

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

YOSHIO KATSUNO

APPELLANT

AND

THE QUEEN

RESPONDENT

Katsuno v The Queen [1999] HCA 50
30 September 1999
M88/1998

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation:

D Grace QC with O P Holdenson QC and M K Moshinsky for the appellant
(instructed by Hale & Wakeling)

A J Howard QC with N T Robinson and R T Barry for the respondent
(instructed by Commonwealth Director of Public Prosecutions)

Interveners:

D M J Bennett QC, Solicitor-General for the Commonwealth with
M J Crennan intervening on behalf of the Attorney-General of the
Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with P M Tate
intervening on behalf of the Attorney-General of the State of Victoria
(instructed by Victorian Government Solicitor)

2.

R J Meadows QC, Solicitor-General for the State of Western Australia with C F Jenkins intervening on behalf of the Attorneys-General of the States of Western Australia and South Australia (instructed by Crown Solicitors for Western Australia and South Australia)

M G Sexton SC, Solicitor-General for the State of New South Wales with K M Guilfoyle intervening on behalf of the Attorney-General of the State of New South Wales (instructed by Crown Solicitor for New South Wales)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Katsuno v The Queen

Criminal law – Juries – Practice in Victoria of provision of conviction and other information concerning potential jurors to Director of Public Prosecutions by police – Information used to exercise challenge – Whether practice prohibited by *Juries Act* 1967 (Vic) – Consequences of invalidation of practice – Whether prohibition of practice relates to the constitution and authority of the jury and to the trial process in a fundamental respect – Whether breach constituted a fundamental failure to observe requirements of the criminal process.

Criminal law – Juries – Nature of and entitlement to peremptory challenge – Relevance of reasons for exercise.

Criminal law – Constitutional requirement of trial by jury – Representative nature of the jury.

Jury – Commonwealth offence – Trial in State court – Provision of information by police to prosecutor – Information used to exercise challenge – Whether practice prohibited – Whether breach constituted a fundamental failure to observe requirements of the criminal trial.

Words and phrases – "constitution and authority of the jury".

The Constitution, s 80.
Juries Act 1967 (Vic).

Maher v The Queen (1987) 163 CLR 221.

1 GLEESON CJ. The material facts of the case are set out in the judgments of Gaudron, Gummow and Callinan JJ and Kirby J. There are two principal issues to be decided. The first is whether the facts disclose a contravention of the *Juries Act* 1967 (Vic) ("the Act"). The second concerns the effect of any such contravention upon the conviction of the appellant.

2 As to the first issue, I agree that the practice followed in the present case contravened an implied prohibition contained in s 21(3) of the Act, and was therefore unlawful. I am unable to accept that there was also a contravention of s 67(b). In that respect, I agree with Kirby J.

3 As to the second issue, there is no justification for concluding that the appellant's conviction should be quashed. As the Court of Appeal pointed out¹, s 568 of the *Crimes Act* 1958 (Vic) enables that court to set aside a verdict on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or to set aside a judgment on the ground of a wrong decision on any question of law or on the basis of a conclusion that "on any ground there was a miscarriage of justice"; in all other cases the court is to dismiss the appeal.

4 The process by which the jury panel was constituted, and jurors' cards were drawn, was random. When it came to the selection of the jury, the prosecution and the defence, pursuant to s 34 of the Act, were entitled to exercise a specified number of peremptory challenges. The prosecution exercised one such challenge to exclude a person about whom certain information had been obtained. The system does not assume, or require, that the exercise of a right of peremptory challenge by either side at a criminal trial will be based exclusively on speculation, or impression, rather than on information. It could hardly be suggested, for example, that if a police officer, sitting in court, were to recognise a member of a jury panel as someone who had been committed for trial on a serious charge, or who was known to the police as an associate of criminals, or who was known to be an associate of the accused, it would be unlawful or improper for the officer to pass that information on to the prosecutor, or for the prosecutor to use the information in deciding to exercise a right of peremptory challenge.

5 Whether "jury vetting" is desirable is a subject about which there are differing views. The expression covers a range of practices, which operate in different jurisdictions against a background of varying statutory provisions concerning such matters as access to information about the names of prospective jurors.

6 It is necessary to bear in mind exactly what it was, in this case, that contravened the Act. The unlawfulness did not result from providing, at the trial, to a representative of the prosecuting authorities, information concerning the antecedents of the potential juror in question. Nor did it result from withholding

1 (1997) 99 A Crim R 350 at 360.

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such information from the defence. If, as requested, the information had been made available to the defence, there would nonetheless have been a contravention of s 21. The unlawfulness resulted from providing, in advance of the trial, the names of those on the jury panel. The practical effect of what was done was to give the prosecution advance knowledge of information which could lawfully have been communicated later, and in sufficient time to enable it to be used in making a decision as to a peremptory challenge. Indeed, the contravention of s 21 would have occurred even if no challenge had been made on the basis of the information provided.

7 The contravention did not render the appellant's trial a nullity, or involve a miscarriage of justice requiring the conviction to be set aside.

8 I also agree, for the reasons given by Gaudron, Gummow and Callinan JJ, that there was no infringement of the provisions of s 80 of the Constitution.

