R v Woods & Williams [2010] NTSC 69

PARTIES:	THE QUEEN v GRAHAM WOODS AND JULIAN WILLIAMS
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20912126 & 20912166
DELIVERED:	14 DECEMBER 2010
HEARING DATES:	21-23 SEPTEMBER 2010
JUDGMENT OF:	MILDREN ACJ, BLOKLAND & REEVES JJ

CATCHWORDS:

CRIMINAL LAW & PROCEDURE – JURIES – CHALLENGE TO THE ARRAY – whether grounds exist – *Juries Act* – consequence of upholding challenge

CRIMINAL LAW & PROCEDURE – *Juries Act* – whether act invalid as inconsistent with *Racial Discrimination Act – Racial Discrimination Act* s 9 and s 10

CRIMINAL LAW & PROCEDURE – selection of jury list – *Information Act* – whether breached

CRIMINAL LAW – jurors – statutory provision as to qualification and liability for jury service – whether compatible with requirement of fair hearing – whether judge has jurisdiction to empanel multiracial jury – *Juries Act*

PRACTICE – jury – selection – whether compilation of jury list on discriminatory basis infringing claimant's right to fair trial by impartial tribunal – whether jury selection constitutional – *Juries Act*

Constitution, s 80
Criminal Code, s 298, s 348, s 351, s 351A(2), s 352, s 354
Criminal Records (Spent Convictions) Act (NT), s 6(2)(a), s 11, s 12
Electoral Act (NT), s 16
Human Rights Act 1998 (UK)
Information Act (NT), s 4, s 65, s 69, s 70, Sch 2
Interpretation Act (NT), s 41, s 43
Juries Act (ACT), s 24(4), s 24(5)
Juries Act (NT), s 4, s 5(1), s 6, s 9, s 9(1), s 10, s 10(1)(c), s 10(3)(a), s 10(3)(b), s 10(3)(c), s 11, s 11(1), s 13, s 14, s 15, s 17A, s 17A(1), s 17A(2), s 19, s 20, s 21, s 21, s 21(2), s 21(5), s 24, s 25, s 26, s 27, s 27A, s 29, s 30, s 30(a), s 30(b), s 42, s 43, s 44, s 47, s 47(1), s 58, Sch 3
Juries Act (Tas), s 24
Juries Act (Vic), s 21, s 21(3)
Juries Act (WA), s 17
Juries Act 1927 (SA), s 12(1)(a)
Juries Act 1977 (NSW), s 75A(2A), s 75A(2B), s 75A(2C)
Juries Act 2000 (Vic), s 26
Juries Regulations (NT), reg 4, reg 5, reg 7, reg 17
Jury Act (NSW)
Jury Act 1995 (Qld), s 14
Jury Amendment Act 2010
Racial Discrimination Act 1975 (Cth), Pt III, s 9, s 10, s 10(1), s 10(2)
Sheriff Act (NT), s 6
Supreme Court Act (NT), s 21
Youth Justice Act, s 83, s 214(1), s 214(4)

Archbold, *Criminal Pleading, Evidence and Practice*, 42nd ed, Sweet & Maxwell, London

Rojas v Berllaque (Attorney General for Gibraltar intervening) [2004] 1 WLR 201; distinguished

Kingswell v The Queen (1985) 159 CLR 264; *R v Smith (Lance Percival)* [2003] 1 WLR 2229; followed

Berghuis v Smith 559 US 1 (2010); *Broadstock's* case (unreported, 27 February 1962); referred to by S Forgie, *Challenge to the Array* (1975) 49 ALJ 528*; Brown v The Queen* 160 CLR 171; *Dietrich v The Queen* (1992) 177 CLR 292; *Dupas v The Queen* (2010) 267 ALR 1; *Duren v Missouri* 439 US 357 (1979); *Fittock v The Queen* (2003) 217 CLR 508; *Gerhardy v Brown* (1985) 159 CLR 70; *Grey v Pearson* (1857) 6 HLC 61; (1857) 10 ER 1216; *Katsuno v The Queen* (1999) 199 CLR 40; *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565; *O'Connell v The Queen* (1844) 11 CL & Finn 155; (1844) 8 ER 1061; *Porter v Magill* [2002] 2 AC 357; *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; *R v Badenoch* [2001] VSC 409; *R v Bernasconi* (1915) 19 CLR 629; *R v Diack* (1983) 19 NTR 13; *R v Grant & Lovett* [1972] VR 423; *R v Ilic* (1959) Qd R 228; *R v Smith* (Unreported, District Court of New South Wales, 19 October 1981); *R v Thomas* [1958] VR 97; *Re East; Ex parte Nguyen* (1998) 196 CLR 354; *Reg v Ford (Royston)* [1989] 3 WLR 762; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Tasker v Fullwood* [1978] 1 NSWLR 20*; Taylor v Louisiana* 419 US 522 (1975); *Tuckerman v Tuckerman & Hogg* (1932) 32 SR (NSW) 220; *Western Australia v Ward* (2002) 213 CLR 1; *Woods & Williams v The Queen* [2010] NTSC 36; referred to

REPRESENTATION:

Counsel:

Prosecution:	M Grant QC with S Brownhill
G Woods:	J Tippett QC with R Goldflam
J Williams:	D Brustman SC with E Sinoch

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused G Woods:	NT Legal Aid Commission
Accused J Williams:	North Australian Aboriginal Justice Agency

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IN THE FULL COURT
OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Woods & Williams [2010] NTSC 69
No. 20912126 & 20912166

BETWEEN:

THE QUEEN
Applicant

AND:

GRAHAM WOODS
First Respondent

AND

JULIAN WILLIAMS
Second Respondent

CORAM: MILDREN ACJ, BLOKLAND & REEVES JJ

REASONS FOR JUDGMENT

(Delivered 14 December 2010)

THE COURT:

[1] This is a reference to the Full Court pursuant to s 21 of the *Supreme Court Act*.

Agreed Facts

[2] The following facts have been agreed between the parties.

A. Agreed Statement of Facts and Matters

1. On 22 January 2010, the accused persons were indicted on the charge of murder.

2. On 11 June 2010, the accused persons were arraigned on the charge and pleaded not guilty.

3. The accused persons are Aboriginal.

4. The jury district of Alice Springs comprises the area of land in the municipality of Alice Springs within the meaning of the *Local Government Act* (NT), and the jury list for the jury district of Alice Springs includes only those persons whose names are on the roll for that municipality.

5. In November 2009, the Sheriff of the Supreme Court of the Northern Territory ("the Sheriff") was provided by the Australian Electoral Commission, with a copy of the electoral roll for the municipality of Alice Springs.

6. The electoral roll contained the following information regarding the persons enrolled to vote in elections relating to the municipality of Alice Springs:

   (a) full name;

   (b) date of birth;

   (c) residential address;

   (d) gender; and

   (e) an indicator of their occupation, if any.

7. The electoral roll does not include information regarding a person's ethnicity or race.

8. The electoral roll so provided was adopted by the Sheriff as the annual jury list for the jury district of Alice Springs for 2010 ("annual jury list").

9. In about August 2010, the Sheriff began the process for obtaining an array of jurors for the September sittings of the Supreme Court in Alice Springs.

10. The Sheriff estimated that 150 jurors would be required to attend the September sittings of the Court.

11. The Sheriff determined that 350 persons should be selected from the annual jury list in order to achieve the required number of jurors.

12. The Sheriff used a computer system which complies with reg 7 of the *Juries Regulations* (NT) in order to randomly select 350 persons from the annual jury list.

13. The Sheriff does not know which or how many people of the 350 persons selected are Aboriginal.

14. The information contained in the annual jury list in respect of the 350 persons selected by the computer system was forwarded by the Sheriff to SAFE NT, a division of Police, Fire and Emergency Services.

15. SAFE NT checked whether each person on that list was disqualified from service as a juror by:

    (a) manually entering each name on the list into the National Police Reference System Database. The Database contains information as to criminal charges laid, in all jurisdictions in Australia;

    (b) any hits were confirmed with the dates of birth and gender information provided in the list;

    (c) any confirmed hits were then investigated by:

(i) as regards charges laid outside the Northern Territory, contacting the relevant jurisdiction by facsimile, requesting further information as to whether the person was convicted on the charge/s and sentenced to a term of imprisonment, and if so, when that term commenced and ceased (as the case may be);

(ii) as regards charges laid in the Northern Territory, conducting a search of the Northern Territory database to ascertain whether the person was convicted on the charge/s and sentenced to a term of imprisonment, and if so, when that term was commenced and ceased (as the case may be);

(d) striking through the entry on the list in respect of any person whose sentence of imprisonment had been completed less than 7 years prior to the date of the check; and

(e) returning the list to the Sheriff.

16. The checking by SAFE NT, together with checking by a Deputy Sheriff, revealed that a total of 92 of the persons on the list were either disqualified from jury service by virtue of a term of imprisonment, or exempted from jury service pursuant to s 11(1) of the *Juries Act*. The only three persons on the list with apparently exempt occupations (namely 'lawyer', 'pastor' and 'prison officer') were all exempted.

17. Upon receipt of the list from SAFE NT, the Sheriff added the details of 34 people to the list, being people previously summoned for jury service who had had their jury service deferred to the September sittings by orders made pursuant to s 17A of the *Juries Act*.

18. The list then comprised 291 persons. The Sheriff placed before the Chief Justice for execution a precept directing him to summon 291 persons.

19. The Sheriff issued summonses to those 291 persons and sent them by ordinary post from Darwin to the addresses as recorded in the annual jury list.

20. In the past, jury summonses were served personally. For at least seventeen years, service of jury summonses has been effected by post.

21. The Sheriff does not know which or how many people to whom summons were sent are Aboriginal.

22. In the Sheriff's experience, if summonses are posted to 300 people in Alice Springs or Darwin, it is not unusual for 150 people to answer their summonses.

