently with that purpose. In *The Queen v SG*,¹³ Bellew J (Hoeben CJ at CL and McCallum J agreeing) observed (at [45]):

The unfair prejudice of which s 137 speaks may be constituted by a danger that a jury may make improper use of the evidence, for example, by giving it more weight than it properly deserves, by considering it in a manner logically unconnected with the issues in the case, or by allowing it to provoke an irrational, emotional or illogical response. Unfair prejudice may also be occasioned because the evidence has some feature which is likely to lead to a jury giving it more weight than it warrants, or because it is apt to invite the jury to draw an inference about some matter which would ordinarily be excluded from evidence... [citations omitted]

[32] More recently, on the basis of acceptance by the Australian, New South Wales and Victorian Law Reform Commissions that an inability to test evidence by cross-examination may constitute a legitimate ground for its exclusion where this would affect the ability of the fact-finder to assess rationally the weight of the evidence, the High Court has accepted that such

¹² Australian Law Reform Commission, *Evidence (Interim) Report*, No 26, Vol 1, 1985, [957]. See also the Introductory Note to the *Evidence Act*, which states that the *Evidence Act* is in most respects uniform with, *inter alia*, the *Evidence Act 1995* (Cth).

¹³ *The Queen v SG* [2017] NSWCCA 202.

a procedural disadvantage may constitute ‘unfair prejudice’ within the meaning of s 137 of the *Evidence Act*.¹⁴

[33] Various Victorian and New South Wales decisions have accepted that ‘unfair prejudice’ in the equivalent of s 137 of the *Evidence Act* can apply in relation to other forms of ‘procedural unfairness’, such as late service of the evidence of an expert by the Crown,¹⁵ the fact that the only way the accused could respond to the evidence necessitated putting highly prejudicial and otherwise inadmissible evidence before the jury,¹⁶ or some other procedural unfairness.¹⁷

[34] All of these authorities identify the words ‘unfair prejudice’ in s 137 of the *Evidence Act* as relating to a prejudice that would be suffered by the accused in the criminal proceeding in which the evidence is sought to be elicited.

[35] As Bromwich J observed (at [59]) in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 2)*,¹⁸ the authorities dealing with procedural disadvantages as a potential aspect of unfair prejudice were directed to the substance of the evidence

14 *Moore (a pseudonym) v The King* (2024) 98 ALJR 1119 at [34]-[35] per the Court.

15 *The Queen v Sharpe (No 2)* [2021] NSWSC 32 at [23] per Bellew J; *The Queen v Rice (No 4)* [2014] NSWSC 1525 at [31]-[32] per Bellew J; *Haoui v The Queen* (2008) 188 A Crim R 331 at [101]-[126] per Beazley JA (Johnson and McCallum JJ agreeing).

16 *The Queen v Cook* [2004] NSWCCA 52 at [36]-[37], [48] per Simpson J (Ipp JA and Adams J agreeing); *Hannes v Director of Public Prosecutions (Cth) (No 2)* (2006) 165 A Crim R 151 at [305]-[315] per Barr and Hall JJ; *Director of Public Prosecutions v Hague* [2018] VSCA 39 at [31]-[36] per Maxwell P and Beach JA.

17 *The King v Parkes* [2024] NSWSC 269 at [81] per N Adams J.

18 *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 2)* [2018] FCA 1459.

itself, and potentially insurmountable obstacles to challenging the evidence due to its inherent characteristics in the particular circumstances in which it was to be adduced. His Honour held in that case that purely financial considerations concerning the capacity of a party to afford to mount a cross-examination of the experts who had provided the impugned evidence exceeded the proper scope of the term ‘unfair prejudice’ in the equivalent of s 135(a) of the *Evidence Act*, which permits a court to refuse to admit evidence if its probative value is substantially outweighed by ‘the danger that the evidence might be unfairly prejudicial to a party’.

[36] The accused argued that the constructional choice favoured by the accused would not *necessarily* render otherwise admissible evidence inadmissible for a reason outside of the criminal trial. Rather, it would simply permit a court, when deciding whether to admit evidence, to take into account prejudice which may be suffered by an accused by virtue of a criminal process (whether existing or potential) external to the criminal trial in which the evidence is sought to be adduced. It was put that ss 101 and 137 should not be construed so as to narrow the court’s power to take into account prejudice which is inconsistent with the accusatorial system of criminal justice.

[37] That submission is premised upon establishing that the type of prejudice identified by the accused is inconsistent with the accusatorial system of criminal justice. That argument is addressed below.

[38] Leaving that argument aside for the moment, the text, context and purpose of ss 101 and 137, as well as the authorities referred to, all indicate that the provisions refer only to prejudice in and of the proceeding in which the evidence is adduced by the prosecutor.

Effect of evidence of uncharged acts on accused's decision to give evidence

[39] In *Azzopardi v The Queen*,¹⁹ speaking of the particular aspect of the right to silence comprised of the immunity of an accused person undergoing trial from being compelled to give evidence, Gleeson CJ observed (at [8]-[9]) that one of the most common tactical decisions that has to be made by an accused at a criminal trial is whether to rest on perceived weaknesses in the prosecution case, or to advance a positive defence case. His Honour said both decisions are rarely devoid of consequences. His Honour said that a practical compulsion to testify frequently arises in a criminal trial and may arise from the facts of a particular case, from the nature of an accused's defence, or because of the accidental unavailability of a witness who could give evidence of some fact important in the defence case. Importantly, his Honour said that the existence of a practical compulsion to testify is not inconsistent with the immunities which together make up the right to silence.