9 The appeal should be dismissed.

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- 10 GAUDRON, GUMMOW AND CALLINAN JJ. There has been a longstanding practice in Victoria of the provision in confidence, by the Chief Commissioner of Police to the Director of Public Prosecutions, of details of any convictions and other information concerning persons summoned to serve as jurors in criminal trials. That practice was followed in this case.
- 11 The appellant, together with five others, was charged with the importation into Australia, at Tullamarine in Victoria, of a commercial quantity of heroin, contrary to s 233B(1)(b) of the *Customs Act* 1901 (Cth) ("the Customs Act"). An offence under s 233B(1)(b) of the Customs Act may be prosecuted summarily or upon indictment. This is the combined effect of sub-ss (2) and (4) of s 235 of the Customs Act. Here, the appellant was prosecuted upon indictment. The result was that s 80 of the Constitution required the trial to be by jury and to be held in the State where the offence was committed.
- 12 The appellant was prosecuted in the County Court at Melbourne. Section 68(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") contains the necessary investment of federal jurisdiction in the State court and s 68(1) made the laws of Victoria, including the *Juries Act* 1967 (Vic) ("the Juries Act") applicable to the procedure for the appellant's trial. The indictment stated that the appellant was prosecuted by the Director of Public Prosecutions ("the DPP") on behalf of Her Majesty the Queen. The DPP holds office under the *Director of Public Prosecutions Act* 1983 (Cth) and one of the DPP's functions is to institute and carry on prosecutions on indictment for indictable offences against the laws of the Commonwealth (s 6(1)(a) and (b)).
- 13 Before a jury was empanelled the appellant sought an order from the trial judge, his Honour Judge Byrne, that the prosecutor be forbidden to use the information supplied by the Chief Commissioner, or, alternatively that the information be furnished to the defence. The trial judge refused the application. The trial proceeded and the appellant was convicted. An application by him for leave to appeal to the Court of Appeal (Tadgell, Phillips and Charles JJA) was dismissed². The questions that the case raises are whether the Chief Commissioner's practice is a lawful one, and if it is not, what consequences should follow.

2 *R v Katsuno* (1997) 99 A Crim R 350.

The facts

14 The case was argued in the Court of Appeal and here on the basis of an agreed statement of facts:

"The Sheriff obtained a list of names of prospective jurors (the jury list) randomly selected from the Electoral Rolls by the Electoral Commissioner (s 8 Juries Act 1967). The jury list has approximately 80,000 names on it.

The Sheriff, following the usual procedure of breaking the jury list into randomly selected groups of about 15,000 and sending the questionnaire as necessary to maintain the flow of jurors, sent a questionnaire to about 15,000 names selected at random by him from the jury list to determine qualifications and liability (s 10(1) Juries Act). The questionnaire asks inter alia whether the recipient is disqualified as described in the form or seeks exemption.

Upon receipt of the completed questionnaires the Sheriff deleted the names of those who had disclosed that they were disqualified and those exempted (s 11(1) Juries Act). A recent example showed that 38 people out of 12,000 had been either disqualified or exempted.

The Sheriff prepared jury panels by selecting, at random, names from the now modified jury list (s 20 Juries Act). These panels are prepared approximately every two weeks and are designed to cover a two week period. Six panels are prepared – two each of 300 for Monday, two each of 250 for Wednesday and two each of 130 for Friday.

The Sheriff made copies of these panels and forwarded copies of each to the Chief Commissioner of Police (s 21(3) Juries Act). This is done approximately every two weeks.

The Chief Commissioner of Police checked the panels against his records (s 21 and Schedule 2 of the Juries Act).

The Chief Commissioner of Police drew up a list of names from each panel, of those found to have prior convictions and forwarded this list, which included the criminal history of each person named (the list), to the Sheriff to enable him to complete the panel (s 21(3)). Upon receipt of the list the Sheriff deleted from the panel those found to be disqualified, those remaining constituted the completed panel.

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The Sheriff issued summonses to every person on the completed panel (s 23 Juries Act). The people summoned make up the 'jury pool' for that particular day for all types of trials (criminal and civil) in all courts.

The Chief Commissioner of Police forwarded other copies of the list to the Office of Public Prosecutions for Victoria.

The list is held at the Ground Floor Reception Office at the Office of Public Prosecutions at 565 Lonsdale Street, Melbourne (OPP). A new list is available for each new panel every Monday, Wednesday and Friday.

The list is available to be collected by instructing solicitors for the OPP and, with the exception of solicitors for the Commonwealth Director of Public Prosecutions, will not be given to anybody else.

By arrangement solicitors acting on behalf of the Commonwealth Director of Public Prosecutions will be provided with a copy of the list upon request and the production of identification.

The trial of the applicant began on 23 September 1996. Preliminary argument lasted until 30 October 1996.

On 9 October 1996 Counsel for the applicant made an application to the trial judge that the Crown not be permitted to use the list or in the alternative that the list should be supplied to the defence. This application was rejected by his Honour.

A panel of 27 was randomly selected from the jury pool for attendance at court.

A jury of 12 was empanelled on Wednesday, 30 October 1996.

On the morning of the empanelment the instructing solicitor for the Crown, Mr B Tchakerian, obtained from the Victorian Office of Public Prosecutions a copy of the list.

On the list were the names of 22 people with prior convictions. In addition copies of the relevant prior convictions were provided. No other information was on the list.

During the empanelment of the jury Mr Tchakerian exercised a right of peremptory challenge (s 34 Juries Act) in relation to a Mr [G] who according to the list had previously been convicted of shopbreaking and stealing in 1971 at the Northcote Magistrate's Court. In addition, Mr [G] had appeared in the

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Liverpool Court of Petty Sessions in August 1976 charged with trespass and had been placed on a good behaviour bond for 1 year with a condition that he remain away from the Base Hospital at Ingleburn.

Mr [G] was challenged only on the basis of his prior convictions.

The defence peremptorily challenged five people.

No other person was challenged by the Crown for any other reason.

No other person, whose name appeared on the list was called during empanelment.

On the 15th of August 1997 the Commonwealth Director of Public Prosecutions advised the Victorian Law Institute that where information contained in the list was to be used to challenge a juror called, a copy of that information (on express conditions of confidentiality and non-retention) would be provided to the defence during empanelment.

...

The respondent orally informed the applicant's counsel in or about June 1997 (subsequent to the trial and conviction of the applicant) that there had been a positive use made of the information in the list for the purpose of exercising the right of peremptory challenge at the trial of the applicant."

The appeal to this Court

- 15 The appellant submits that the practice referred to in the statement of facts is impliedly prohibited by the Juries Act. The two sections which, it is submitted, give rise to the implied prohibition are s 21 and s 67 of the Juries Act:

"21. Copies of panels to be made

- (1) For the purposes of this Act the sheriff shall cause to be made a sufficient number of copies of every panel.
- (2) Subject to this Act the sheriff or any of his officers shall not make known to any person the names in any panel from which the jury is to be struck in any inquest.
- (3) A copy of every panel from which the jury is to be struck in every inquest shall be forwarded to the Chief Commissioner of Police not later than 12 days before the day appointed for the holding of the inquest,

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and the Chief Commissioner of Police shall make such inquiries as he sees fit as to whether any person disqualified under section 4 from serving as a juror is named on such panel and shall report the result of those inquiries to the sheriff."