23. The usual practice is that if a person who answers a jury summons by attending the Alice Springs courthouse appears to a Deputy Sheriff to be unable to read, write and speak the English language, the Deputy Sheriff assists that person to declare a statutory declaration seeking to be excused from jury service. The statutory declaration is then forwarded to a Judge or Master or Registrar for the purpose of determining whether to discharge the juror as a person not qualified for jury service under s 10(3)(c) of the *Juries Act*.

24. Each of the Deputy Sheriffs at Alice Springs has not been expressly authorised in writing by a Judge or the Master to exercise power under s 27A of the *Juries Act*.

25. The Chief Justice has not given directions to be complied with by the Sheriff and the Deputy Sheriffs in the exercise of any power under s 27A of the *Juries Act*.

26. Of the 291 persons on the list, 14 had addresses comprising one of the Alice Springs town camps.

27. It is the practice of the Australian Electoral Commission to record an address located in an Aboriginal community (whether a town camp or not) as simply the name of the community, with no identified house or street number or

street name. This practice is designed to ensure that people who live in Aboriginal communities are not struck off the electoral roll if they move from one residence within the community to another, which is reasonably commonplace.

28. Australia Post does not deliver mail directly to Alice Springs town camp residents. Instead, it delivers mail addressed to persons at a town camp by delivering it to the address of Tangentyerre Council at 4 Elder Street, Alice Springs.

29. Tangentyerre Council holds mail so delivered for periods of approximately six weeks for town camp residents to collect if they wish. Only a small proportion of the mail held is collected by town camp residents.

30. The total population of Alice Springs is 27,481.

31. Aboriginal people make up approximately 21 per cent of the population of Alice Springs.

32. The resident population of the Alice Springs town camps is between 1,765 and 2,065 people.

33. The total population of the area of the Northern Territory from which jury trials are usually conducted in Alice Springs ("Central Australia") is approximately 48,000.

34. Aboriginal people make up approximately 45 per cent of the population of Central Australia, and approximately 76 per cent of the population of Central Australia excluding the population of Alice Springs.

35. The incidents the subject of the alleged offences occurred in Alice Springs, and the accused were resident in Alice Springs at the time of the alleged commission of the offences.

36. Approximately 83 per cent of the Northern Territory prison population in 2008 was Aboriginal.

37. The usual experience is that the proportion of Aboriginal people on a particular jury in Alice Springs is substantially lower than the proportion of Aboriginal people in the total population of Alice Springs.

38. The accused persons were not given a list of the persons on the jury panel for the trial as required s 351A of the *Criminal Code* (NT).

39. On 15 September 2010, Acting Chief Justice Mildren wrote by email to Justice Blokland, Justice Kelly, Justice Southwood, Justice Riley, Master Luppino and Sheriff Wilson regarding the subject of jury summonses. In a message which is annexed hereto and marked 'A', the Sheriff forwarded this email to the Solicitor-General.[1]

40. On or about 15 September 2010, acting pursuant to section 6 of the *Sheriff Act*, the Sheriff duly appointed Ms Donna Quong, the officer in charge of NT SAFE, to be a Deputy Sheriff.

41. On 12 July 2010, Blokland J delivered in these proceedings a Ruling on Change of Venue Application,[2] a copy of which is annexed hereto and marked 'B'.

The Questions

[3] The following questions of law were referred to the Court:

B. Questions of Law

1. Would the accused persons be denied their entitlement to a trial by jury pursuant to s 348 of the *Criminal Code* by a jury empanelled from the array which has been summoned?

2. Are the accused persons entitled to orders discharging the jury panel and adjourning the trial in the exercise of

[1] The email is reproduced at the end of this judgment.
[2] *Woods & Williams v The Queen* [2010] NTSC 36.

the Court's inherent jurisdiction to secure their right to a fair trial?

3. Has the Sheriff failed to summon jurors in accordance with the law so requiring the array to be quashed?

4. Is the *Juries Act* (NT) invalid because:

(a) it is inconsistent with the *Racial Discrimination Act 1975* (Cth) in that, in its operation, the *Juries Act* infringes the right in Article 5(a) of the *Convention on the Elimination of All Forms of Racial Discrimination*?

(b) it infringes s 80 of the *Constitution*?

[4] Following the hearing, the Court answered the questions as follows:

(1) Not possible to answer, because of the answer to question 3.

(2) In the light of the answer to question 3, the answer is yes, but this does not affect the power of the trial judge to make appropriate orders when the matters is next mentioned.

(3) Yes.

(4) (a) No.

(b) No.

[5] The Court said it would provide its reasons at a later time. These are our reasons.

The Legislative Scheme

[6] The right to trial by jury and the law relating to juries in criminal cases is now controlled by statute.

[7] Where a person who has been charged with a crime has been committed for trial in the Supreme Court and it is intended that he or she is to be put on trial for the crime, the charge is required to be reduced to writing in a document called an indictment.[3] If the accused pleads not guilty, the plea is taken to be a demand that the issues raised by such plea shall be tried by jury and the accused is entitled to have them tried accordingly.[4] The law relating to the qualifications and the summoning of juries and the challenges allowed, is set forth in the laws relating to juries and jurors.[5]

[8] The *Juries Act* (the Act) establishes two jury districts in the Northern Territory, one for Darwin and the other for Alice Springs.[6] In criminal trials, the jury shall consist of 12 jurors chosen and returned in accordance with the Act.[7] Section 21 of the Act requires the Sheriff to make out jury lists for each jury district. It provides as follows:

> **21 Jury lists**
>
> (1) The Sheriff shall, not later than 30 November in each year, make out a jury list for each of the jury districts of Darwin and Alice Springs.

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3 *Criminal Code*, s 298.
4 *Criminal Code*, s 348.
5 *Criminal Code*, s 351; *Juries Act*.
6 *Juries Act*, s 19 and s 20; *Juries Regulations*, reg 4 and reg 5.
7 *Juries Act*, s 6.

(2) The Jury lists for Darwin and Alice Springs shall contain, in alphabetical order, the names of persons qualified to serve, and not exempt form (sic) serving, as jurors who reside within the respective jury districts.

(4) A jury list shall show the address and occupation of each person whose name appears on the list and the names appearing on the list shall be prefixed by numbers in regular arithmetical series.

(5) Each jury list made out under subsection (1) shall come into operation on 1 January next after it is made out and shall, notwithstanding that the boundaries of the prescribed areas constituting a jury district may have changed after it was made out, remain valid for all purposes for a period of 12 months expiring with 31 December next following.

[9] Section 9 of the Act provides for the qualification of jurors and the liability to serve:

9 Qualification of jurors and liability to serve

(1) Subject to section 10, a person whose name is on the roll is qualified to serve as a juror.

(2) A person who is qualified to serve as a juror and who is not exempt under section 11 is liable to serve as a juror.

[10] The "roll" referred to in s 9(1) is defined by s 5(1) to mean a roll within the meaning of the *Electoral Act* (NT).

[11] Section 10 of the Act provides for the circumstances under which a person is not qualified to serve as a juror. This section provides as follows:

10 Persons not qualified

(1) For the purposes of this section, a person who has been sentenced to a term of imprisonment has not completed the sentence:

(a) if he has been released from prison on parole – until the expiration of the period of parole; or

(b) if the sentence has been wholly or partly remitted under section 432 of the Criminal Code, section 8A of the *Criminal Law (Conditional Release of Offenders) Act* or section 114 of the *Sentencing Act* subject to conditions – until the conditions have been satisfied and no longer apply in relation to him; or

(c) if that sentence has been suspended:

(i) subject to conditions – until the conditions have been satisfied and no longer apply in relation to him; or

(ii) unconditionally – until the expiration of the period during which the sentence remains suspended.

(2) For the purposes of this section, a person shall be deemed never to have been under sentence of imprisonment for an offence if he has been granted a free pardon in respect of the offence.

(3) A person who:

(a) has been sentenced to a term of imprisonment (whether within the Territory, in a State or another Territory or in a prescribed country) for an offence other than a capital offence and:

(i) has not completed the sentence; or

(ii) a period of less than 7 years has elapsed since he completed the sentence;

(b) has been sentenced to a term of imprisonment (whether within the Territory, in a State or another Territory or in a prescribed country) for a capital offence;

(c) is a person in respect of whom an order under section 15 of the *Adult Guardianship Act* is in force;

(d) is of unsound mind or is:

(i) in a hospital or an approved treatment facility; or

(ii) undergoing treatment,

under the Mental Health and Related Services Act; or

(e) is a protected person within the meaning of the *Aged and Infirm Persons' Property Act*,

is not qualified to serve as a juror.

[12] No foreign countries have been prescribed under the regulations.

[13] Section 11 of the Act deals with exempt persons. It provides:

11 Exempt persons

(1) A person specified in Schedule 7 is exempt from serving as a juror.

(2) A person who is over the age of 65 may exempt himself or herself from serving as a juror on a permanent basis by giving written notice to the Sheriff.

(3) The name of a person exempt from serving as a juror under subsection (1) or (2) must not be included on a jury list.

[14] It is not necessary to refer to Schedule 7 of the Act in any detail. The list of exempt persons includes, inter alia, the Administrator and his Honour's official secretary, Judges and former Judges and their spouses and de facto partners, members of the Legislative Assembly, legal practitioners, members of the clergy, medical practitioners, parole officers, police officers and persons who are "blind, deaf or dumb or otherwise incapacitated by disease or infirmity from discharging the duties of a juror".

[15] The process of summoning a jury panel begins with s 24 and s 25 of the Act which provide:

24 Jury precepts

From time to time, and as often as occasion demands, the Chief Justice shall issue, under his hand and seal, a precept directed to the Sheriff requiring him to summon jurors before the Court at Darwin or Alice Springs, as the case requires.

25 Terms of precept

A jury precept shall be in accordance with the form in Schedule 3 and shall specify the number of jurors required and the time when and the place where the attendance of the jurors is required, and shall be issued and delivered to the Sheriff at least 14 clear days before the time so specified.