[40] Gleeson CJ was in the minority in *Azzopardi*. Nevertheless, his Honour's observations as just set out were not ground-breaking. Nor were they

¹⁹ *Azzopardi v The Queen* (2001) 205 CLR 50.

inconsistent with the reasoning or conclusions reached by the majority in that case. In discussing the introduction of the legislation which permitted an accused person to give evidence at trial, Gaudron, Gummow, Kirby and Hayne JJ drew a distinction (at [40]) between a real choice to give evidence or to stay silent, and a disguised obligation to give evidence. Their Honours observed that providing an opportunity to answer a charge or deny an accusation could easily become an obligation to give evidence *if silence could be treated as an admission of guilt*. That gives an indication of the kind of compelling matter contemplated by the majority as something that would convert a real choice into a disguised obligation to give evidence, and contrasts readily with the ordinary practical compulsions referred to by Gleeson CJ.

- [41] Similarly, in *Kaddour v The Queen*,²⁰ Harrison J (Latham and Garling JJ agreeing) held (at [49]) that the appellant in that case was not ‘compelled’ to give evidence within the equivalent of s 128 of the *Evidence Act* simply because he felt pressured to do so as the result of some strategic or tactical imperative affecting his case. The decision remained one for the appellant alone and he retained complete control over the decision about whether he would give evidence or not, even though he felt compelled by the circumstances of the case to give evidence he would rather not give.

20 *Kaddour v The Queen* [2013] NSWCCA 243.

- [42] In *Cooper v The King*,²¹ Grant CJ and Hiley J observed (at [24]) that the need for the accused to give evidence in order to deny evidence of uncharged acts admitted as context evidence did not constitute ‘unfair prejudice’ within s 137 of the *Evidence Act*. Their Honours said such issues arise in relation to any trial in which tendency, coincidence or context evidence relating to uncharged acts is admitted, and something more was required in order for such issues to constitute ‘unfair prejudice’.²²
- [43] Similarly, *Environment Protection Authority v Wollondilly Abattoirs*²³ was an appeal against sentence on, *inter alia*, the ground that the sentencing judge erred in excluding evidence on the basis that it may have required the accused to give evidence and/or be cross-examined concerning matters with which he was not charged. This ground of appeal was upheld by the Court, holding (at [78]) that even if, by giving evidence, the accused might expose himself to conviction for another offence, that would not be unfair prejudice but rather the result of a forensic decision to give evidence. Further, the Court observed that the decision of the High Court in *Lee* (referred to below) said nothing about conducting a case in a manner that results in an accused being confronted with having to make a forensic decision whether or not to give evidence, which frequently arises.

21 *Cooper v The King* [2022] NTCCA 16.

22 See also *Hannes v Director of Public Prosecutions (Cth) (No 2)* (2006) 165 A Crim R 151 at [315] per Barr and Hall JJ; *The King v Ashley* [2024] NTSC 14 at [37]-[39] per Brownhill J.

23 *Environment Protection Authority v Wollondilly Abattoirs Pty Ltd* [2019] NSWCCA 312.

[44] *The Queen v KQE*²⁴ involved three charges of sexual offending, two against one complainant and one against another. The accused sought that the indictment be severed under a provision which required him to satisfy the court that his defence may be prejudiced or embarrassed if the charges were not tried separately. The accused argued that, if the matters were heard together, his ability to raise the mistake of age defence in relation to one complainant required him to waive his right to silence in relation to the other. McWilliams AJ observed (at [66]) that the accused's argument about forensic decisions forced to be made by the accused is one faced for every trial where there is more than one count on an indictment. Further, it is also an issue faced where there is only one count – the accused may wish to propound a positive defence and give evidence in support of that, but in doing so, may be exposed to a line of cross-examination on a point on which the accused may otherwise have wished to maintain a right to silence. The fact that the accused is put in a position of making a forensic decision which concerns what is a fundamental right does not amount to embarrassment.

[45] In *The Queen v RD*,²⁵ the accused had been charged with a historical sexual offence alleged to have been committed against the complainant in the context of a relationship with her. The complainant provided a statement to Police the following day. About a week later, the accused participated in an interview with Police in which he denied the allegations. Prior to the trial,

24 *The Queen v KQE* [2022] ACTSC 69. Application for leave to appeal from this decision was refused in relation to the ruling on the admissibility of tendency evidence. See *KQE v The Queen* [2022] ACTCA 18 at [23] per Elkaim J.

25 *The Queen v RD* [2016] NSWCCA 84.

Police informed the prosecutor that the transcript of the accused's interview had been lost. At the trial, the complainant gave evidence and was cross-examined. In cross-examination, it was put to her that she had discovered the accused's infidelity and her reaction was to make false allegations against the accused. After the cross-examination finished, Police advised the prosecutor that the transcript of the accused's interview had been found. The transcript showed that the accused had told Police he had ended the relationship with the complainant because she was emotionally involved with a former boyfriend. The result was that the motive to lie put to the complainant was inconsistent with what the accused had told Police about the end of the relationship. When the transcript was disclosed, the jury were discharged. The accused briefed new counsel and applied for a permanent stay of the proceedings on the indictment.

- [46] On the stay application, the prosecutor made it clear that, if the accused gave evidence at a further trial, he would cross-examine him about inconsistencies between the interview with Police and the cross-examination of the complainant at the aborted trial. The prosecutor accepted that the late service of the transcript created an unfairness and said that he wished to exploit it. The trial judge granted the stay, in part because of the unavailability of evidence due to the passage of time and in part because limiting any cross-examination of the complainant in the re-trial could not fully address unfairness to the accused.