"67. Wilful offences by persons under this Act

The Supreme Court may in a summary way impose such fine as is thought fit upon any person exercising any duty under this Act or performing any function under this Act who without lawful excuse the onus of proof of which shall lie upon him –

- (a) causes any alteration omission insertion or misdescription in or falsely certifies to the correctness of any record of jurors summons list panel or card;
- (b) subtracts destroys or permits any person to have access to any such record of jurors summons list panel or card;
- (c) omits or refuses to do or to permit the doing of any act or thing in the manner or at or within the time prescribed by or under this Act for the doing thereof;
- (d) excuses any person from serving or from being summoned to serve on juries;
- (e) places upon any panel or return the name of any person whose name is not included among the persons liable to serve as jurors for the jury district of a court;
- (f) wilfully records the appearance of any person summoned to serve as a juror who did not appear; or
- (g) directly or indirectly takes or receives any money or reward or any promise of or contract for money or reward for excusing or under the pretence of excusing any person from being summoned to serve or from serving as a juror."

16 Schedule 2 of the Juries Act sets out five categories of persons disqualified from serving as jurors:

"1. Any person who has been –

- (a) convicted of treason; or

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- (b) convicted of one or more indictable offences and sentenced to imprisonment for a term or terms in the aggregate not less than three years –

but any conviction for an offence in respect of which a free pardon has been granted shall be disregarded.

- 2. Any person who at any time within the last preceding five years –

- (a) has been imprisoned; or

- (b) has been on parole –

but there shall be disregarded –

- (i) all sentences of imprisonment served during that period if together they do not exceed a period of three months;

- (ii) any imprisonment incurred as a result of failure to pay a fine; and

- (iii) any imprisonment in respect of a conviction for an offence in respect of which a free pardon has been granted.

- 3. Any person who is bound by a recognizance entered into after conviction for any offence.

- 4. Any person who is subject to a community-based order that includes a condition referred to in section 38(1)(b) of the *Sentencing Act* 1991 made by a court.

- 5. Any person who has been declared bankrupt and has not obtained a discharge."

17 Part III of the Juries Act prescribes the procedure for the pre-selection of jurors³. Section 11 provides that the Sheriff shall determine the qualification and liability of each person (selected at random pursuant to s 10) to serve as a juror. It

3 As to the role of juries before randomness and absence of preconception became the desired ends see *Melbourne v The Queen* (1999) 73 ALJR 1097; 164 ALR 465. See also Forsyth, *History of Trial by Jury* (1852) at 192-208, 259-282.

is then for the Sheriff as often as necessary to prepare panels of persons from which juries may be struck for trials in every jury district (s 20).

18 By s 21(2) the Sheriff or any of his officers shall not make known to any person the names in any panel from which the jury is to be struck in any inquest. (By definition, (s 3) inquest includes a criminal inquest or trial.) Having emphasised, by the enactment of s 21(2), the confidential nature of the names on any panel, the legislature then expressly further enacted that the Chief Commissioner of Police is to report the result of his or her inquiries to the Sheriff. The inquiries in question are such inquiries as the Chief Commissioner of Police sees fit to make (s 21(3)) as to whether any person is disqualified under s 4 of the Juries Act.

19 Positive legislative statements will often be capable of giving rise to negative implications. A recent example of the application of this principle (in a constitutional case) is *Gould v Brown* in which McHugh J said⁴:

"The affirmative but limited grants of constitutional power to the Parliament of the Commonwealth negate its competency to invest the federal courts and the High Court with original and appellate jurisdiction except in accordance with ss 73, 75 and 76. In my view, logically these affirmative grants must also negative the power of other legislatures in the federation to invest the High Court and the federal courts with jurisdiction."

20 The principle is applicable to this case. The structure of the Juries Act, with its emphasis upon confidentiality and the sole and express reference to the Sheriff as the recipient of the report, gives rise here to a negative implication that no one else is to receive the report.

21 The making of the implication does not however depend solely upon the language of s 21 and Sched 2 of the Juries Act. It gains strength from s 67(b). This should be read inclusively, that is, as referring to a record, list, panel or card, in whole or in part. This provision makes it an offence for any person performing a function under the Act (relevantly the Chief Commissioner) to permit any person (here the prosecutor) to have access to such material.

4 (1998) 193 CLR 346 at 423. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *affd Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529; [1957] AC 288 (PC) and *Marbury v Madison* 5 US 87 at 109 (1803) per Marshall CJ.

22 Section 31 is also relevant. It provides as follows:

"Sheriff to deliver panel with cards

- (1) On the day named in the summonses for the attendance of jurors, the sheriff must in open court –
 - (a) deliver the copy of the panel; and
 - (b) subject to sub-section (2), furnish the names and occupations of the jurors written on separate cards –

to the proper officer who must put the cards in a box.

- (2) In the case of an inquest where there are two or more persons of the same name and occupation on the panel, the names of those persons with additions must be written on separate cards and furnished to the proper officer."

23 This section further reinforces the confidential nature of the panel until a copy of it is delivered "in open court" to "the proper officer".

24 The case also falls within the principles expressed in *Johns v Australian Securities Commission* by Brennan J⁵:

"A statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed. The statute imposes on the person who obtains information in exercise of the power a duty not to disclose the information obtained except for that purpose. If it were otherwise, the definition of the particular purpose would impose no limit on the use or disclosure of the information. The person obtaining information in exercise of such a statutory power must therefore treat the information obtained as confidential whether or not the information is otherwise of a confidential nature. Where and so far as a duty of non-disclosure or non-use is imposed by the statute, the duty is closely analogous to a duty imposed by equity on a person who receives

5 (1993) 178 CLR 408 at 424. Agreement with Brennan J's judgment was expressed by Dawson J (at 435-436) and Gaudron J (at 458), and the reasoning of Toohey J (at 452-453) and McHugh J (at 468-469) was to the same effect. See also Sir Nicolas Browne-Wilkinson V-C in *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 at 234 (affirmed on appeal [1992] Ch 241 at 261-262) and Sir Donald Nicholls V-C in *Morris v Director of the Serious Fraud Office* [1993] Ch 372 at 381.

information of a confidential nature in circumstances importing a duty of confidence."