[16] Section 17A of the Act provides:

> **17A Power to exempt from jury service on condition of subsequent service**
>
> (1) Where a person is excused under section 15 from attendance or further attendance on the Court, the Judge or the Master may, as a condition of excusing that person, order that the name of the person be included amongst the names of jurors to be summoned for jury service at some subsequent time specified in the order.
>
> (2) Where a Judge or the Master makes an order under subsection (1), he shall notify the Sheriff of the making of the order and the Sheriff shall cause the person the subject of that order to be summoned, in accordance with that order, as a juror.

[17] Section 27 of the Act provides for jurors to be selected by random selection by computer and is in the following terms:

> **27 Jurors to be chosen by random selection by computer**
>
> When a jury precept is delivered to the Sheriff, the Sheriff shall choose the persons to be summoned from those whose names appear in the jury list for Darwin or the jury list for Alice Springs in accordance with random selection by computer in the prescribed manner.

[18] Regulation 17 of the *Juries Regulations* provides:

> **7 Random selection by computer**
>
> For the purposes of section 27 of the Act, the prescribed manner for the random selection by computer of the persons to be summoned from those whose names appear in the jury list for Darwin or the jury list for Alice Springs is any system for random selection by computer which, for a statistical analysis over a population of 120,000, gives a variation from the

expected value of less than plus or minus 0.5 per cent based on percentiles of 12,000.

[19] Sections 29 and 30 of the Act deal with the summoning and service of jury summonses, as follows:

> **29 Summons to jurors**
>
> The Sheriff shall cause to be served upon each juror chosen in pursuance of section 27 a summons in a form approved by the Sheriff.
>
> **30 Service of summons**
>
> A summons to a juror shall be served on the juror:
>
> (a) by delivering it to him personally as soon as practicable and not less than 7 clear days before the time specified in the summons for his attendance; or
>
> (b) by forwarding the summons by ordinary prepaid post to his address, as it appears on the annual jury list, so that the summons would, in the ordinary course of post, be delivered to that address not less than 7 clear days before the time specified in the summons for his attendance.

[20] It is not necessary to set out the provisions of the Act dealing with the return of the jury precept, the division of the jurors selected into separate panels or other provisions of the Act dealing with the selection of the jury for a particular trial. Suffice it to say that the names of the jurors are drawn at random from a barrel one at a time and there is an opportunity for the prosecution and the defence to challenge each juror so selected either for

cause[8] or peremptorily.[9] The Crown may also ask for up to six jurors to be stood aside.[10]

[21] In addition, the law recognises that there may be a challenge to the array, which is a challenge to the whole panel. This form of challenge must be taken before any juror is sworn.[11] Sections 42 and 47 of the Act provide:

> **42 Right of challenge**
>
> Subject to the provisions of this Act, challenge to the array and to the polls may be made and allowed for such and the like cause, in such and the like form and manner and under and subject to the like laws, rules and regulations in every respect as by law was or were established, used and practised in like cases in the Northern Territory immediately before the commencement of this Act.
>
> **47 Informalities in summoning jurors**
>
> (1) An omission, error or irregularity by the Sheriff or any of his officers in the time and mode of service of a summons on a juror, or the summoning or return of a juror by a wrong name (if there is no question as to identity) is not a cause of challenge either to the array or to the juror.
>
> (2) A matter which might have been objected by way of challenge to the polls or to the array does not invalidate or affect any verdict in any case, civil or criminal, unless the objection is taken by way of challenge.

[22] The Act came into force in 1963. Prior to that time, the law relating to juries was contained in a number of South Australian Statutes and

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8 *Criminal Code*, s 354.
9 *Juries Act*, s 44 (12 challenges in murder cases; otherwise 6, on each side).
10 *Juries Act*, s 43.
11 *Criminal Code*, s 352.

Ordinances, which were repealed by s 4 of the Act. Prior to 1963, there were no statutory provisions dealing with the manner and form of a challenge to the array and whatever the practice in the Northern Territory may have been is now lost. In *R v Diack*,[12] Nader J accepted that the position was governed by the common law.[13] We will return to this question later.

[23] It is convenient to deal with the answers to the questions in reverse order.

Is the *Juries Act* invalid because it infringes s 80 of the *Constitution*?

[24] This argument was only put formally. Both parties agreed that *R v Bernasconi*[14] is binding authority that s 80 of the *Constitution* has no application to the trial of Territory offences. The High Court has declined to overrule that case in a number of subsequent cases, including *Fittock v The Queen*.[15] The answer to this question is therefore "No".

Is the *Juries Act* invalid because it is inconsistent with the *Racial Discrimination Act 1975* (Cth) in that, in its operation, the *Juries Act* infringes the right in Article 5(a) of the Convention on the Elimination of All Forms of Racial Discrimination?

[25] Notwithstanding the conclusions we have reached below, for the purposes of considering this question, we will assume that the Act, has been, and will

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[12] (1983) 19 NTR 13 at 17.
[13] The *Juries Act 1862*, s 25, provided that trials by jury in the Supreme Court were subject to the same "like incidents and rules of procedure as are attendant and are observed on trials by jury before Judges of Her Majesties Superior Courts of Record in England".
[14] (1915) 19 CLR 629.
[15] (2003) 217 CLR 508.

be, correctly applied in relation to the selection of the jury for the trial of accused.

[26] On this question, the accused specifically rely upon s 9 and s 10 of the *Racial Discrimination Act 1975* (Cth) ("the RDA").

[27] In *Gerhardy v Brown*[16] ("*Gerhardy v Brown*"), Mason J made these observations about the respective operations of s 9 and s 10 of the RDA:[17]

> [t]he operation of s 9 is confined to making unlawful the acts which it describes. It is s 10 that is directed to the operation of laws, whether Commonwealth, State or Territory laws, which discriminate by reference to race, colour or national or ethnic origin.

[28] Section 9 of the RDA provides:

> **9 Racial discrimination to be unlawful**
>
> (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
>
> (1A) Where:
>
> (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
>
> (b) the other person does not or cannot comply with the term, condition or requirement; and

[16] (1985) 159 CLR 70.
[17] At 93.

(c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.

(3) This section does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(4) The succeeding provisions of this Part do not limit the generality of this section.

[29] The "acts" that the accused say are rendered unlawful by s 9 of the RDA are summarised in their written outline of submissions as follows:

(a) … s10(3)(a) of the [Act] disqualifies as a juror any person who has within the previous seven years been either in custody or on conditional liberty imposed as part of a sentence of imprisonment.

(b) … s30(b) of the [Act] permits service of juror summonses by ordinary post.

[30] While these "acts" have been identified as "acts" under s 9 of the RDA, it is clear, in our view that the accused are really complaining about the operation of a Northern Territory law, viz the Act. So much is made even clearer when the nature of each "act" is examined more closely.

[31] The first "act", i.e. the imprisonment disqualification provision in s 10(3)(a) of the Act, is specifically sanctioned by the Northern Territory legislature as a disqualifying criterion for jury service. In *Western Australia v Ward*[18] ("*Ward*"), in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ, their Honours said,[19] addressing a similar legislative sanction in the *Lands Act 1898* (WA), that:

> Because legislative sanction is now necessary before anything can be done with Crown land which would extinguish or affect native title, s 9(1) does not operate to invalidate discriminatory acts of that kind. The appropriate provision is that in s 10(1).

[32] The second "act" involves the Sheriff serving juror summonses in accordance with the statutory authority contained in s 30(b) of the Act. In *Gerhardy v Brown*, Mason J made some further observations about the operation of s 9 of the RDA in relation to acts done under statutory authority as follows:[20]

> Because *s 9(1) creates a criminal offence* and because the sub-section is aimed at an act whose purpose or effect is to nullify or impair the recognition, enjoyment or exercise on an equal footing of a relevant human right or fundamental freedom, the operation of the sub-section does not extend to circumstances in which the actor,

[18] (2002) 213 CLR 1.
[19] At [103].
[20] At 93.

> having statutory authority to confer a benefit or to impose a burden or liability only in a particular way, acts in accordance with that authority. (Emphasis added)

[33] In *Ward*,[21] the Court explained the words emphasised above by saying:

> It should be observed that, although s 9(1) makes it unlawful for a person to do an act there mentioned, unlawful acts are not offences unless the RDA expressly so provides (s 26). There is no such provision in relation to a contravention of s 9. Further, the procedures and remedies applicable to a breach of s 9 are to be found in Pt III of the RDA.

[34] The Court then quoted two parts of the decision in *Re East; Ex parte Nguyen*,[22] the first of which described the scheme established under Pt III of the RDA and the second of which summarised the effect of that scheme as follows:[23]

> The elaborate and special scheme of Pt III of the [RDA] was plainly intended by the Parliament to provide the means by which a person aggrieved by a contravention of s 9 of the [RDA] might obtain a remedy.

[35] The effect of the decision in *Gerhardy v Brown* as explained in *Ward* is that, even if the second "act" was discriminatory in purpose or effect such that it contravened s 9 of the RDA, the remedy for that lies under the scheme established by Pt III of that Act. It therefore does not avail the accused for present purposes.

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[21] At [102].
[22] (1998) 196 CLR 354.
[23] At [102].

[36] That leaves for consideration the contentions about s 10 of the RDA. That section is directed to the operation of the laws of the various Australian legislatures. It relevantly provides:

> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

[37] Article 5(a) of the *Convention on the Elimination of All Forms of Racial Discrimination* which is mentioned in s 10(2) (above) provides that:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> (a) The right to equal treatment before the tribunals and all other organs administering justice;

[38] As the High Court pointed out in *Ward*, s 10(1) of the RDA is directed to the "enjoyment of rights" and it "does not use the word 'discriminatory' or cognate expressions". Furthermore, when it is read with the relevant part of the *Convention on the Elimination of all Forms of Racial Discrimination*, it

is apparent the section is directed to both "the purpose *or effect* of nullifying or impairing … the enjoyment of certain rights".[24]

[39] In their written outline of submissions, the accused correctly point out that in *Ward* the High Court also emphasised that s 10(1) of the RDA is directed to "the practical operation and effect" of the legislation in question and is "concerned not merely with matters of form but with matters of substance".[25]

[40] The accused contend that because of the practical operation and effect of s 10(3)(a) and s 30(b) of the Act, the enjoyment of their right to a fair trial by jury is impaired or more limited than that of non-Aboriginal people facing a jury trial in Alice Springs in otherwise similar circumstances. They say that they will not enjoy their right to a jury trial "on an equal footing" with non-Aboriginal accused persons in similar circumstances.