- [47] The Crown appealed the trial judge's decision and the Court of Criminal Appeal allowed the appeal on the basis that the unfairness to the accused could be ameliorated by excluding in the re-trial under the equivalent of s 137 of the *Evidence Act*, the evidence of the cross-examination of the complainant at the aborted trial.
- [48] Bathurst CJ (Johnson and RS Hulme AJ agreeing) held (at [61]) that the trial judge had not erred in concluding that the late production of the statement could be productive of unfairness, particularly insofar as it would affect any decision of the accused to give evidence at the re-trial. His Honour held (at [63]) that evidence which would render a trial unfair must, as a matter of definition, be unfairly prejudicial (a matter neither party had contested at the aborted trial or on the appeal). His Honour held (at [64]) that the prejudice could have been avoided by making rulings excluding cross-examination on any inconsistencies between the manner in which the complainant was cross-examined at the aborted trial and: (a) evidence given by the accused at the re-trial; and/or (b) the accused's interview with Police.
- [49] This case is the only example the parties were able to locate in which evidence sought to be tendered by the prosecutor was excluded under s 137 because it would impact the accused's decision whether or not to give evidence. This demonstrates two things. First, that such cases are rare. Secondly, that the mere fact that evidence may bear on an accused person's decision to give evidence does not constitute 'unfair prejudice'. The prejudice in that case arose because of the Crown's failure to comply with

its fundamental duty to disclose all relevant material, which led the accused to take a particular course, and that failure and course were intended to be exploited by the prosecutor at the trial.

- [50] These authorities indicate that an impact upon the accused's decision whether to give evidence or stay silent at trial creating or adding to the tactical and forensic reasons pressing an accused to give evidence in response to evidence sought to be adduced by the prosecution will not, ordinarily and without more, be caught by the words 'the danger of unfair prejudice to the defendant' in ss 101 and 137 of the *Evidence Act*.

The X7 and Zhao argument

Summary of the argument

- [51] The argument for the accused on the issues raised by Question 1 may be summarised as follows.
- [52] The text and purpose of ss 101(2) and 137 of the *Evidence Act* are capable of applying to the 'systemic' or 'inchoate' prejudice recognised by the High Court in *Zhao*.
- [53] Based on X7, it is systemic or inchoate prejudice because of the accusatorial nature of the whole process of criminal justice, which extends from the investigation of criminal conduct to prosecution for it and the trial, in all of which the accused is entitled to say nothing, save to enter a plea of guilty or not guilty.

- [54] Based on *X7* at [124], it is a fundament of the accusatorial criminal justice system that the accused can decide the course which he or she should adopt at trial in answer to a charge, which includes deciding what plea to enter, what evidence to challenge and what evidence to give or lead at trial, according *only* to the strength of the prosecution case revealed by the material disclosed by the prosecution before trial and the strength of the evidence led at trial.
- [55] Based on *Zhao*, if an accused is placed in the dilemma of choosing whether to prejudice his or her criminal trial or some other legal process, then he or she is required to decide the course to adopt in the criminal trial according to something outside of the strength of the prosecution case or the evidence led at trial. Such a dilemma is contrary to the accusatorial nature of the criminal justice system.
- [56] In the present case, the receipt of the tendency and relationship evidence (the alleged NSW offending) would place the accused in such a dilemma because he would have to choose between not giving evidence in the criminal trial in response to that evidence, which may prejudice his defence, and giving evidence in response which may provide material usable by New South Wales Police in investigating the alleged NSW offending and potentially prosecuting the accused in relation thereto.
- [57] Whatever decision the accused makes may prejudice him in a criminal process in two different jurisdictions, an unusual matter in this case which

deprives him of the usual protections existing under the criminal process of a single jurisdiction. The absence of those protections takes this case outside of the authorities referred to above which hold that having to decide whether to remain silent or give evidence in response to evidence of uncharged acts does not impair the right to silence and is not ‘unfair prejudice’ within ss 101 and 137 of the *Evidence Act*.

Accusatorial nature of the whole process of criminal justice

[58] It must be accepted that the process for the investigation, prosecution and trial of an offence is entirely accusatorial, with the precept that, subject to statute, an accused is not to be called upon to answer an allegation of wrongdoing until presented with particulars of the evidence on which it is proposed to rely in proof of a charge and then only to enter a plea of guilty or not guilty when and if charged.²⁶ Those fundamentals of the criminal justice system comprise the common law ‘right to silence’, which includes the substantive right of any person to refuse to answer any question except under legal compulsion and the privilege of any person to refuse to answer any question, and which, subject to statute, applies at all stages of the

²⁶ *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 (‘*Strickland*’) at [95] per Kiefel CJ, Bell and Nettle JJ, citing *X7* at [97]-[105], [118] per Hayne and Bell JJ (Kiefel J agreeing), and at [160] per Kiefel J and *Lee v The Queen* (2014) 253 CLR 455 (‘*Lee*’) at [31]-[34].

process to all persons suspected of an offence whether charged or not yet charged as well as at trial.²⁷

Accused's decision according only to the evidence in the criminal trial: the X7 [124] 'rule'

[59] In *X7*, the majority of the High Court held (at [124]) that, even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, a requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. The majority went on to hold that in such circumstances:

[n]o longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according *only* to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution in the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge. [emphasis in original]

²⁷ Ibid, citing *Lee* at [1] per French CJ, at [125] per Crennan J, at [182] per Kiefel J (Bell J agreeing, at [318] per Gageler and Keane JJ and, *inter alia*, *X7* at [39]-[47] per French CJ and Crennan J (in dissent but not in point of principle), at [102]-[105] per Hayne and Bell JJ (Kiefel J agreeing).

- [60] It is necessary to note that, in coming to the conclusion set out at [124], the majority said that the features of the accusatorial system of criminal justice referred to in paragraph [58] above can be described as an accused having a ‘right to silence’, which has itself been described as comprising ‘the fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown’ and its ‘companion principle that an accused person cannot be required to testify to the commission of the offence charged’.²⁸
- [61] It is also necessary to note that in this paragraph, the majority was referring to an accused having to decide the course to be followed at trial in light of any self-incriminatory answers which he or she: (i) *has been compelled to give* at an examination conducted; (ii) *after the charge was laid*. It was those features specifically which the majority described as fundamentally altering the accusatorial judicial process.
- [62] That underpinning of the decision of the High Court in *X7* was confirmed by the Queensland Court of Appeal in *The King v Silcock (No 2)*.²⁹ That case involved an initial trial and successful appeal against conviction on the ground of a miscarriage of justice. In order to establish the miscarriage, the appellant gave evidence before the appeal court which included evidence about his instructions to his counsel in relation to the trial. The appellant gave that evidence after being advised that waiving his client legal privilege in that way would permit his instructions to be provided to the Director of

²⁸ See also at [159] per Kiefel J.