25 It follows, in our opinion, that the practice of the Chief Commissioner of supplying details or information obtained as a result of inquiries made pursuant to s 21(3) of the Juries Act to a prosecutor (as happened in this case), or to anyone else other than the Sheriff in advance of the delivery of a copy of the panel in open court is unlawful and, if necessary, its continuance can be restrained by injunction.

26 Before considering the consequences of the invalidation of the practice, there is one submission of the appellant that should be dealt with: that a prosecutor in Victoria is not entitled to make a peremptory challenge unless the prosecutor has a sound reason for doing so. Intuition, instinct, suspicion or mere distaste for a potential juror on his fleeting appearance before being sworn as a juror, the matters upon which counsel rely in deciding whether to offer a peremptory challenge, are, it was put, not available to a prosecutor. Such a proposition, if correct, would elevate the legal obligations of a prosecutor in making a peremptory challenge to something akin to those which he or she would need to satisfy in deciding to make and in making a challenge for cause.

27 The Juries Act clearly distinguishes between peremptory challenges (s 34) and challenges for cause (s 38) and in terms provides that the Crown is entitled to challenge peremptorily up to six times⁶. Once the legislature conferred upon the Crown in unmistakable language a right of peremptory challenge there is no reason to treat the Crown's right in that regard as being any different from the right of peremptory challenge enjoyed by an accused person. Compliance with guidelines formulated by a Director of Public Prosecutions of the kind promulgated to prosecutors (a copy of one set of which was provided to the Court in this case) however desirable that may be, is another matter, and cannot alter the lawful right of a prosecutor to challenge peremptorily.

28 Barwick CJ in *Johns (Roger) v The Queen*⁷ discussed the nature of a peremptory challenge:

"The right of challenge, and particularly the right of peremptory challenge, lies at the very root of the jury system as it now exists. That the challenge is peremptory means that the accused need not in any wise justify his challenge. It need represent no more than his personal objection to be tried by the person whom he sees before him and whose name he has heard. No doubt, in

6 Where only one person is arraigned at the inquest: Juries Act, s 34(1B)(a).

7 (1979) 141 CLR 409 at 418.

deciding whether or not to exercise the right of challenge, an accused may profit by the views of counsel. But, even so, he may prefer his own instinctive reaction to the person he sees to the experience or theories of the advocate. It is his peculiar right to follow his own impressions and inclinations."

29 The statute in this case confers the same rights upon prosecutors.

30 The final question is whether the unlawfulness of the conduct by the Chief Commissioner in following the practice in this case, and the utilization of the information so provided to the prosecutor, renders the verdict of guilty a nullity or makes it otherwise impeachable.

31 In *Maher v The Queen*⁸ the accused pleaded not guilty to 19 counts (some under Commonwealth and some under State law) before a jury had been sworn. After the jury had been sworn, two counts were added to the indictment. The trial judge re-arraigned the accused and gave him in charge of the jury on the new counts after rejecting a plea that the court had no jurisdiction to entertain the further two charges. On appeal this Court held that the jury could only have been sworn and empanelled to try the issues raised by pleas to the 19 counts charged in the indictment at the time they were sworn. No provision of the *Criminal Code* (Q) or any other statute authorized an amendment of the indictment by adding counts after the jury had been sworn. They had not been sworn to try the issues on the further counts, and re-arraigning the accused did not alter the issues they had been sworn to try. There had therefore been a failure to comply with mandatory provisions governing the constitution and authority of the jury. A conviction founded on a verdict on the further counts could not withstand an appeal.

32 The Court (Mason CJ, Wilson, Brennan, Dawson and Toohey JJ) reached its conclusions by reference to the requirements of Queensland law. No point with respect to s 80 of the Constitution had been taken. Their Honours said⁹:

"The provisions of the *Jury Act* and of the Code which govern the constitution and authority of the jury as the tribunal of fact in a criminal trial are mandatory, for the entitlement to trial by jury which s 604 of the Code confirms is trial by a jury constituted in accordance with the *Jury Act* and authorized by law to try the issues raised by the plea of not guilty. A failure to comply with those provisions may render a trial a nullity, at least in the

8 (1987) 163 CLR 221.

9 (1987) 163 CLR 221 at 233-234.

sense that the conviction produced cannot withstand an appeal¹⁰. In any event it involves such a miscarriage of justice as to require the conviction to be set aside. Thus, in *R v Smith*¹¹ a trial was regarded as a nullity because a challenge for cause had been wrongly determined by the judge and not by the jurors. The converse situation arose in *R v Hall*¹² where the trial judge directed jurymen to try a challenge for cause when the relevant statute required the judge to try any challenge. The conviction was set aside. A similar view was taken in *R v Short*¹³. There a juryman was taken ill and the remaining jurymen were discharged but did not leave the jury-box. Another juryman was called and sworn but the other eleven jurymen were not resworn. Judgment against the prisoner was reversed for error on the record. Again, in *R v Dempster*¹⁴, when it appeared that one of the jurors while duly empanelled and chosen had not been sworn, the court directed the record to be amended by expunging all entries subsequent to the plea of not guilty."

- 33 Earlier the Court had summarized the provisions of the *Jury Act* 1929 (Q), the *Oaths Act* 1867 (Q) and the *Criminal Code* (Q) governing the selection of the jury and had said¹⁵:

"These provisions spell out the sequence of the steps to be taken to put an accused who pleads not guilty in charge of the jury: the indictment is presented, the accused is called upon to plead, he pleads not guilty, he is informed of his right of challenge, the jurors are called one by one, each member of the jury is sworn to try the issues, and the proper officer of the court gives the accused in charge of the jury. Giving the accused in charge

10 See *Crane v Public Prosecutor* [1921] 2 AC 299.

11 [1954] QWN 49.