[41] In their written submissions, the accused accept that the alleged impairment associated with s 30(b) of the Act can be cured by the Sheriff effecting personal service on prospective jurors under s 30(a) of the Act. It is trite to observe that in construing legislation, one must read the provisions in question as a whole and in context. When that is done, and this concession of the accused is taken into account, it necessarily follows that s 30 of the Act does not have the limiting effect alleged. Put another way, the practical operation and effect of s 30 considered as a whole and in context is not as

[24] See *Ward* at [105].
[25] See *Ward* at [115].

the accused allege. This aspect of their contentions must therefore be rejected.

[42] That leaves for consideration their contentions about s 10(3)(a) of the Act. They make no similar concession that the alleged limitation on their right to a fair trial by jury associated with the operation of that section can be cured by an administrative choice.

[43] In relation to s 10(3)(a) of the Act, the accused say in their written submissions that the following circumstances are relevant:

(a) That each Australian jurisdiction has its own differing provisions disqualifying persons from jury service by reason of criminal conduct;

(b) That over 25 per cent of the jury panel members who should have been summoned in this matter were subject to prisoner disqualification.

(c) That a very substantial majority of those who should have been summoned in this matter but were subject to prisoner disqualification, are Aboriginal people.

(d) That by contrast in *Katsuno v The Queen*,[26] it was an agreed fact that approximately 0.3 per cent of jurors in a sample Victorian panel of 12,000 had been disqualified or exempted.

(e) That similarly, it is estimated that in NSW, 0.5 per cent of persons aged 21 years in 2005, had received a prison sentence.

[26] (1999) 199 CLR 40 at [52].

(f) That many prisoners are sentenced to brief periods of imprisonment:

> …[A] very substantial proportion of prisoners serve sentences of six months or less. Secondly, when decisions to impose short-term custodial sentences are made, the range of practical sentencing options (including fines, home or periodic detention and community service orders) may be limited by the facilities and resources available to support them and by the personal situation of those offenders who are indigent, homeless or mentally unstable….
>
> Sentencing policy and, in particular, that regarding mandatory sentencing is notoriously a matter of continuing public debate and variable legislative responses in different Australian jurisdictions…;

(g) The accused persons are Aboriginal, facing a murder charge involving inter-racial issues.

[44] They also rely upon the following aspects of the agreed facts:[27]

- Aboriginal people make up approximately 45 per cent of the population of Central Australia, of approximately 48,000, from which jury trials are usually conducted in Alice Springs [facts: 33,34].

- Aboriginal people make up approximately 21 per cent of the population of Alice Springs which comprises of 27,481 persons [facts: 31, 30].

[27] see [2] above.

- Approximately 83 per cent of the Northern Territory prison population in 2008 was Aboriginal [fact: 36].

- The usual experience is that the proportion of Aboriginal people on a particular jury in Alice Springs is substantially lower than the proportion of Aboriginal people in the total population of Alice Springs [fact: 37].

[45] Finally, they rely upon the circumstances of their case identified by Blokland J when considering their application for a change of venue for their trials.[28] Those circumstances were as follows:

- The deceased was a prominent person, who some may regard as a local hero or loved son of Alice Springs;

- A significant manifestation of public grief has been evident in for instance, a statement from the mayor of Alice Springs; a public appeal to raise money for the deceased's family that received widespread support; a memorial procession through Alice Springs; a significant volume of expressions of regret and notices in the local Newspapers by persons acquainted or connected with the deceased;

- Media reporting surrounding the case tending to highlight racial issues, including a juxtaposition of this case with a previous unrelated case

[28] *Woods & Williams v The Queen* [2010] NTSC 36 at [3].

where racial elements were acknowledged; instances of inaccurate or misleading reporting;

- Evidential material in the committal indicative of racial issues surrounding the incident alleged;

- Specific prejudice to both accused and in relation to the accused/applicant Woods, to his family, leading to both accused being moved by authorities to Darwin for a period while in custody;

- The historical racially skewed composition of juries in Alice Springs;

- General prejudice given the expressed anger and distress reported on or otherwise shown in Alice Springs.

- The deceased was a non Aboriginal person and the accused are Aboriginal persons;

[46] From the circumstances relied upon by the accused (above), it is apparent that the essence of their complaint is that the imprisonment disqualification provision in s 10(3)(a) of the Act is likely to impact disproportionately on the Aboriginal population of Alice Springs such that the jury selected for their trial is likely to include a disproportionately low number of Aboriginal people.

[47] We consider this complaint must be rejected.

[48] To begin with, there is no direct evidence as to how many of the 25 per cent of people who were disqualified from the array that was selected in this case, were Aboriginal people. There is, therefore, no direct evidence that the imprisonment disqualification provision in s 10(3)(a) had the effect the accused say it did. Further, the only agreed fact that might come close to supporting an inference that it had this effect is the fact that approximately 83 per cent of the Northern Territory prison population in 2008 was Aboriginal. However, it is not possible to correlate this fact to the proportion of Aboriginal people living in Alice Springs, as distinct from the Northern Territory as a whole, who may have been subject to the imprisonment disqualification provision as at August 2010, when this jury array was selected.

[49] Further, the agreed fact about the usual experience of the proportion of Aboriginal people who serve on particular juries in Alice Springs does not support such an inference either.

[50] There are any number of reasons why that may be so, unassociated with the imprisonment disqualification provision in s 10(3)(a) of the Act. They include: seeking excusal because of family or kinship ties to an accused person, or to a victim; peremptory challenges made by counsel; and disqualification associated with illiteracy in English. In our experience, factors such as these often arise in the course of empanelling juries for criminal trials in Alice Springs.

[51] However, even if we were to infer that there is a causal link between the imprisonment disqualification provision in s 10(3)(a) of the Act and the proportion of Aboriginal people in this jury array, we do not accept that involves any limitation on, or impairment of, the enjoyment by the accused of a fair trial by jury. This is so for the following reasons.

[52] It has been held in both Australia and England that an accused person does not have the right to be tried by a racially balanced, or proportionate, jury. In *R v Grant & Lovett*,[29] McInerney J dealt with a challenge to a jury panel on the grounds that it was not representative of the community in that both of the accused, by occupation, were labourers and no one on the panel was a labourer. Furthermore, one of the accused, Lovett, was an Aboriginal and there was no Aboriginal person on the panel. In rejecting this challenge, McInerney J said:[30]

> The procedure for summoning a jury and the procedure for selecting a jury is prescribed by the *Juries Act* 1967 and there is no allegation in the plea that the sheriff has in any way failed to observe the provisions of the *Juries Act*. The allegations made in that plea indicate that the jury is of a composition which is not to the liking of the accused or either of them, but there is nothing in that plea to indicate that that result comes about as the result of any failure on the sheriff's part to comply with the provisions of the *Juries Act*.
>
> The compiling of a jury list and the summoning of jurors for service in a particular case proceeds on the basis of a random selection of names. In such a random selection it may well come about that a panel emerges, in the end, as being of some general overall pattern as to occupations or income, but unless it is shown that this is a result

[29] [1972] VR 423.
[30] At 425.

of some deliberate contriving of the sheriff, it does not appear to me that this constitutes a ground for setting aside the panel.

[53] In *R v Ford (Royston)*,[31] the English Court of Appeal dealt with an appeal where one of the grounds was that the trial judge was wrong in declining to accede to an application for a multi-racial jury. In rejecting this ground of appeal, the Court of Appeal made the following observations. First:[32]

> The whole essence of the jury system is random selection, as the passage from *Reg v Sheffield Crown Court, Ex parte Brownlow* [1980] QB 530, from Lord Denning's judgment cited in the course of argument, shows. He said, at p 541:
>
> > 'Our philosophy is that the jury should be selected at random– from a panel of persons who are nominated at random. We believe that 12 persons selected at random are likely to be a cross-section of the people as a whole–and thus represent the views of the common man… The parties must take them as they come.'
>
> The judgment was supported by Shaw LJ, sitting with Lord Denning MR.

[54] Secondly:[33]

> We wish to make two final further points. It appears to have been suggested in some of the cases that there is a 'principle' that a jury should be racially balanced. One of those cases to which Mr Herbert has referred us is *Reg v Frazer* [1987] Crim LR 418. There was a similar suggestion in *Reg v Bansal* [1985] Crim LR 151 already referred to. The existence of any such principle however was denied in a case which escaped the attention of Mr Herbert, *Reg v McCalla* [1986] Crim LR 335. No authority is cited by those who have argued for the existence of the principle. In our judgment such a principle cannot be correct, for it would depend on an underlying premise that jurors of a particular racial origin or holding particular religious

[31] [1989] 3 WLR 762.
[32] At 767.
[33] At 768–769.

> beliefs are incapable of giving an impartial verdict in accordance with the evidence.
>
> Secondly, the principles we have already set out apply not only where it is argued that a jury of a particular composition ought to be empanelled because of the nature of the particular case or particular defendants, but also where complaint is made that the panel was not truly 'random': for instance, that the population of a particular area contained 20 per cent of persons of West Indian origin, but that only a much lower percentage of such persons was to be found on the panel. For the judges to entertain any such application would equally involve his seeking to investigate the composition of the panel in a manner which, for reasons already indicated, lies outside his jurisdiction, and lies within the jurisdiction of the Lord Chancellor.