²⁹ *The King v Silcock (No 2)* (2022) 15 QR 154.

Public Prosecutions in relation to the appeal and in relation to any future re-trial. On the successful appeal, the matter was remitted for re-trial. Before the re-trial commenced, the appellant applied for a stay until the Director of Public Prosecutions appointed a prosecutor and legal officer who did not have access to, and who would undertake not to have access to, the appellant's evidence in the appeal. The trial judge dismissed the application, the trial proceeded and the appellant was found guilty. He subsequently appealed against the convictions on the ground that a miscarriage of justice had occurred because the prosecutor was privy to his instructions about the charges. In relation to that ground, the appellant relied on *X7* and *Lee* to argue that the prosecutor being privy to his instructions compromised the accusatorial nature of his trial. That argument was rejected by the Court of Appeal.

[63] The Court held (at [61]) that a central consideration in both *X7* and *Lee* was the intersection between a compulsory power and the fundamental principle and its companion rule. The Court cited (at [62]) Justice Kiefel's reference in *X7* to the fundamental principle, its companion rule and (at [63]) the reference to them in *Lee* at [32]-[34].

[64] The Court held (at [64]) that the appellant was not compelled by statute, court process or any conduct on the part of the Crown to waive privilege (and thereby reveal his instructions to the prosecution). The decision to waive privilege was a forensic decision made by him on legal advice which informed him that if he did so his instructions would be available for use by

the prosecution in any re-trial. Consequently, the Court held that the case did not concern the intersection between the exercise of compulsory powers and the fundamental principle and the companion rule.

[65] Further, the Court rejected the appellant's argument that the prosecutor being privy to the appellant's evidence given to the appeal court created 'an improper fetter' on the forensic choices open to him at the re-trial, particularly the choice whether to give evidence, because that choice had to be made knowing that the prosecutor was aware of, and would be prepared to undermine, the precise account the appellant would give in evidence, thereby substantially constraining his decisional freedom. The Court accepted (at [70]) that the prosecutor's knowledge of the appellant's instructions was a fetter on any forensic decision in the conduct of the defence, particularly the decision to give evidence, but held that the fetter did not result in a miscarriage of justice because the prosecution was legally in possession of the material and the appellant's decision to waive privilege was not the result of any compulsion by the Crown but rather a decision made by the appellant on legal advice.

[66] The decision in *Silcock* is consistent with the authorities referred to above about matters impacting the accused's decision to give evidence.

Dilemma of prejudice in criminal trial or prejudice in other legal process

[67] The case of *Zhao* concerned the involvement of Mr Jin and Ms Zhao in civil proceedings in the Victorian County Court relating to the proceeds of crime,

one being a property forfeiture proceeding commenced against them by the Commissioner of the Australian Federal Police and the other being a proceeding commenced by them to exclude their property from restraining orders which had been made against them and seeking compensation by them. Mr Jin had been charged with criminal offences, had resisted those charges and a trial had been listed. Mr Jin and Ms Zhao filed applications seeking a stay of the civil proceedings until after the hearing and determination of the charges against Mr Jin.

[68] The relevant criminal proceeds legislation provided that the fact that criminal proceedings have been instituted or commenced is not a ground on which a court may stay proceedings that are not criminal proceedings. At first instance, the Commissioner submitted that the mere existence of criminal proceedings in which an applicant's defence might be prejudiced was not a sufficient basis for a stay. The judge at first instance refused to grant a stay, finding that there was no evidence as to how Mr Jin and Ms Zhao giving evidence in the civil proceedings might give rise to a real risk of prejudice in the criminal proceedings against Mr Jin.

[69] The Victorian Court of Appeal allowed the appeal from that decision.³⁰ The Court set out (at [18]) the guidelines frequently referred to in deciding stay applications as set out in *McMahon v Gould*.³¹ Those principles included that: (a) the court's task is to balance justice between the parties taking

30 *Zhao & Anor v Commissioner of the Australian Federal Police* (2014) 43 VR 187.

31 *McMahon v Gould* (1982) 7 ACLR 202 at 206-207 per Wootten J.

account of all relevant factors; (b) one factor to take into account where there are pending or possible criminal proceedings is the accused's 'right to silence' in a criminal proceeding; and (c) the right to silence does not extend to give a defendant as a matter of right the same protection in contemporaneous civil proceedings, meaning that the plaintiff in a civil action is not debarred from pursuing action merely because the defendant would, or might if he wished to resist the action, have to disclose what his defence was likely to be in the criminal proceeding. The Court went on to consider whether, in the light of various authorities decided since *McMahon v Gould*, the guidelines in that case should be reconsidered with greater weight being given to the practical as opposed to legal prejudice to an accused of facing coincidental forfeiture and criminal proceedings.

[70] The Court referred (at [24]) to the observations of Kirby P in *Yuill v Spedley Securities Ltd (in liq)*³² where his Honour recognised the 'deep-rooted' inclination of the law to avoid, directly or indirectly, depriving a person of the right to silence in criminal proceedings and said that sometimes the prior litigation of a civil trial may have that effect by the need of the accused, in the forensic setting of the civil trial, to give evidence or ask questions, thereby disclosing a defence to the outstanding criminal charge. The Court observed (at [26]) that the notion of giving increased primacy to criminal proceedings in the sense contemplated by Kirby P in *Yuill* finds support in

32 *Yuill v Spedley Securities Ltd (in liq)* (1992) 8 ACSR 272 at 274-5.

the reasoning of the majority of the High Court in *X7*, citing paragraphs [124]-[125] of that decision.

