Defendant Not Giving Evidence, where an adverse inference may follow from that[1]

The defendant has not given [or called**] evidence. That is his right. He is not bound or obliged to give [**or to call**] evidence. The defendant is entitled to insist that the prosecution prove the case against him, if it can. The prosecution bears the burden of proving the guilt of the defendant beyond a reasonable doubt, and the fact that the defendant did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill gaps in the evidence led by the prosecution.[2] It proves nothing at all, and you must not assume that because he did not give evidence that adds in some way to the case against him. It cannot be considered at all when deciding whether the prosecution has proved its case beyond a reasonable doubt, and most certainly does not make that task confronting the prosecution any easier.[3] It cannot change the fact that the prosecution retains the responsibility to prove the guilt of the defendant beyond reasonable doubt.**

What I have said is subject to this qualification. The prosecution asks you to conclude that the defendant is guilty from the circumstances which it says are established by the following facts which it claims to have proved. I remind you that those facts are as follows:

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[1] After *Azzopardi v The Queen* (2001) 205 CLR 50 (*"Azzopardi"*) the circumstances in which such a comment might be appropriate are "both rare and exceptional" (at [68]).
In *R v Doyle* [2018] QCA 303, the President explained, at [20] and [21]:

> "The problem is not that a jury might regard an accused's failure to give evidence as strengthening the Crown case. They are entitled to do so…The problem is the possibility that the jury may use the accused's decision not to give evidence as proving too much. In a case in which such reasoning is permissible, it is important for a trial judge to explain to the jury the limited use that can be made of an accused's decision not to offer an explanation. The jury should be told that the accused is not bound to give evidence. The jury should be told that the onus remains on the prosecution to prove guilt beyond a reasonable doubt even if the accused does not give evidence. The jury should be given to understand that the accused's decision not to offer an explanation does not of itself prove anything.
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> The jury should be told specifically the limited use to which they can put the absence of an explanation from an accused. It is that in circumstances in which the jury might expect that, if there was an innocent explanation for the facts that give rise to an incriminating inference, then the accused would know what that explanation might be and would offer it and so the accused's failure to offer any explanation strengthens the inference urged by the prosecution [*Weissensteiner v The Queen* (1993) 178 CLR 217].

[2] Each of these directions is mandated by *Azzopardi* at [67] and [51].
[3] See note 2.

[List the significant facts relied on and said by the prosecution to call for an explanation].[4]

The prosecution argues that those facts prove that the defendant is guilty as charged. You may think that if there are any additional facts that would explain that evidence against the defendant, or contradict the conclusion of guilt which the prosecution asks you draw, those additional facts, if they exist, would be additional facts known only to the defendant, and could not be the subject of evidence from any other person or source.[5]

Those facts would be additional to evidence given by the witnesses who have been called; and mere contradiction would not be evidence of any *additional* fact. By mere contradiction, I mean the defendant simply giving evidence and denying he was guilty. That mere contradiction by the defendant of evidence already given would not be evidence of any *additional* fact.[6]

The consequence of the defendant electing to call no evidence is that you have no evidence of additional facts from him to explain the evidence put forward by the prosecution. The conclusion of guilt the prosecution argues for may be more safely drawn from the proven facts when a defendant elects not to give evidence of relevant additional facts which, if they exist, must be within his knowledge.[7]

You are not allowed to resolve doubts about the reliability of witnesses, or the conclusion to be drawn from the evidence simply because the defendant has not contradicted evidence already given. Remember also that the defendant has already contradicted the general allegation against him by the plea of not guilty.[8] You may only ask yourselves if the prosecution case for the conclusion of guilt is strengthened[9] by the decision of the defendant not to offer any explanation in evidence where, if there are additional facts that would explain the evidence led by the prosecution, or contradict the conclusion of guilt that the prosecution asks

[4] This requirement is mandated too by *Azzopardi* (at [67]).
[5] *Azzopardi* at [61].
[6] These directions come from *Azzopardi* at [64] with the inclusion of the example of a contradiction which would not be evidence of anything "additional".
[7] This is the (modified) direction which was actually given in *Weissensteiner v The Queen* (1993) 178 CLR 217 at 223-224 ("*Weissensteiner*"). In *Azzopardi,* the majority held the directions to be given should not go beyond that. See *Azzopardi* at para [67].
[8] An observation to this effect is in *Azzopardi* at [62].
[9] *Weissensteiner* at 228 approves reference to "strengthening" the prosecution case, and at 237 to "strengthening" the inference of guilt. The term "conclusion" may be understood better by jurors than "inference".

you to draw, those additional facts, if they exist, would be peculiarly within the knowledge of the defendant;[10] who has not given evidence of them.

You should keep in mind that a person charged may have a number of reasons for not giving evidence, other than that his evidence would not assist his case.[11] Reasons might include timidity; a concern that cross examination might confuse the person charged; the fact that the person charged has already given an explanation to the police; a possible memory loss; fear of retribution from other persons; or a belief that weaknesses in the prosecution case will leave you in any event with a reasonable doubt as to guilt. These are just some possibilities. You must bear all those things in mind when considering whether it is safe to accept and act upon the evidence led by the prosecution, and to draw beyond reasonable doubt the conclusion of guilt it asks you to draw.=

For an example of a direction about the limited use a jury might make of an accused's failure to offer an explanation see *R v Doyle* [2018] QCA 303 at [10] in which the trial judge said, after reminding the jury about the onus of proof, the presumption of innocence and that the accused was not obliged to give evidence:

> "Because the accused chose not to call evidence, you do not have additional facts from him to explain the evidence led by the prosecution. The conclusion of guilt contended for by the prosecution may be more safely drawn from the proven facts when an accused person elects not to give evidence of any additional facts which, if they existed, must have been within the knowledge of that … accused. That is as far as this exception goes. The failure of the accused to call evidence or give evidence does not help you. You are not allowed to resolve doubts about the reliability of witnesses or conclusions to be drawn from the evidence simply because [the accused did not give evidence]. The plea of not guilty is his denial, and in that way, he has contradicted the prosecution case in a general way.
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> … [I]f the evidence presented raises an inference that the accused was the driver and the man with the sword, that inference that it was him may be strengthened by the accused's decision not to offer any evidence as an explanation. And it may strengthen it but only if any additional facts that could offer an innocent explanation for the use of his car at that time and his later presence in the street would, if those facts existed, be peculiarly within the knowledge of the accused. It is in those circumstances that the absence of an explanation from [the accused] may strengthen the case against [him]. It does not automatically mean that he is guilty, but it is something that you may consider."

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10 "Peculiarly" may not be easy for all jurors; but that is the term used in *Azzopardi* at [64].

11 *Weissensteiner* at 228.