[55] More recently, the same issue was considered by the English Court of Appeal in *R v Smith (Lance Percival)*[34] ("*Smith*"). That case was decided after the passage of the *Human Rights Act 1998* (UK) which incorporated Article 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* into English and Welsh law.

[56] Article 6 of that Convention provided that an accused was entitled to a fair hearing by "an independent and impartial tribunal established by law". In relation to this, the Court of Appeal noted that in *Porter v Magill,*[35] Lord Hope of Craighead had stated:[36]

> In both cases the concept [of impartiality] requires not only that the tribunal must be truly independent and free from actual bias, proof of which is likely to be very difficult, but also that it must not appear in the objective sense to lack these essential qualities.

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[34] [2003] 1 WLR 2229.
[35] [2002] 2 AC 357.
[36] At [88].

[57] In *Smith*, the Court of Appeal rejected a submission that the decision in *Ford* could not stand following these changes to the law in England.[37] In doing so, the Court of Appeal observed:[38]

> We do not accept that it was unfair for the defendant to be tried by a randomly selected all-white jury or that the fair-minded and informed observer would regard it as unfair. We do not accept that, on the facts of this case, the trial could only be fair if members of the defendant's race were present on the jury. It was not a case where a consideration of the evidence required knowledge of the traditions or social circumstances of a particular racial group. The situation was an all too common one, violence late at night outside a club, and a randomly selected jury was entirely capable of trying the issues fairly and impartially. Public confidence is not impaired by the composition of this jury.

[58] We respectfully agree with the principles expressed in these authorities. They show that an accused person is not entitled to be tried by a jury that is racially balanced or comprised of the same proportion of people of a particular race, as occurs in the broader community from which the jury is selected. Instead, they show that an accused person is entitled to be tried by an independent and impartial jury selected in accordance with the law. In essence, in this case, that means an accused person is entitled to be tried by a jury of 12 persons who are randomly selected in accordance with the Act from a jury array that is itself randomly selected from the local community.

[59] To impose some overriding requirement to the effect that a jury, once randomly selected in this way, has to be racially balanced or proportionate would be the antithesis of an impartially selected jury, not to mention the

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[37] See at [42].
[38] At [40].

enormous practical difficulties that would be associated with attempting to meet such a requirement, particularly as it is not an easy matter to identify who is, or is not, a member of a particular racial group.

[60] Insofar as the accused in this case appear to be concerned that racial prejudice may influence the deliberations of the jury in their trial, it should not be forgotten that there is a range of steps and measures taken before and during a criminal trial that are apt to avoid that happening. They include the following. At the outset of the process of empanelling a jury, the jury array will be informed by the presiding judge that, if any of them considers for any reason that they will be unable to approach their task of determining the guilt of the accused impartially, they should seek excusal. Then, during the process of empanelling the jury, each of the accused will be entitled to twelve peremptory challenges[39] and an unlimited number of challenges for cause. The latter will allow the accused to challenge a potential juror if, for example, they can produce evidence to the satisfaction of the jury members who are determining that issue, that the potential juror concerned may not be able to determine the case free of racial prejudices.

[61] Once the jury panel is selected, each member of it will be required to take an oath that: "I swear that I will faithfully try the several issues joined

[39] For a capital case, see s 44(1) (a) of the Act.

between our Sovereign Lady the Queen and the prisoner at the bar and will give a true verdict according to the evidence … So help me, God!".[40]

[62] As was observed in the authorities to which we have referred above, there is no reason to expect that those selected to serve on the jury will not abide by this oath or affirmation and determine the guilt of the accused according to the evidence, whatever racial, religious or other aspects may arise during the trial. Finally, to reinforce the previous point, during the course of the trial, the jury will be instructed by the presiding judge to determine the guilt (or otherwise) of the accused on the evidence given in court and according to law, not on extraneous materials such as inflammatory media statements, or personal prejudices. The overriding effect of these steps and measures (and others) was summarised by Deane J in *Kingswell v The Queen*[41] as follows:

> The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberative processes, the jury's isolation (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob…

[63] For these reasons, we reject the contentions of the accused based on s 10 of the RDA. Because we have reached this conclusion, it is unnecessary to consider whether s 10 of the RDA would operate to strike down a provision such as s 10(3)(a) of the Act, if it had the impeding or limiting effect

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[40] See s 58 and Sch 6 of the Act. Alternatively, a juror may take an affirmation attesting to the same.
[41] (1985) 159 CLR 264 at 301–302.

described, or whether it would operate to super impose on s 10(3)(a) of the Act a requirement that the accused would enjoy to the full extent the rights that were otherwise impeded or limited.

[64] Before leaving this issue, we should record that the accused relied heavily on the decision of the Privy Council in *Rojas v Berllaque (Attorney General for Gibraltar intervening).*[42] That decision is distinguishable because it depended upon the combined effect of a provision of the Gibraltar Constitution and the Convention for the Protection of Human Rights and Fundamental Freedoms.

[65] The accused also relied on two other decisions. One was *R v Smith*[43] where a Judge of the District Court of New South Wales discharged a jury selected after the Crown made four peremptory challenges to prospective Aboriginal jurors in a case involving an Aboriginal accused. That case is unreported and no reasons were disclosed. In those circumstances, we would not be minded to depart from the principles outlined in the decisions we have referred to above.

[66] The other decision was *Roach v Electoral Commissioner* (Cth).[44] In that decision the High Court examined the provisions of a piece of Commonwealth legislation that disqualified as voters at federal elections persons who were serving sentences of imprisonment. The Court struck

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[42] [2004] 1 WLR 201.
[43] Unreported, District Court of New South Wales, 19 October 1981.
[44] (2007) 233 CLR 162.

down the legislation in so far as it applied to prisoners serving sentences of less than three years (which was the position before the amendments were passed) but held as valid the disqualification as it applied to those serving terms of three years or longer. Since that decision revolved around the provisions of the Australian *Constitution* relating to the qualifications of electors and did not involve any consideration of the provisions of the RDA, we do not consider it has any application in this case.

[67] For these reasons, we answered this question "no".

Has the Sheriff failed to summons jurors in accordance with the law so requiring the array to be quashed?

[68] At common law, a challenge to the array could succeed only on one of two grounds. The first ground was called a principal challenge and the second ground was called a challenge for favour.[45]

[69] Both grounds related to "unindifferency" by the Sheriff, i.e. that the Sheriff was not indifferent to the parties, perhaps by being related to one of the parties, or if the Sheriff was indebted to the accused, or had a pecuniary interest in the outcome, or was the actual prosecutor.[46] The other ground, for favour, was more subtle and dealt with cases where the Sheriff's indifference was less apparent and direct, as in cases where "the position of

[45] See Archbold, *Criminal Pleading, Evidence and Practice*, 42nd ed, paras 4-156 and 4-157.
[46] Archbold, *Criminal Pleading, Evidence and Practice*, 42nd ed, para 4-156.

the summoning officer was not necessarily inconsistent with indifference and may be suspected".[47]

[70] By the mid 19th century, it was recognised that *some default* by the Sheriff could also be a proper ground.[48] Although Napier CJ in an unreported South Australian case concluded that there could no longer be a challenge to the array, because there was no longer an array as had been the case at common law,[49] other Australian authorities have held that the right of challenge to the array still exists. Clearly, the Northern Territory Legislative Assembly thought so too, as otherwise references to such a challenge in the *Criminal Code* and in the Act would be otiose. In *Tuckerman v Tuckerman & Hogg*,[50] the New South Wales Full Court found that the Sheriff had not provided a list of the jurors summoned in accordance with the *Jury Act* (NSW) and technically was in default in summoning the jury. The Court held that this default was a ground for a challenge to the array and, had the challenge been taken before the jury had been empanelled, it should have prevailed; but, as the objection was not then taken, it came too late.

[71] In *R v Ilic*,[51] the Court of Criminal Appeal (Queensland) considered an appeal on the ground that a challenge to the array had wrongly been dismissed by the trial Judge. In that case, the Sheriff had sent the jury list

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47 Archbold, *Criminal Pleading Evidence and Practice*, 42nd ed, para 4-157.
48 *O'Connell v The Queen* (1844) 11 CL & Finn 155; (1844) 8 ER 1061.
49 *Broadstock's* case (unreported, 27 February 1962); referred to by S Forgie, *Challenge to the Array*, (1975) 49 ALJ 528.
50 (1932) 32 SR (NSW) 220 at 242 per Halse Rogers J, who delivered the judgment of the Court (Street CJ, James & Halse Rogers JJ).
51 (1959) Qd R 228.

to the police who marked off several names and returned the list to him. The Sheriff accepted their markings without enquiry. Section 14 of the *Jury Act 1995* (Qld) provided that it was the duty of the police "to render every assistance in the making of the jury lists and to undertake any enquiries that the sheriff may require in the administration of this Act". The police used three types of markings. One for persons who had died or left the district. Another to indicate that a person was of ill fame or repute. A third for persons who, for one reason or another, were not eligible for jury service. The trial judge found that the police did not "strike off any names" or "mark off any names" or exercise a right of veto. They simply provided assistance as they were empowered to do under s 14 of the Acts. It was a matter for the Sheriff if he accepted that information or made further enquiries of his own. Counsel for the appellant argued that as the police are concerned in the prosecution of offenders, the practice aroused suspicion of partiality. The Full Court held that there was nothing on the record to suggest that the trial judge had erred; the statute empowered the Sheriff to receive assistance and the Sheriff cannot be said to have acted improperly if he accepts the assistance that the statute made available to him.

[72] In *R v Grant & Lovett*,[52] McInerney J dismissed a challenge to the array, observing that there was nothing to show that the jury was of a composition which came about "as the result of any failure on the Sheriff's part to comply with the provisions of the *Juries Act*".

[52] [1972] VR 423 at 425; see para [52] above.