12 [1971] VR 293.

13 (1898) 19 LR (NSW) L 385.

14 [1924] SASR 299.

15 (1987) 163 CLR 221 at 229.

of the jury is a traditional part of the criminal procedure¹⁶. The procedure, of long historical standing, is described by Dearsly, *Criminal Process*¹⁷."

34 The passages we have quoted emphasise the importance and mandatory nature of the provisions relating to the constitution and authority of the jury with which the Court was concerned in *Maher*. In addition to *Maher* the appellant sought to rely on *Johns (Roger) v The Queen*¹⁸. In *Johns*, the wrongful denial of the right to a peremptory challenge was held by Barwick CJ to be a "fundamental [defect] in the proceedings" and that there had not been "a trial according to law"¹⁹. Gibbs J (with whom Mason J agreed) held that there had been a mistrial²⁰. Stephen J did not characterise the defect in the proceedings but said that "the orders made by [the] Court followed as a necessary consequence"²¹. Murphy J held that the trial was a nullity²².

35 At one level, the decisions in *Maher* and *Johns* are concerned with failure to comply with mandatory legislative provisions relating to the constitution and authority of the jury. At another, as is clear from the judgment of the Court in *Maher*, they are concerned with "failure to observe the requirements of the criminal process in a fundamental respect"²³, of which the failure to observe mandatory provisions relating to the constitution and authority of the jury is but an example. A conviction simply cannot stand if the trial process is flawed in a fundamental respect²⁴.

16 See Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 42nd ed (1985) at par 4-176.

17 (1853) at 49.

18 (1979) 141 CLR 409.

19 (1979) 141 CLR 409 at 421.

20 (1979) 141 CLR 409 at 429.

21 (1979) 141 CLR 409 at 430.

22 (1979) 141 CLR 409 at 431.

23 (1987) 163 CLR 221 at 234.

24 See *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56 per Deane J; *R v Glennon* (1992) 173 CLR 592 at 605-606 per Mason CJ and Toohey J, 617 per Brennan J, 623-624 per Deane, Gaudron and McHugh JJ.

36 It will later be necessary to return to the decisions in *Maher and Johns* and the principle upon which those decisions are based. At the moment, however, it is appropriate to note that the appellant relied on a number of other cases, which although not determinative of this matter, illustrate the fundamental importance which the law attaches to the irregularities affecting or involving the jury. The cases included *R v Screen and McCarthy*²⁵ and *R v Ashton*²⁶ in which unsworn evidence was given in the presence of the jury.

37 In *R v Screen and McCarthy*, the jury were taken on a "view" which was attended by a police constable who was an eyewitness to the offence, for the purposes of pointing out certain features of the crime scene to the jury. The foreman of the jury asked the constable certain questions about how he had managed to see the offence being committed, and in his response the constable disclosed that the persons he had seen were the accused. The Court of Criminal Appeal held that the conviction could not stand as the constable's answers were, in effect, evidence given by the constable to the jury in the absence of the accused and without the accused having an opportunity to cross-examine the witness.

38 In *R v Ashton* the facts were similar to those in *R v Screen and McCarthy*. One of the principal witnesses for the prosecution gave an unsworn answer to a question put by a juror whilst accompanying the jury on a view. The Court of Criminal Appeal held that the accused was entitled to "insist on being tried by sworn evidence, and not to be affected by statements made outside a court of justice and not on oath"²⁷.

39 Two other cases which illustrate the fundamental nature of irregularities in the constitution of the jury are *R v Short*²⁸ and *R v Dempster*²⁹. In *Short* a jury was sworn and one of the jurors subsequently fell ill. The jury was discharged but did not leave the jury box. Another juror was then called and sworn, but the original eleven were not re-sworn. It was held that the trial had taken place before an improperly constituted tribunal because the original eleven had not been re-sworn

25 (1924) 41 WN (NSW) 20.

26 (1944) 61 WN (NSW) 134.

27 *R v Ashton* (1944) 61 WN (NSW) 134 at 135 per Jordan CJ, with whom Davidson and Halse Rogers JJ agreed.

28 (1898) 19 LR (NSW) L 385.

29 [1924] SASR 299.

and were simply "members of the public in Court"³⁰. In those circumstances, the conviction could not stand.

40 In *Dempster*, the accused was convicted by a jury of whom eleven had been duly chosen, empanelled and sworn, but the twelfth had never been sworn as a juror. The record of conviction was expunged and a new trial was ordered.

41 The question in this case is whether there was a fundamental failure to observe the requirements of the criminal process. As *Maher* and *Johns* show, there will have been a failure of that kind if there was a failure to comply with a mandatory provision relating to "the constitution and authority of the jury". However, not every legislative provision is a mandatory one. In this context, it is convenient to return to the Act. For example, it hardly seems likely that a minor arithmetical error by the Sheriff in notifying the Electoral Commission of the number of persons required for jury service, or an error as to the exact location of a juror's residence within 32 kilometres of a relevant court house pursuant to s 8, would invalidate the process for which that section makes provision. Nor would an omission to send a questionnaire as required by s 10(2) to every person recorded on a jury list be likely to render a nullity a verdict given by a jury selected from a panel which might have been a little more numerous had all questionnaires been sent as required.

42 Part IV of the Juries Act in which s 21 appears is concerned, as the heading states³¹, with the summoning of jurors. Some of its provisions are clearly mandatory (eg ss 14 and 17, dealing with the number of jurors, and ss 20 and 23, dealing with random selection). It is true that any jury will have to be constituted from a panel prepared pursuant to Pt IV and after the processes referred to in s 21 are complete.