[71] The Court went on to say (at [27]) that in those paragraphs, the majority of the High Court was speaking of whether the statute empowered the examiner to compel a witness to give evidence, whereas:

There is no question of compulsion in this case. But their Honours' explication of the 'accusatorial judicial process' presents more generally as based on a broader, more practical view of the privilege against self-incrimination than *McMahon v Gould* would allow.

[72] The Court also referred (at [28]) to the decision of the Queensland Court of Appeal in *Director of Public Prosecutions (Cth) v Jo*³³ in which the Court held that, where the fact that allowing forfeiture proceedings to be heard before related criminal proceedings might allow the Crown to expose defects in the accused's defence of the criminal charges and to repair deficiencies in the Crown case, there is reason for requiring that the criminal proceedings be heard first. Further, where the issues were identical in the forfeiture proceedings and the criminal proceedings, the Crown should not be afforded the opportunity to use the civil proceedings to test and potentially improve the case it would rely on in the criminal proceedings. It was recognised that there is a well-defined and real advantage available to a person in criminal proceedings in respect of revealing evidence in advance. Depriving a defendant of such an advantage by requiring him or her to undergo prior proceedings where the Crown may, in effect, test-run the same case it

33 *Director of Public Prosecutions (Cth) v Jo* (2007) 176 A Crim R 17.

proposes to lead in the prosecution proceeding, and if necessary improve it if it can, would be a reason why the interests of justice would not be served by the forfeiture proceedings being heard in advance of the criminal proceedings.

[73] Ultimately, the Court of Appeal held that the forfeiture proceedings should have been stayed because (at [59]) it accepted that there was both a prima facie significant overlap between the subject matter of the charges and the matters to which Mr Jin would need or wish to depose in the forfeiture proceedings, and he could not defend the forfeiture proceedings without telegraphing his likely defence of the criminal proceedings. It followed (at [60]) that, if the forfeiture proceedings were to precede the criminal proceedings, the Crown would be informed in advance of trial of Mr Jin's likely defence to the criminal charges and, on the basis of its understanding of the decision in *Lee*, the criminal charges would be altered in a fundamental respect contrary to Mr Jin's privilege against self-incrimination. The Court said it must do what it can to prevent that.

[74] The Commissioner appealed that decision to the High Court, which dismissed the appeal. The High Court distinguished (at [18]) *Lee* from the case before it. The Court said that in *Lee*, there was a wrongful release of evidence obtained from the accused by compulsion to the Director of Public Prosecutions who was pursuing charges against the accused. The possession of that evidence meant that, contrary to a fundamental principle of the common law that the prosecution is to prove the guilt of an accused and

cannot compel a person charged with a crime to assist in the discharge of its onus of proof, the accused's trial was fundamentally affected because the position of the prosecution vis-à-vis the accused had been altered.

[75] The High Court said (at [19]) that, in this case, the issue had arisen at an earlier point (i.e., before trial). The question was whether Mr Jin 'should be placed in a position where he must decide whether to prejudice his criminal trial or his defence of the forfeiture proceedings and his case in the exclusion proceedings'.

[76] After rejecting that the terms of the proceeds of crime legislation constrained the exercise of the court's discretion to grant a stay, the High Court held (at [42]):

The risk of prejudice to [Mr Jin] if a stay is not granted in the forfeiture proceedings and the exclusion proceedings is plain. It is not necessary for [Mr Jin] to say any more than he did on the application for a stay in order to identify that risk, given that the offences and the circumstances relevant to both proceedings are substantially identical.

[77] The High Court observed (at [46]) that, even if Mr Jin's evidence in the civil proceedings could not be used as evidence against him, its possession by the prosecution might affect his defence. The High Court held (at [47]) that the prospect that civil proceedings may prejudice a criminal trial and that such prejudice may require a stay of the civil proceedings was not novel and the risk of the prejudice in a case such as this was real. Consequently (at [48]), the interests of justice were not served by requiring Mr Jin to defend the

forfeiture proceedings or pursue the exclusion proceedings before his criminal proceedings were finalised.

[78] The accused argued that the High Court's observation in *Zhao* at [19] was the 'dispositive observation' of the Court. That is, that the disposition of the case was founded upon Mr Jin being placed in a position where he must decide whether to prejudice his criminal trial or his defence and case in the civil proceedings. It was put that being faced with this 'dilemma' was the 'plain' risk of prejudice to which the High Court referred at [42].

[79] A more accurate expression of the effect of these paragraphs and the decision in *Zhao* is that the plain risk of prejudice to which the High Court was referring in [42] was the risk that, if Mr Jin put on evidence in defence or pursuit of the civil proceedings, he would thereby be informing the Crown in advance of the trial of his likely defence in the criminal proceedings. So much appears from the observation (at [46]) that even if Mr Jin's evidence in the civil proceedings could not be used as evidence against him, its possession by the prosecution might affect his defence. That plain risk existed because Mr Jin was effectively placed in the dilemma of deciding whether to prejudice his criminal trial or his defence and case in the civil proceedings, and the High Court considered that Mr Jin should not

be forced to make that choice, which is why the stay should have been granted.³⁴

[80] Contrary to the submissions of the accused, the prejudice identified by the High Court was not being in the dilemma. Rather, it was the prospect of giving evidence which would inform the Crown of his defence in the existing criminal proceedings. In other words, the plain risk of prejudice was the risk of a breach of the companion rule: that an accused cannot be required to testify to the commission of the offence charged or, to adopt the language of the Court of Appeal in *Zhao*, to ‘telegraph his likely defence of the criminal proceedings to the Crown’.