[73] In *R v Diack*,[53] the Sheriff had selected by lot a panel roughly twice the number of jurors specified in the precept. The names were then divided into two parts on the list depending on gender. The list was then submitted to the police to see if any were disqualified. After the police had checked the list, summonses were prepared for all those jurors not ineligible. Officers of the Sheriff's department then served as many of the summonses as were necessary to arrive at the number on the Chief Justice's precept. Because it was less trouble to serve women who were more likely to be at home during the day, the number of women served was a little under double the number of men. Nader J held that the Act had not been complied with in a substantial respect and that was enough to uphold the challenge to the array. His Honour said that "failure by the Sheriff to comply with the provisions of the *Juries Act* can give rise to a successful challenge… A jury selected by other means would not acquire the jurisdiction conferred upon it by the *Juries Act*".[54] His Honour also indicated that there must be substantial, if not strict compliance with the Act. Although Nader J did not specify in so many words which provisions of the Act he thought had been breached, it is implicit in the judgment: (a) that a precept which called for 75 jurors did not permit 150 jurors to be chosen; and (b) the practice of serving only 75 jurors of the 150 summoned made it possible for a person arranging service to make choices for improper reasons.

[53] (1983) 19 NTR 13.
[54] *R v Diack* (1983) 19 NTR 13 at 18.

[74] The only other decision to which we were referred was *R v Badenoch*,[55] where there was a challenge to the array on the basis that there were no indigenous people on the jury panel. Coldrey J, after referring to *R v Grant & Lovett* and an earlier decision of *R v Thomas*,[56] held that this was not a proper basis for such a challenge, because no default of duty by the Sheriff in respect of the panel had been established.

[75] The Court of Appeal in England has also recently rejected as a ground for a challenge to the array, that the jury panel was not multiracial.[57] In our reasons for the answer to question 4(a) we have referred to the decision of the Privy Council in *Rojas v Berllaque (Attorney General for Gibraltar intervening)*,[58] and the reasons why it can be distinguished.[59] It does not assist the accused in determining non-compliance by the Sheriff with the Act.

[76] In our opinion, the authorities establish the following propositions.

A challenge to the array may be based on a principal ground, or for favour, or because the Sheriff has failed in a material respect to comply with the provisions of the Act. A challenge will not otherwise succeed. In particular, a challenge to the array will not succeed merely because the racial mix of the panel does not reflect the racial mix of the community from which the panel has been drawn.

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55 [2001] VSC 409.
56 [1958] VR 97.
57 *Reg v Ford (Royston)* [1989] 3 WLR 762 at 766-797; *Regina v Smith (Lance Percival)* [2003] 1 WLR 2229.
58 [2004] 1 WLR 201; see also paras [52]-[57] above.
59 At para 63.

[77] Counsel for the accused, Mr Tippett QC, submitted that the Sheriff had failed to comply with the Act in a number of respects.

[78] The first submission was that the steps set out in paragraphs 12 to 17 of the reference were carried out without a precept being issued in accordance with s 24 of the Act. In our opinion, s 24 plainly requires a precept to be issued by the Chief Justice before the process of random selection takes place.

[79] Mr Grant QC for the Crown submitted that it was impractical for the Sheriff to identify those persons on the electoral roll who were not qualified or exempt at the time the jury list was prepared. The numbers of persons whose qualifications would need to be checked made this a practical impossibility. However, we do not think that the Act intended to provide an obligatory duty on the Sheriff such that non-compliance with s 21(2) had any effect on the validity of the jury list. It is sufficient to observe that s 14 of the Act specifically envisages that there will be persons on the list who are either not qualified or exempt and provides that a person on the list who is not qualified or exempt but who is served with a summons is not excused from attendance unless the Sheriff excuses him or her. Similar observations might be made about s 13. Moreover, it is obvious that during the year in which the list is in force by virtue of s 21(5), there will be some persons who will become unqualified and others exempt due to changes of circumstances.

[80] Mr Grant QC's next submission was that the only practical way the Sheriff could ensure that unqualified or exempt persons were not summoned was to adopt the system actually employed in this case of checking each juror after the selection process occurred and that s 27 should be read as accommodating this process. When pressed by the Court during argument on how this might be achieved, it was submitted that the words "jury list" in s 27 should be construed to exclude those persons who were unqualified or exempt, by application of the "golden rule" of statutory interpretation. We are unable to accept this submission. The "golden rule" requires some absurdity, or some repugnancy or inconsistency with the rest of the Act, to paraphrase Lord Wensleydale's famous dictum in *Grey v Pearson*.[60] We can see no such thing in s 27. It is perfectly possible to follow the literal words of the section, which are consistent with the mechanism provided for by s 14. Further, any individual juror who is not qualified or exempt can be challenged for cause by either party; or excused by the Master or a Judge under s 15.

[81] We are of the opinion that, until a jury precept was issued by the Chief Justice, the Sheriff was not authorised to choose the persons to be summoned under s 27 and that this was a material departure from the provisions of the Act. We consider that this is sufficient in itself for the challenge to be upheld. Mr Grant QC submitted that this requirement was not obligatory so as to affect the validity of the array because the critical

[60] (1857) 6 HLC 61 at 606; (1857) 10 ER 1216 at 1234.

element is choosing the jury panel by random selection and the order in which things are done cannot have any material impact on the lawfulness of the array. Citing *Project Blue Sky v Australian Broadcasting Authority*,[61] he submitted that the test to be applied is whether it was a purpose of the legislation that an act done in breach of the provision should be invalid, "having regard to the language of the relevant provision and the scope or object of the whole statute".[62]

[82] For the reasons already discussed, the language of s 27 does not contemplate the process being done in the reverse order. However, we do not accept the implied premise that the composition of the panel is unaffected by the order in which things are done, as persons who were disqualified or exempt on one day may not be so on another. Furthermore, 350 persons were selected randomly, whereas the precept required only 291 persons. The precept is not a mere formality. It is the instrument which authorises the Sheriff to act and which determines how many jurors are to be selected. Without it, the Sheriff has no authority. Also, s 26 of the Act empowers the Chief Justice to direct a precept to a person other than the Sheriff if it appears to him that the Sheriff may be interested in a matter to be tried before the jury. Section 47(1) of the Act specifically excuses "an omission, error or irregularity by the Sheriff or any of his officers" in certain specified circumstances, but does not deal with or excuse non-compliance with the

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[61] (1998) 194 CLR 355 at [91]-[93].

[62] *Project Blue Sky v Australian Broadcasting Association* (1998) 194 CLR 355 at 390-391[93] citing with approval *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24.

terms of s 26. We conclude that the legislature intended strict compliance with s 26 for the array to be valid.

[83] Mr Tippett QC also submitted that the Sheriff failed to comply with s 27 by adding to the panel the names of 34 jurors who had been deferred under s 17A of the Act. As we understand this submission, since the precept required 291 persons to be served, 291 persons needed to be selected by random selection pursuant to s 27. We do not accept this submission. Section 17A was introduced as an amendment to the Act in 1982. If Mr Tippett QC's submission were correct, s 17A would have no work to do. It is improbable, to say the least, that the legislature would have inserted a provision which would have no practical effect.[63] Plainly, the intention of the legislature is that deferred jurors must be summoned as jurors.[64] Section 29 of the Act must be read consistently with s 17A. The means of complying with both provisions is straightforward. If a precept requires 291 jurors to be served and there are 34 deferred jurors, the process of random selection under s 27 is for the balance of 237 jurors. However, the process actually used resulted in 350 names being selected by random selection. It is difficult to see how that was authorised by the Act. That circumstance is similar to what occurred in *Tuckerman v Tuckerman & Hogg*,[65] where too many jurors were selected. That was held to be a sufficient reason to uphold

[63] *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574.
[64] s 17A(1) and s 17A(2).
[65] (1932) 32 SR (NSW) 220 at 221.

a challenge to the array in that case and we think the same reasoning applies to this case.

[84] Mr Tippett QC's next submission was that the process of sending the panel, selected randomly under s 27, to SAFE NT was not authorised by the Act. In all other jurisdictions, there is statutory authority enabling the Sheriff to send the names of the jurors selected to the police or to the prosecution or elsewhere to seek assistance as to whether any of the jurors selected have disqualifying convictions.[66] Until 2010, New South Wales was the only jurisdiction, other than the Northern Territory, which made no such provision.

[85] As we understood the first limb of Mr Tippett QC's submission, the facts show that the Sheriff made no independent enquiry of his own (except as to checking for exempt exceptions)[67] and relied solely on the checks made by SAFE NT, which simply struck the name of each such person from the list. In the absence of statutory authority, we are unable to see how this was authorised by the Act.

[86] It was submitted that the Sheriff does not have any lawful authority to receive this information under the *Information Act* (NT).

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[66] *Juries Act* (WA), s 17; *Jury Act* (Qld), s 14; *Juries Act* (Vic), s 21(3), since amended and replaced by *Juries Act 2000* (Vic), s 26; *Juries Act* (ACT), s 24(4) and s 24(5); *Juries Act 1927* (SA), s 12(1)(a); *Juries Act* (Tas), s 24; *Juries Act 1977* (NSW), s 75A(2A), s 75A(2B) and s 75A(2C) inserted by the *Jury Amendment Act 2010*.

[67] It was agreed during the hearing that the checking by the Deputy Sheriff referred to in paragraph 16 of the facts was limited to checking for exempt occupations.

[87] Although we have concluded the Sheriff was not authorised under the Act to rely on checks made by SAFE NT to determine disqualification on the grounds of certain criminal convictions and sentences, we are not persuaded the provisions of the *Information Act* restrict the Sheriff or a Deputy Sheriff from accessing and providing information on criminal convictions for the purpose of determining juror disqualification.

[88] The term "sensitive information" in the *Information Act* includes personal information about a criminal record.[68] The Information Privacy Principles ("IPP's") and the *Information Act* govern the power to provide or use "sensitive information".[69] Specifically however, s 69 of the *Information Act* states the IPP's:

> … do not apply in relation to a proceeding or other matter before a court or tribunal.