43 In this case, however, the jury was constituted from such a panel. The complaint in this case is not that the jury panel was not properly constituted but that a particular person was not a member of the jury finally chosen. This is not a case, as was the situation in *Maher*, *Short* and *Dempster*, where there was non-compliance with legislative provisions or mandatory procedures which resulted in a person or persons sitting on the jury when not entitled to do so. Rather, it is a case involving the exclusion of a potential juror who, as already

30 (1898) 19 LR (NSW) L 385 at 390 per Owen J.

31 The heading reads "Summoning of Jurors". Section 36(1) of the *Interpretation of Legislation Act* 1984 (Vic) provides that headings form part of legislation in Victoria.

pointed out, could have been excluded by peremptory challenge for any reason, whether good or bad.

44 The appellant can succeed in this case only by establishing either that the Juries Act mandated that the potential juror in question not be challenged in circumstances in which knowledge of his prior criminal record came to the notice of prosecuting authorities in breach of the Act or that, in those circumstances, the challenge otherwise constituted a fundamental defect in the trial process. It is one thing to construe the Act as containing a negative implication perfecting the obligation of confidentiality made explicit by s 21(2). It is another thing to treat the Act as giving rise to a negative implication limiting the exercise of the right of peremptory challenge which s 34 expressly confers. It is a fundamental rule of statutory construction that implications cannot be made contrary to express legislative provisions. It follows that the challenge made to the potential juror in this case did not involve a failure to observe a mandatory legislative provision relating to the constitution or authority of the jury.

45 Moreover, once it is accepted that a peremptory challenge may be made for any reason, whether good or bad, it follows that the challenge made to the potential juror in this case cannot be viewed as a defect in the criminal process, much less the "failure to observe the requirements of [that] process in a fundamental respect"³². The reason for the prosecutor's exercise of the right of peremptory challenge is irrelevant.

46 Section 68(1) of the Judiciary Act rendered applicable to the appellant the laws of the State of Victoria not only with respect to his trial and conviction on indictment but also with respect to the hearing and determination of any appeal by him. Further, s 68(2) is to be construed as investing the Court of Appeal with jurisdiction with respect to the hearing and determination of his application for leave to appeal and consequent appeal³³. In the present case, leave was refused. Section 567(c) of the *Crimes Act* 1958 (Vic) required leave and s 568(1) provided the grounds of determination of any appeal. The appellant contends that there was a miscarriage of justice within the meaning of s 568(1). It follows from what has been said above that the breaches of ss 21 and 67(b) of the Juries Act which occurred in the present case did not cause any such miscarriage of justice.

32 *Maher v The Queen* (1987) 163 CLR 221 at 234.

33 See *Peel v The Queen* (1971) 125 CLR 447 at 457, 462, 467.

47 It was further submitted that there had been such a miscarriage because, in the events that happened, there had not been a trial by jury as required by s 80 of the Constitution. This states:

"The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."

48 The submission was that the jury was not truly representative of the community; and was not selected randomly; and was selected otherwise than in accordance with law, that is, it was selected in breach of the provisions of the State Act governing the conduct of the trial. In consequence, the appellant urged, he was denied his constitutional right to a trial by a lawfully chosen jury.

49 As important as the statement made by Deane J in *Kingswell v The Queen*³⁴, upon which the appellant relies, is, it has nothing to say about what occurred in this case. In *Kingswell* Deane J said³⁵:

"The institution of trial by jury also serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. 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."

34 (1985) 159 CLR 264.

35 (1985) 159 CLR 264 at 301-302. Dawson J (at 216) quoted these observations with approval and Brennan J (at 197) stated virtually identical propositions in *Brown v The Queen* (1986) 160 CLR 171.

50 In *Cheatle v The Queen* all members of this Court emphasised the importance of the representative nature of the jury in modern times. Their Honours said³⁶:

"Neither the exclusion of females nor the existence of some property qualification was an essential feature of the institution of trial by jury in 1900. The relevant essential feature or requirement of the institution was, and is, that the jury be a body of persons representative of the wider community. *It may be that there are certain unchanging elements of that feature or requirement such as, for example, that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State.* The restrictions and qualifications of jurors which either advance or are consistent with it may, however, vary with contemporary standards and perceptions. The exclusion of women and unpropertied persons was, presumably, seen as justified in earlier days by a then current perception that the only true representatives of the wider community were men of property. It would, however, be absurd to suggest that a requirement that the jury be truly representative requires a continuation of any such exclusion in the more enlightened climate of 1993. To the contrary, in contemporary Australia, the exclusion of females and unpropertied persons would itself be inconsistent with such a requirement." (emphasis added)

51 In practice, in many cases, one side or the other is likely to be in possession of information with respect to a juror or jurors that is not available to both. Police officers associated with the prosecution may well have knowledge about a juror's antecedents gained in the course of their ordinary duties and not as a result of inquiries initiated by the Chief Commissioner pursuant to s 21 of the Juries Act. So too, in circuit towns a local solicitor will often have a good knowledge of the inclinations of members of a jury panel. The object, as the Court's statement in *Cheatle* makes clear, is to have a *panel* that is randomly and impartially selected rather than chosen by the prosecution or the State. It is at the next point, the point of selection of the jury to serve in a particular trial, that the defence, at least, will strive to achieve a jury that he or she believes will be susceptible to the submissions of the defence, or indeed even perhaps to such unlikely matters as the voice, the hairstyle or the appearance of the accused person. There are many theories and claims, some apocryphal and all untested in this country, about the susceptibilities of juries and the matters which should guide counsel in deciding whether to make a peremptory challenge³⁷. No matter how eccentric or illogical such theories may

36 (1993) 177 CLR 541 at 560-561.

37 In the United States, detailed studies on this topic have been made: see Kalven and Zeisel, *The American Jury* (1971).

be, there is nothing in law to prevent prosecutors and defence counsel from giving effect to them in making peremptory challenges.

52 The jury in this case was not unrepresentative and was selected from a panel randomly chosen. The breaches of the Juries Act that did occur took place at a point anterior to the actual selection of the jury and did not deny the accused his constitutional right to trial by jury. The fact that the prosecutor made use of the information in making the peremptory challenge that he made was not such a departure from a mandatory provision relating to the authority and constitution of the jury as to deny the constitutionality of the appellant's trial.