[81] In *The Queen v Independent Broad-Based Anti-Corruption Commissioner*,³⁵ the High Court held (at [48]) that the companion rule is a principle which governs the conduct of curial proceedings and is thus not engaged until and unless an accused is charged. In *Strickland*, the majority of the High Court held (at [95]) that nothing said in that case runs counter to the learning explicated in *X7* that the process for the investigation, prosecution and trial of an offence is entirely accusatorial or, consequently, counter to the precept that, subject to statute, an accused is not to be called upon to answer an allegation of wrongdoing until presented with particulars of the evidence on which it is proposed to rely in proof of a charge and then only to enter a plea when and if charged.

34 *Commissioner of the Australian Federal Police v Yang* [2023] VSCA 271 at [49] per Emerton P, Priest and Taylor JJA.

35 *The Queen v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459.

Uncharged acts and tendency evidence in a trial

[82] Nevertheless, evidence of uncharged criminal conduct (whether committed in the same jurisdiction as that in which the trial is conducted or in some other jurisdiction³⁶) has long been and is routinely received as tendency evidence in a criminal trial, without any suggestion that doing so is or may be inconsistent with the fundamentals of the criminal justice system.³⁷

[83] Unlike the argument from *Zhao* referred to in paragraph [77] above, it is novel to so argue and would be a large shift in the law to so conclude, particularly when the present situation and argument was not before the High Court in any of the decisions relied on by the accused.

Possible criminal processes in two different jurisdictions

[84] The accused sought to distinguish the present case from the authorities referred to above about tendency evidence in the form of uncharged criminal conduct by emphasising that the uncharged acts here (the alleged NSW offending) are said to have taken place in a different jurisdiction to which the trial is being conducted. A distinction was drawn from the situation in which the uncharged acts involved conduct in the same jurisdiction, in the following ways:

36 By way of example, in *The Queen v Bauer* (2018) 266 CLR 56, the proposed tendency evidence (at [18]) included uncharged acts occurring at the respondent's home in Victoria and an uncharged act occurring in Port Macquarie, New South Wales.

37 See also by way of example *BRS v The Queen* (1997) 71 ALJR 1512; *GBF v The Queen* [2010] VSCA 135; *PG v R* [2010] VSCA 289.

- (a) Firstly, when an accused is charged and tried in the Northern Territory, the Crown in right of the Northern Territory has investigated all the conduct, finalised the investigation and the prosecution has exercised prosecutorial discretion and made a choice as to which acts to charge and which acts not to charge. Whereas, in this case, the Crown in right of New South Wales has undertaken some investigation and is not currently pursuing further investigation, but has not ruled it out, and has not yet exercised any prosecutorial discretion because no charges have been laid in New South Wales.
- (b) Secondly, in the Northern Territory the entire criminal process from the time of charge (committal, disclosure, engagement between prosecutor and defence counsel as to how the trial will be run and the trial) is conducted on the basis of that prosecutorial choice. Whereas, in this case, the Crown in right of the Northern Territory has no similar powers in respect of the alleged NSW offending and the Crown in right of New South Wales has had no input into that Northern Territory criminal process.
- (c) Uncharged acts led as tendency evidence need not be proved to the criminal standard. That applies in both jurisdictions.
- (d) Assuming the evidence about the uncharged acts had been known by investigating police and the prosecution up to the time of charging, the Crown in right of the Northern Territory would be tied by its

prosecutorial choices. Any attempt, after the trial and verdict, to charge the accused with uncharged acts admitted in the trial would provide the accused with a strong argument for a stay on the basis of abuse of process. Whereas, in this case, this ‘structural protection’ would not be available to the accused in a New South Wales trial because the Crown in right of New South Wales is not bound by anything that was done by the prosecuting authorities in the Northern Territory.

[85] The accused accepted that an abuse of process argument would be available in a New South Wales trial if what the authorities in New South Wales did was await the giving of evidence about the alleged NSW offending in the Northern Territory trial, including any evidence the accused gives himself, and then use that evidence against him in investigating and/or prosecuting him in respect of that evidence in New South Wales. It was put that this was what placed the accused in the dilemma referred to earlier and that it was preferable to construe ss 101(2) and 137 to permit the trial judge in the Northern Territory to address that by excluding the evidence of the uncharged acts (the alleged NSW offending) in the Northern Territory trial, rather than create an impairment of a future trial in New South Wales that would have to be dealt with by the more ‘extreme’ measure of the accused having to seek a stay.

[86] This argument is problematic because it acknowledges that a structural protection does exist in the present case to prevent an abuse of process just as it exists where the uncharged acts were committed in the Northern

Territory. Despite that, the accused said that the Northern Territory court should have the option, by excluding otherwise admissible evidence from the trial, to effectively consider and determine the matters that would be considered on any future application for a stay of proceedings in New South Wales. The submission is unpersuasive because: (a) the provisions address the admissibility of evidence; and (b) the determination of matters of justice would be premature given that no charges have been laid, and they may never be laid, in New South Wales, so criminal proceedings there have not yet commenced.

Authority against the argument – DL

- [87] In *The Queen v DL* in the Supreme Court of the Australian Capital Territory,³⁸ the accused was charged with sexual offending against his granddaughters alleged to have been committed in the Australian Capital Territory ('ACT'). The Crown sought to elicit tendency evidence which included evidence about four incidents which occurred in Queensland and in relation to which the accused had been charged in Queensland. The Queensland charges had not reached committal, and he would not face trial in relation to them for a year or so. The accused objected to the admission of evidence of those four incidents on the basis of unfair prejudice by being required to effectively defend in his ACT trial allegations in respect of which he had been charged in another jurisdiction. It was put that if he

38 *The Queen v DL* [2018] ACTSC 28.

wished to maintain his right to silence in respect of the Queensland charges, he could not effectively respond to the allegations in the ACT trial. It was also put that his capacity to make forensic decisions in the ACT trial could be dictated by the effect they would have on the Queensland proceedings.