[89] In our view, it is clear that checks required for jury disqualification fall squarely within the exemption provided in s 69 of the *Information Act.* Section 69 is drawn in broad terms, namely "in relation to a proceeding or other matter…" It is not confined to parties, witnesses or any other class of conceivable participants in legal proceedings. It readily admits a construction capable of including access and use of criminal records for the limited purpose of determining whether potential jurors are to be disqualified.

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[68] *Information Act*, s 4.
[69] *Information Act*, s 65; *Information Act*, Schedule 2.

[90] It was submitted on behalf of the Crown that the Sheriff or Deputy Sheriff might also be exempted under s 70 of the *Information Act* by virtue of coming within the definition of "Law Enforcement Agencies". Although "Law Enforcement Agencies" may be defined widely enough to include certain functions carried out by a Sheriff or Deputy Sheriff, for example "executing or implementing a decision, direction, order or other requirement of a court or tribunal, including executing warrants",[70] the functions referred to in s 70 of the *Information Act* itself are not readily compatible with the judicial nature of the Court's processes but are more akin with the functions of the executive. In our view s 69 is the appropriate part of the *Information Act* capable of exempting the Sheriff or Deputy Sheriff from compliance when engaged in determining whether potential jurors are disqualified.

[91] Further indications than an officer carrying out functions of a similar nature to that of the Sheriff is not prohibited to collect and use the information concerning criminal records are found in IPP 2.1(a) and (g):

> 2.1 A public sector organisation[71] must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose for collecting it unless one or more of the following apply:
>
> (a) if the information is sensitive information:
>
> (i) the secondary purpose is directly related to the primary purpose; and

[70] *Information Act*, s 4, "Law Enforcement Agency", (iv).
[71] 'Public Sector Organisation' for the purpose of the *Information Act* includes a Court of the Territory, s 4.

(ii) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose.

(g) the organisation reasonably believes that the use or disclosure is reasonably necessary for one or more of the following by or on behalf of a law enforcement agency:

(v) preparing for or conducting proceedings before a court or tribunal or implementing the orders of a court or tribunal.

[92] We conclude the *Information Act* does not prevent the Sheriff or Deputy Sheriff from collecting or using criminal records for the purpose of determining juror disqualification. A further indication supporting this conclusion is found at IPP 10.1(b) which provides a public sector organisation must not collect sensitive information about an individual unless the organisation is *required by law* to collect it. In our view, it is necessarily implicit in the Act that the Sheriff is required to collect this information in order to determine disqualification for jury service. In any event, the *Information Act* does not provide a remedy to the applicants enforceable in the Courts for a breach of its provisions. To the extent that a remedy exists, the remedy is given to the person whose privacy has been invaded. The situation is therefore not distinguishable from the effect of the decision in *Gerhardy v Brown*, as explained in *Ward*.[72]

[93] On behalf of the applicants, it has been pointed out that the *Electoral Act* specifically provides the Electoral Commission must give the Sheriff a copy

[72] See paras [32]-[35] above.

of the rolls on request.[73] In our view this specific provision in the *Electoral Act* does not detract from the conclusion we have come to in relation to the *Information Act*. The *Information Act* is a relatively recent statute, drafted in a style that deals in part with categories or types of organisations and their responsibilities under that Act. That the *Electoral Act* specifically directs the rolls be given to the Sheriff does not in our view support the Applicants' case in as far as it asserts there is no authority to access the criminal records of potential jurors to determine disqualification nor does it detract from the conclusion that the same activity would be exempt from compliance under the *Information Act*.

[94] The checking in this case was done by an organisation which is a division of the Police, Fire and Emergency Services. Although it is not suggested by the agreed facts that any person was wrongly identified by SAFE NT as not qualified for jury service (despite the rather alarming statistic that 25 per cent of those on the panel were disqualified), there is a lot of potential for error.

[95] It is not unknown for persons, particularly Aborigines, to have exactly the same names. Furthermore, the provisions of s 10 are open to conflicting interpretations. In relation to persons who have been sentenced to a suspended or partly suspended sentence, s 10(1)(c) provides when the period of the sentence has been completed. Section 10(3)(b) requires seven years

[73] *Electoral Act* (NT), s 16.

to elapse from that time before such a person becomes eligible for jury service.[74]

[96] The words "sentenced to a term of imprisonment" are not defined. Does that include a youth sentenced to detention under s 83 of the *Youth Justice Act*? If so, how does the Sheriff (or SAFE NT) obtain information about a youth's conviction and sentence by the Youth Justice Court, bearing in mind the confidentiality provisions contained in s 214(1) and s 214(4) of the *Youth Justice Act*?[75]

[97] We think also the fact that the checks were carried out without any statutory authority by an organisation connected with the police is objectionable on the basis that the police are interested in the prosecution of offenders. It seems to us that in these circumstances there is a ground for challenge for favour on the basis that the Sheriff's actions are not necessarily consistent with indifference and may be suspected, having employed those connected with the prosecution to strike off names of those selected without either statutory authority or enquiry.

[98] Mr Grant QC referred us to *R v Diack*[76] and *R v Ilic*[77] to support what the Sheriff had done. In *Diack*, Nader J did not comment on the course there taken, where the list in that case was also submitted to the police for the

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[74] See also *Sentencing Act*, s 40(5) and s 40(8).

[75] There is also a potential problem under s 6(2)(a), s 11 and s 12 of the *Criminal Records (Spent Convictions) Act* which prevent spent convictions from being revealed. In the case of offences committed by youths, the Youth Justice Court provides generally, convictions become spent after five years. The Sheriff is not an excepted "law enforcement agency" as defined by s 3(1); see s 12(4) of the *Criminal Records (Spent Convictions) Act*.

[76] (1983) 19 NTR 13.

[77] (1959) Qd R 228.

same purpose. His Honour did not specifically approve it either. In *Ilic*, the challenge failed because the statute authorised the police to provide assistance to the Sheriff and the Court found that the police did not "strike off any names" or exercise a right of veto. The facts of this case do not support the same conclusions.

[99] Reference was also made to *Katsuno v The Queen*,[78] which dealt with an objection made by counsel for the accused to the prosecutor using information supplied to the prosecutor by the Commissioner of Police concerning those persons on the panel who were found to have prior convictions. No challenge to the array was made. The appeal concerned the legality of the Commissioner of Police supplying the relevant information to the prosecution. The Court found that the actions of the Commissioner of Police were impliedly prohibited by s 21 of the *Juries Act* (Vic), but there was no defect in the criminal process such as to deny the accused his constitutional right to trial by jury. That case is not strictly on point. Although there is discussion, in the context of the constitutional requirements of trial by jury of federal offences of the essential features of trial by jury,[79] this case is not concerned with federal offences.

[100] Two other grounds of objection were raised by Mr Tippett QC. The first related to the service of summonses. Section 29 of the Act required the Sheriff to "cause to be served upon each juror chosen in pursuance of s 27

[78] (1999) 199 CLR 40.
[79] At [48]-[50].

a summons in a form approved by the Sheriff". The fact is that of the 350 persons whose names were selected by the computer, only 291 were sent a summons. This is not contemplated by the Act. We do not decide that s 27 requires that every juror be in fact served. Plainly, that would not be able to be complied with and we do not think that this was intended. The form of the precept set out in Schedule 3 of the Act clearly envisages that there will be some jurors who have not been able to be served for various reasons. However, it is one thing to fail to serve, it is another to fail to "cause to be served". If, as in this case, service by post was used at authorised by s 30(b) of the Act, the Act required the Sheriff to post a summons to all jurors selected in pursuance of s 27.

[101] Mr Tippet QC's second complaint was that the Sheriff posted summonses to jurors whose address on the jury list was a town camp which is not in receipt of a postal service. There is no evidence that the Sheriff was aware of the practice adopted by Australia Post, or of the matters set out in paragraphs 27 and 28 of the agreed facts. If the Sheriff does become aware that service by post to a particular address will be ineffective, it would be wise for him to attempt personal service to put beyond doubt that he has complied with s 29. We would not uphold the challenge on this ground.

[102] Finally, complaint was made that the jury list was not supplied to the accused as required by s 351A(2) of the *Criminal Code*. In our opinion, this is not a proper ground for a challenge to the array. There is another remedy available, namely to ask the trial Judge to order that the list be supplied and,

if necessary, to adjourn the trial for so long as is necessary for the accused to consider the list for the purposes of exercising their right to challenge to the polls.

[103] For the reasons given, we answered Question 3, yes.

Question 2 – Are the accused persons entitled to orders discharging the jury panel and adjourning the trial in the exercise of the Court's inherent jurisdiction to secure their right to a fair trial?

[104] Although we have answered this question in the affirmative, it should be understood that by this answer we are not suggesting the unfairness giving rise to the exercise of the Court's inherent jurisdiction can properly be based on any assertion that the array had a disproportionately low number of Aboriginal persons or did not represent a fair *cross section of the community* as that term is applied in other jurisdictions.[80] It must also be noted our answer to this question does not involve any consideration of a *permanent* stay. A permanent stay is a remedy of last resort. This involves a temporary stay of proceedings sufficient to enable proper compliance with the Act and thereby remove an obstacle to the provision of a fair trial by virtue of the results of the non-compliance we have found.

[105] Our answer to this question is based on the general requirement that an accused must receive a 'fair trial according to law'. In *Dietrich v The Queen*,[81] Mason CJ and McHugh observed:

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[80] See the reasons for our answer to question 4(b).
[81] (1992) 177 CLR 292 at 229.

> The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system. As Deane J correctly pointed out in *Jago v District Court*, the accused's right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the State; however, it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial. The right is manifested in rules of law and of practice designed to regulate the course of the trial. However, the inherent jurisdiction of courts extends to a power to stay proceedings in order "to prevent an abuse of process or the prosecution of a criminal proceeding which will result in a fair trial which is unfair.