53 We would dismiss the appeal.

- 54 McHUGH J. Subject to one matter, I agree generally with the reasoning of Gaudron, Gummow and Callinan JJ in this case. But that matter leads me to a different conclusion from that reached by their Honours. In their judgment, their Honours say³⁸:

"Moreover, once it is accepted that a peremptory challenge may be made for any reason, whether good or bad, it follows that the challenge made to the potential juror in this case cannot be viewed as a defect in the criminal process, much less the 'failure to observe the requirements of [that] process in a fundamental respect'³⁹. The reason for the prosecutor's exercise of the right of peremptory challenge is irrelevant."

- 55 I agree with their Honours that disclosure of the jury panel to the Director of Public Prosecutions by the Chief Commissioner in breach of the implied prohibition in the *Juries Act* 1967 (Vic) ("the Act") of itself does not constitute "a failure to observe the requirements of the criminal process in a fundamental respect"⁴⁰. However, the circumstances which give rise to the reason or reasons that motivate a prosecutor's challenge to a juror are relevant in determining whether such a failure has occurred. In my opinion, those circumstances require a different conclusion in this case from that reached by their Honours.

- 56 Whether there has been a failure to observe the requirements of the criminal process in a fundamental respect in a case like the present must rest upon the manner in which the information was obtained and the use that was made of it in selecting the jury, not on the bare fact of disclosure or the reasons for a challenge. If the Chief Commissioner had disclosed the list to the solicitor for the Director of Public Prosecutions, for example, but the solicitor had failed to bring the list to court and was unable to remember any of its contents, it could hardly be suggested that the disclosure in breach of the Act meant there was "a failure to observe the requirements of the criminal process in a fundamental respect"⁴¹. Indeed, this Court refused to grant special leave in relation to the present issue when it arose on the appellant's first trial, because in that trial no use had been made of the information by the Director of Public Prosecutions. Hence "the question of the

38 *Katsuno v The Queen* [1999] HCA 50 at [45].

39 *Maher v The Queen* (1987) 163 CLR 221 at 234.

40 *Maher v The Queen* (1987) 163 CLR 221 at 234.

41 *Maher v The Queen* (1987) 163 CLR 221 at 234.

permissibility of the practice of arming the prosecutor with that information [did] not arise"⁴².

57 But in this appeal the question does arise as to whether the *use* of information obtained in violation of those provisions of the Act which are designed to empanel a jury which will be, and will be seen to be, impartial does constitute a failure to observe the requirements of the criminal process in a fundamental respect. In this case, information, obtained in breach of the Act, was used to make a peremptory challenge to prevent a person with prior convictions from sitting on the jury although under the Act that person was qualified for jury service. It is a necessary corollary of preventing a person on the panel from sitting on a jury that another person from the panel will take his or her place. In this case, it seems clear enough that the place was taken by a member of the panel who had no prior convictions⁴³. The critical question then is: has the unlawful obtaining of the information and its use resulted in a failure to observe the requirements of the criminal process in a fundamental respect?

58 Such failures can take many forms. Upon the facts of this case, determining whether there has been a failure of the criminal process in a fundamental respect appears to depend upon two questions. First, did the Crown in using the unlawful information obtain an unfair advantage over the accused? Second, if it did, is the unfair advantage which the Crown has obtained over the accused properly characterised as a failure to observe the requirements of the criminal process in a fundamental respect?

59 The Crown contends that, by eliminating a juror who might be sympathetic to the accused, it has done no more than ensure that there was an impartial jury to try the case. The conclusion that a particular juror's prior convictions may mean that he or she has a propensity to return a not guilty verdict is a matter of speculation. It appears to be a conclusion not shared by the legislature of Victoria: the Act allows persons with convictions like those of the challenged juror to sit on juries. The conclusion is also based on the assumption that persons who have no prior convictions are less likely to return a verdict of not guilty than persons who have prior convictions. Obviously, the Crown authorities are of the opinion that the Crown is more likely to get a conviction when persons with prior convictions are prevented from sitting on the jury. That opinion may or may not be correct. But one point is beyond doubt. By obtaining and acting on unlawful information, the Crown has subverted the legislative scheme for selecting an impartial jury. It

42 *Katsuno v The Queen* unreported, High Court of Australia, 6 June 1997, transcript of proceedings at 23 per Brennan CJ.

43 That is because any member of the panel who had prior convictions would have appeared on the list provided by the Chief Commissioner and presumably would also have been challenged.

has sought to give itself an advantage by using information, unlawfully obtained, to select a jury that it thinks is more likely to convict the accused than the jury that it would have obtained without using that unlawful information. It has also used information that was not available to the accused and it has used information which the legislation denied to it. In those circumstances, the Crown should be seen as having obtained an unfair advantage over the accused in selecting the jury.

60 The Crown argued that the existence of peremptory challenges necessarily envisages that the Crown might have access to information relating to the prior convictions of panel members. The Crown contended that it would sometimes obtain this information without the Chief Commissioner disclosing information to it in breach of the Act. Thus, at a trial in a country town the instructing solicitor for the Crown or a police officer might personally know a potential juror and his or her antecedents. The Crown claimed that the exercise of a peremptory challenge on the basis of such information would not constitute a defect in the trial. It argued that such a situation was indistinguishable from the situation where the Chief Commissioner disclosed the relevant information to the Crown in breach of the Act.

61 However, the example relied upon is distinguishable from the present case. The breach of the Act and its object is the crucial distinction. The existence of peremptory challenges obviously envisages that ad hoc, perhaps instinctive, judgments will be made by the Crown and the accused in the court as each panel member is selected. But the provisions of the Act, which have been breached, deny to the Crown and the accused the right to pre-trial-day information concerning the jurors. They seek to impose a level playing field. The Act obviously assumes that peremptory challenges will be made on the basis of such information as happens to be *lawfully* available to the Crown and the accused at the time those challenges are made. It could not be suggested that the existence of a peremptory challenge in itself enables the Crown or the accused to obtain any information on jury panel members, regardless of whether that information is obtained unlawfully. That must be the case whether it is the Crown or the accused who obtains the information unlawfully. If it came to light that an accused person had broken into the Sheriff's office and stolen the list of the jury panel, made inquiries about the panel members, and then made peremptory challenges on the basis of the inquiries, the Crown would surely be entitled to have the jury discharged. The accused would have obtained an advantage over the Crown which the Act denies to the accused.