[88] The trial Judge, Elkaim J, noted (at [11]) the Crown's concession that the disputed tendency evidence would significantly prejudice the accused's capacity to defend the Queensland proceedings and recited the Crown's argument that the prejudice referred to in the ACT equivalent of s 101(2) was confined to prejudice in the proceedings in which the evidence is to be adduced. The ACT equivalent of s 101(2) provided that tendency evidence could not be used against the accused unless its probative value 'substantially outweighs *any prejudicial effect* it may have' on the accused.

[89] Elkaim J rejected (at [19]) the Crown's argument, holding that the words 'any prejudicial effect' should not be limited to the proceeding in which the evidence was being adduced.

[90] The Crown then sought leave to appeal from the decision of Elkaim J. The application was heard by Burns J sitting as a single judge exercising the jurisdiction of the ACT Court of Appeal. Burns J refused leave to appeal.³⁹ His Honour refused leave to appeal because (at [16]) he was not satisfied that the issue, of whether the prejudice referred to in the equivalent of s 101(2) is prejudice that must arise in the proceedings in which the

39 *The Queen v DL* [2018] ACTCA 9.

tendency evidence is adduced, arose with any clarity in the proceedings. That was so because the accused also relied on prejudice in the ACT proceedings in the form of impacting his forensic decisions about what evidence to challenge or give or lead, whether to cross-examine Crown witnesses and so on which he said would be impacted by the need to avoid disclosing his defence to the Queensland charges. Further (at [18]), the decision of Elkaim J could be upheld on other grounds.

[91] After the trial, a question of law was referred to the ACT Court of Appeal, which delivered its decision in *Director of Public Prosecutions (ACT) v DL*.⁴⁰ The question was whether it was permissible when determining whether the probative value of tendency evidence substantially outweighs any prejudicial effect it may have on the accused to consider the effect that the use of the tendency evidence against the accused in that proceeding may have on the accused in other proceedings.

[92] The ACT Court of Appeal held (at [34]) that ‘unfair prejudice’ in the equivalent of s 101(2) was not confined to the ‘real risk’ that the jury will misuse the evidence in some unfair way in the trial in which it was to be tendered. The Court cited (at [32]) the observation of the High Court in *The Queen v Bauer* (at [73]) that the term ‘unfair prejudice’ conveyed the idea of harm to the interests of the accused by reason of a risk that the jury would use the evidence improperly in some unfair way. The Court held (at [34])

40 *Director of Public Prosecutions (ACT) v DL* (2018) 14 ACTLR 62.

that the language of the provision was a wider criterion than ‘real risk’ and may include procedural disadvantage flowing from the admission of the evidence in a given case. However, the Court of Appeal distinguished (at [37]) such disadvantage from the Crown tendering evidence which would have the inevitable consequence of causing the accused to make unavoidable forensic choices in the conduct of the ACT trial. The Court held (at [39]) that having to make such necessary and unavoidable forensic choices was not ‘unfair prejudice’ within the meaning of the provision. Further, the Court held (at [41]) that it was not permissible for the trial judge to consider the effect that the use of the tendency evidence in one proceeding may have on the defendant in other proceedings.

[93] No reference was made in *DL* to the decisions of *X7*, *Lee* or *Zhao*.

Nevertheless, the accused in that matter had put to Elkaim J precisely the same arguments as are put by the accused in this proceeding. As set out in the Court of Appeal’s decision (at [20], [26]), the arguments were that, if the tendency evidence was admitted, the accused’s capacity to meet the allegations in the Queensland proceedings would be significantly prejudiced in that he might be compelled to reveal his defence, he would lose his right to silence, and his capacity to make forensic decisions in the ACT trial could be dictated by the effect they would have on the Queensland proceedings.

[94] The Court of Appeal explained (at [25]) that, as a matter of logic, prejudice could arise in two ways. It could arise in the Queensland proceedings

because the complainants and the witnesses would be forewarned of the areas of cross-examination in advance of the accused's defence case commencing, as well as alerting the prosecuting authorities to those matters and gaps where steps could be taken to shore up the Crown case. It could arise in the ACT trial from forensic decisions taken by the accused to limit or minimise the information flowing from that trial to those complainants, witnesses and authorities. The decision to give sworn evidence in the ACT trial might be said, in that context, to have heightened significance.

[95] Thereby, the Court of Appeal described the 'dilemma' said by the accused in this case to be inimical to the fundamentals of the accusatorial criminal justice system. The Court of Appeal rejected the specific arguments made and clearly did not see the circumstances that way, even though the proposed tendency evidence had the *inevitable* consequence of causing the accused to make *unavoidable* forensic choices in the conduct of the ACT trial. *DL* has since been followed in the ACT.⁴¹

[96] The accused argued that we should not follow the decision in *DL* because:

- (a) it was not an exercise of judicial power in resolution of a controversy;
- (b) its reasoning is limited and without reference to *X7*, *Lee* or *Zhao* or any other authority; and
- (c) it is plainly wrong.

⁴¹ See *The Queen v Stott* [2019] ACTSC 272 at [32]-[33] per Mossop J; *Director of Public Prosecutions v Mastalerz* [2024] ACTSC 30 at [81] per Baker J; *Director of Public Prosecutions v McGary (No 6)* [2024] ACTSC 136 at [11]-[14] per McCallum CJ.

[97] These arguments are of little assistance. First, the answers given by the Court of Appeal are valid unless and until set aside, and the accused accepted that that now seems most unlikely. Secondly, while the aspects of reasoning in those High Court authorities upon which the accused in this case relied were not put to the Court of Appeal in *DL*, the substance of the accused's argument was. Further, as already observed, the Court of Appeal did not notice any inconsistency with the fundamentals of the criminal justice system, even though the accused had actually been charged in relation to the Queensland matters. Thirdly, the submission that the decision is plainly wrong is essentially a conclusion that we would reach if we were to come to the different view urged upon us by the accused in this matter.