[106] The enlivening of the inherent power in this instance is directed to the *prevention* of an unfair trial and the consequential appearance of unfairness. There is no exhaustive definition of the attributes of a fair trial,[82] however where as here the Act regulates the process from which a randomly selected panel will be chosen to try the accused and the purpose of that process is designed to achieve fairness, non compliance to the extent we have found it does in our view require a stay to achieve a fair trial at law. It is not necessary to show an abuse of process has occurred to enliven the inherent power.

[107] Much of what we have to say in this context has been dealt with in our answers to both questions 3 and 4(a), however, those considerations are also relevant to fair trial.

[82] *Dietrich v The Queen* (1992) 177 CLR 292 at 300.

[108] Mention was made by way of comparison of the requirement in the United States that venire[83] lists must represent a "fair cross section of the community". The Sixth Amendment provides that the right to trial shall be "by an impartial jury".[84] In *Taylor v Louisiana*,[85] the Supreme Court held that the Sixth Amendment guaranteed a jury drawn "from a representative cross section of the community". In *Duren v Missouri*,[86] the Court outlined a three-part test to determine whether a group has been unconstitutionally excluded from the venire. The group must be (i) distinctive and (ii) lacking "fair and reasonable representation" for reasons that are (iii) caused by the system of jury selection. A number of tests had been utilised to test for under-representation of a distinctive group. The comparative disparity test is a method where a court calculates the percentage of otherwise eligible jurors from a given group who are excluded from jury service. The absolute disparity test compares the number of excluded potential jurors to the overall population. Most recently in *Berghuis v Smith*[87] the Supreme Court declined to specify any method or test which must be used to measure the alleged disparity.

[109] Despite the apparent far-reaching nature of the content of the US constitutional guarantee of fair cross section of the community, the individual States in the US remain free to prescribe relevant qualifications

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[83] Broadly, the term venire appears to have the same meaning as array – the panel of prospective jurors from which a jury is selected.
[84] US Constitutional Amendment VI.
[85] 419 US 522, 526 (1975).
[86] 439 US 357 (1979).
[87] 559 US 1 (2010).

to juror service and eligibility.[88] The qualifications allowed include similar categories of disqualification and exemption that have been considered here. It is clear the mechanisms for achieving a fair trial by an impartial jury in the United States are sourced in part in constitutional guarantees. By comparison, in the Northern Territory it is the Act and associated common law principles and processes which seek to ensure and protect jury impartiality as a fundamental feature of a fair trial. In our view, resort to the inherent jurisdiction to temporarily stay or adjourn the proceedings until substantial compliance with the Act is achieved is an entirely appropriate use of the inherent power.

[110] We are not here advocating the use of the inherent jurisdiction to ensure a racially representative jury. Rather we have determined that fairness of the trial, intrinsic to the Act cannot be achieved when there has been substantial non-compliance with the provisions discussed in our reasons for our answer to question 3.

[111] Considerations arising from *R v Smith*[89] do not arise here. Neither the common law nor the Act require any particular element of racial representation, however to achieve fairness the Act must be substantially complied with.

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[88] Kalt, *The Exclusion of Felons From Jury Service* (2003) 1 American University Law Review 53 at 65.

[89] Unreported, District Court of New South Wales, 19 October 1981. Discussed at paragraph [64] above.

[112] In large part, the English decision of *R v Ford (Royston)*[90] supports the approach taken here. As noted in our discussion to our answer to question 4(a), *Ford* stands for the proposition that the inherent jurisdiction may not be exercised in an attempt to secure a jury drawn from particular sections of the community as the fairness of the selection is achieved by the "random selection". We would add to "random selection" as intrinsic to fairness of the selection, substantial compliance with the provisions of the Act, so that the array assembled does not detract from the jurors randomly selected. Compliance with the provisions of the Act protects not only the fairness of the selection of jurors and consequently the fairness of the trial, but also the appearance of fairness.

[113] Although the appearance of a fair trial in every other context is not necessarily the primary consideration for the exercise of the inherent jurisdiction, in this context it assumes significance. The appearance of fairness as opposed to its actuality in relation to jury selection may be regarded as almost one and the same. In the context of the s 80 Australian Constitutional guarantee of trial by jury of Commonwealth matters Deane J said:[91]

> That constitutional guarantee is, however, for the benefit of the community as a whole as well as for the benefit of the particular accused. As Griffith CJ pointed out in *R v Snow*, the requirement of s 80 is "a fundamental law of the Commonwealth" which should be prima facie construed as "an adoption of the institution of "trial by jury" with all that was connoted by that phrase in constitutional law

[90] [1989] 3 WLR 762.
[91] *Brown v The Queen* 160 CLR 171 at 201-2.

> and in the common law of England". The adoption of that institution reflected "a fundamental decision about the exercise of official power" (see *Duncan v Louisiana*) or, to repeat words I used in *Kingswell v The Queen*, "a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases", namely that, regardless of the position or standing of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representative of the general community, of whose hands neither the powerful nor the weak should expect or fear special or discriminatory treatment. That essential conception of trial by jury helps to ensure that, in the interests of the community generally, the administration of criminal justice is, *and has the appearance of being* unbiased and detached (our emphasis added).

[114] In our view, the question of *appearance* of fairness is referable to the compliance with the Act and not to the question of the racial composition of the jury.

[115] The Crown has argued that the composition of the array, even if not composed in accordance with the Act, will not affect the jurors ultimately selected to try this matter. Those jurors would deliberate and give a verdict in accordance with their oath. It is not doubted that jurors sworn will act in accordance with their oath.[92] The jurors ultimately selected to try the case must in our view be drawn from an array that substantially complies with the Act to ensure the process can be properly considered as a matter of law, a trial by jury, and as matter of fairness, must reflect the community in a manner consistent with that contemplated by the Act.

[116] The combination of the Sheriff acting without authorisation of the Chief Justice's precept and by the checks for disqualification being made by a

[92] *Dupas v The Queen* (2010) 267 ALR 1.

party who is not indifferent to the prosecution lead to the conclusion that any trial conducted drawn from the array assembled would not fulfil the legal requirements of a trial by jury and would not be fair or seen to be fair as the array has not been chosen in a way contemplated by the Act.

[117] We have concluded the Court in these circumstances is entitled to rely on its inherent powers to ensure a fair trial. For these reasons, we answered question 2 in the affirmative noting this answer did not affect the further mention and orders to be made by the trial judge.

Question 1 – Would the accused persons be denied their inherent entitlement to a trial by jury pursuant to s 348 of the *Criminal Code* by a jury empanelled from the array which has been summoned?

[118] We answered this question, "not possible to answer, because of the answer to Question 3". In other words, if a challenge to the array is successful, no trial is possible from the array which has been summoned. There is no discretion in the trial Judge, once the challenge is upheld, to do anything other than to quash the panel at once and direct a new panel to be summoned.[93]

The Act should be reviewed

[119] The the Act is in need of amendment to make statutory provision for the Sheriff to utilise SAFE NT or by some similar organisation or process to carry out checks to exclude jurors who are not qualified. It is probably a good time for the whole of the Act to be reviewed and we suggest that a

[93] *R v Diack* (1983) 19 NTR 13 at 18.

reference should be made by the Attorney–General to the Law Reform Committee. In the instruction given by the Acting Chief Justice dated 15 September 2010, it was directed that the jury panel should be sent to SAFE NT for checking after the summonses had been sent out for service. No objection could be taken to this course if the person in charge of SAFE NT is appointed a Deputy Sheriff, so long as that person is not a sworn police officer (which we understand to be the case). The Act should also make it clear that the process of determining disqualifications should be in the control of the Sheriff and if there is doubt, by the Master or a Judge. Once it becomes known that a person is not qualified or exempt, that person's name should be removed from the jury list by the Sheriff. It may also be appropriate to give the disqualified person notification and a right to challenge such a determination. The power to maintain the jury list and keep it up to date is to be found in the *Interpretation Act*, s 41 and s 43.

The system to be adopted for the time being is as follows:

1. A precept for a fixed number of jurors to be summonsed will be issued by the Chief Justice in accordance with the form in Schedule 3.

2. Before anything else is done, you are to make a list of the jurors who have been deferred.

3. You then select the balance to make up the number required by the precept by random selection in accordance with s 27.

4. You then post the summonses, together with the information booklet and an attachment referring to those sections of the booklet which deal with jurors who are not qualified and exempt, and asking them to contact you if they fall into either of those categories.

5. At the same time or thereafter, you send the list to Donna Quong (this could be done before the summonses are sent out, but does not alter who receives a summons).

6. When the list is returned, you excuse those from attending who are struck out as being not qualified, pursuant to s 14. This can be done by sending a pro forma letter advising them that they are not qualified or exempt and therefore are not required to answer their summons and, that if a person wishes to challenge what you have done, they can be reviewed if they contact your office. You should also advise that persons over 65 can apply to exempt themselves on a permanent basis under s 11.

7. During the induction process, you remind the panel that those who are not qualified or who are exempt should either see you or apply to the Judge.

8. Jurors whose names are on the Jury List but who are exempt or not qualified should be removed from the Jury List for that year. When you make up a new list for the following year, you should check to ensure that exempt persons are not included on the new list. It would be a good idea if you kept a list of exempt persons who have come to your attention. It may be impractical to do the same for persons who are not qualified, because they may have become qualified in the meantime. Would it be practical to get Donna Quong to indicate in respect of each person who has been excluded, when his or her disqualification would cease? If this could be done, you could keep this as a separate list and see if it is appropriate to exclude them from the next List when you make it out. Of course, this is not going to pick up people who have become unqualified in the meantime.

If this system is followed, there is no need for a “variable” number in the precept. However, your experience should tell you how many are likely to be struck out by SAFE NT and to make allowances accordingly when advising the CJ of the number to be included in the precept so as to ensure that we have a sufficient number of jurors answering their summonses and available to serve on the panels.