The legislative consequences of the accused's choice to give evidence

[98] As set out in paragraphs [12] to [18] above, the *Evidence Act*, particularly s 128, dictates the legislative parameters of an accused person's choice to give evidence in a trial. Those parameters include that an accused person who elects to give evidence may, notwithstanding that their answers may tend to prove that they have committed an offence, be cross-examined about the doing of an act or their state of mind which is a fact in issue, including facts from which the doing of the act or the state of mind can be inferred.

[99] In the face of that legislative policy choice, it is difficult to accept that the influence upon an accused's election to give evidence in a trial of exposure to cross-examination about what may be unlawful conduct, whether in the

trial jurisdiction or in another jurisdiction, could constitute ‘unfair prejudice’ warranting the exclusion of otherwise admissible tendency evidence.

[100] This is not, as the accused submitted, to ‘beg the question’. Rather, it is to identify a matter of legislative context which points against the construction of ss 101(2) and 137 of the *Evidence Act* pressed by the accused.

Could this ‘dilemma’ constitute ‘unfair prejudice’ within s 101(2) and 137?

[101] We consider that the ‘dilemma’ faced by the accused in this case does not fall within the term ‘unfair prejudice’ in ss 101(2) and 137 of the *Evidence Act*.

[102] As set out in paragraph [80] above, the prejudice identified by the High Court in *Zhao* was not being in the ‘dilemma’; it was a breach of the companion rule, which says that an accused cannot be *required* to testify to the commission of a charged offence. In the present case, the companion rule is not invoked because the accused has not been charged in relation to the NSW offending.

[103] As set out in paragraph [50] above, the authorities referred to indicate that an impact upon the accused’s decision whether to give evidence or stay silent at trial which creates or adds to the tactical and forensic reasons pressing an accused to give evidence in response to evidence to be adduced by the prosecution will not, ordinarily and without more, be caught by the

words ‘the danger of unfair prejudice to the defendant’ in ss 101(2) and 137 of the *Evidence Act*.

[104] As set out in paragraph [86] above, the additional factors identified by the accused which relate to the fact that the alleged NSW offending was committed in a different jurisdiction from that in which the trial is to be held would not preclude the ‘structural protection’ of a stay of any criminal proceedings commenced in New South Wales. We consider it to be undesirable for a trial judge considering the admissibility of tendency evidence to consider and prematurely determine, by excluding otherwise admissible evidence, the matters that would be considered on any application for such a stay if and when criminal proceedings were to be commenced in New South Wales.

[105] As set out in paragraphs [93] to [95] above, the decision of the ACT Court of Appeal in *DL* is authority against the accused’s argument in a context where there had been charges laid in the other jurisdiction. We are not persuaded that that decision is plainly wrong.

[106] As set out in paragraphs [61] and [63] to [65] above, *X7* concerned a compulsion to give evidence about criminal conduct after charges had been laid. Paragraph [124] of that decision must be read in that context. In *Silcock*, where the accused had to choose between preserving his right to silence in any re-trial and giving evidence to sustain his appeal against conviction, the Queensland Court of Appeal held that that ‘fetter’ upon the

accused's decision to give evidence was not the same as a compulsion to do so. In that scenario, the word 'fetter' could readily be substituted by the word 'dilemma'.

[107] As set out in paragraph [82] above, it would be a large shift in the law to conclude that the admission of tendency evidence comprised of uncharged criminal conduct would or may be inconsistent with the fundamentals of the criminal justice system. None of the authorities relied on by the accused have established or even precipitated such a shift.

[108] We are not satisfied that the type of prejudice identified by the accused, the 'dilemma' he faces if the tendency evidence is adduced, is inconsistent with the fundamentals of the accusatorial system of criminal justice. We consider that the accused retains a 'real choice' about whether or not to give evidence at trial, despite the 'fetter' upon that decision represented by the possibility of incriminating himself or 'telegraphing' his defence to any potential criminal proceedings in relation to the alleged NSW offences. The accused also retains the structural protection of an application for a stay of any criminal proceedings in New South Wales to the extent necessary to prevent any abuse of process.

[109] As set out in paragraphs [38], [27] and [98] above, the text of ss 101(2) and 137 of the *Evidence Act*, read with s 128(10) and the legislative purpose of the provisions, indicate that the words 'the danger of unfair prejudice to the

defendant’ are not capable of applying to prejudice to the accused in other criminal proceedings (whether existing or potential).

[110] Furthermore, the *mere* fact that the admission of evidence of uncharged criminal conduct may bear on the accused’s decision to give evidence at the trial, or may make that decision more difficult because if he elects to give evidence it may be used against him in other criminal proceedings, does not constitute ‘unfair prejudice’ within the meaning of those provisions.

Disposition

[111] The questions referred to the Full Court are answered as follows.

1. Are the words ‘the danger of unfair prejudice to the defendant’ in ss 101 and 137 of the *Evidence (National Uniform Legislation) Act 2011* (NT) capable of applying to:

- (a) prejudice to the accused in other criminal proceedings (whether existing or potential)?

Answer: No.

- (b) forensic disadvantage in the form of affecting his decision whether or not to give evidence in this trial?

Answer: The mere fact that the admission of evidence of uncharged criminal conduct may:

(a) bear on the accused's decision to give evidence at the trial;
and/or

(b) make that decision more difficult because any evidence he
gives may be used against him in other criminal proceedings,

does not constitute 'unfair prejudice' within the meaning of those
provisions.

2. If an accused person elects to give evidence, and is asked to give evidence to which s 128(10) of the *Evidence (National Uniform Legislation) Act 2011* (NT) applies, can they claim a common law privilege against self-incrimination in respect of that evidence?

Answer: No.