62 Once the first question is answered in favour of the appellant, the answer to the second question inevitably follows: the trial suffered from "a failure to observe the requirements of the criminal process in a fundamental respect"⁴⁴ because the Crown took advantage of information which the Act denied to it and used it for a

44 *Maher v The Queen* (1987) 163 CLR 221 at 234.

purpose that the legislation was designed to prevent. Furthermore, the unlawful information very probably led to the selection of a jury that was different from that which the Act required. The actions of the Crown led to a different jury from that which would have tried the case unless, by chance, the accused or the Crown had happened to challenge the juror in question.

63 No one could deny that the selection and composition of the jury is fundamental to trial by jury in criminal cases. In Victoria, the legislature has been at pains to deny to the accused and the Crown any information concerning the jurors before the process of jury selection commences. The evident object of the legislation is to minimise jury vetting by the Crown and the accused. If the terms of the legislation are followed, that object will be achieved. Indeed, in all but exceptional cases, the effect of the legislation is to eliminate jury vetting in Victoria, except by the Chief Commissioner in accordance with the Act. Jury vetting cannot be prevented in every case because, from time to time, the accused, or individuals associated with the accused or the Crown, will know the background of individual jurors and can use their knowledge to prevent jurors from sitting on particular panels. But, subject to that qualification, the intention of the legislation is that accused persons in Victoria are to be tried by jurors who are qualified within the meaning of the Act and whose backgrounds have not been investigated or examined except in accordance with the Act. Given the legislative intention, a breach of the requirements of the criminal process in a fundamental respect occurred once the prosecution was able to obtain an unfair advantage by using information received in breach of the Act to select the jury panel.

64 The accused's conviction must be quashed. No occasion for the application of the proviso arises because there has been "such a departure from the essential requirements of the law that it goes to the root of the proceedings"⁴⁵.

65 One final point should be made. Upholding this appeal does not mean that every criminal conviction in Victoria by a jury is in jeopardy. Even if a convicted person was given leave to appeal out of time, it would still be necessary for that person to show that at his or her trial the Crown obtained information in breach of the Act and used it to challenge one or more potential jurors.

Order

66 The appeal of the accused should be allowed.

45 *Wilde v The Queen* (1988) 164 CLR 365 at 373.

67 KIRBY J. Section 80 of the Australian Constitution provides that "[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury ...". This provision is a "fundamental law of the Commonwealth"⁴⁶. Contrary to early opinions about its operation⁴⁷, it is now clearly established that the section requires that, in all cases involving offences against the law of the Commonwealth to which it applies, a trial must be had which partakes of the essential features or requirements of jury trial. Such requirements include the impartiality and representativeness of the jurors⁴⁸. Amongst the "unchanging elements" of these requirements is that the panel of jurors must "be randomly or impartially selected rather than chosen by the prosecution or the State"⁴⁹.

68 Such are the elements of constitutional law which provide the background to the problem presented by this appeal⁵⁰. That problem concerns the practice of "jury vetting" as undertaken by the Chief Commissioner of Victoria Police ("the Chief Commissioner") and by those engaged in the prosecution of offences tried by jury in Victoria, including federal offences. The appellant complains that the practice engaged in, which affected the selection of the jury which found him guilty of an offence against the law of the Commonwealth, was in breach of Victorian law, was not authorised by federal law to apply to his trial and was inconsistent with the requirements of the Australian Constitution.

46 *Cheatle v The Queen* (1993) 177 CLR 541 at 549. See also *Kingswell v The Queen* (1985) 159 CLR 264 at 298, 301-302 per Deane J; *Brown v The Queen* (1986) 160 CLR 171 at 197 per Brennan J.

47 See eg *R v Snow* (1915) 20 CLR 315 at 323; *Spratt v Hermes* (1965) 114 CLR 226 at 244; cf *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 31 January 1898 at 352 (Mr Isaacs). See also *R v Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1938) 59 CLR 556 at 582 per Dixon and Evatt JJ.

48 *Cheatle v The Queen* (1993) 177 CLR 541 at 560; cf *R v Biddle* (1995) 96 CCC (3d) 321 at 341 per Gonthier J.

49 *Cheatle v The Queen* (1993) 177 CLR 541 at 560; cf *Kingswell v The Queen* (1985) 159 CLR 264 at 301-302; *Duncan v Louisiana* 391 US 145 at 156 (1968).

50 There is also a common law principle, originally established in the law of England, that statutory derogations from the essential features of jury trial must be strictly construed and "nothing should be holden to come under its operation that is not expressly within the letter and spirit of the act": *Looker v Halcomb* (1827) 4 Bing 183 at 189 [130 ER 738 at 741].

The facts

69 The appellant and four other persons were detained at Melbourne airport on 17 June 1992 after a large quantity of heroin was found in their luggage. The appellant and the other suspects, together with another passenger, who had been allowed to leave the airport, were arrested and charged with offences against the *Customs Act* 1901 (Cth)⁵¹. In March 1994 the first trial of the appellant and his co-accused began in the County Court of Victoria. In May 1994 the jury in that trial returned a verdict of guilty in respect of each accused. Each of them, including the appellant, was convicted and sentenced to imprisonment. Each sought leave to appeal to the Court of Appeal of Victoria. That Court dismissed the applications of all of the prisoners save the appellant⁵². His application was granted and his appeal was allowed. His conviction was quashed on grounds unconnected with his present complaints⁵³. In the case of all applicants, the Court of Appeal rejected arguments based upon the provision to the prosecutor by the Chief Commissioner of information concerning the members of the jury panel. This information had been given purportedly to assist the prosecution in the exercise of its right of peremptory challenge in the selection of the jury⁵⁴.

70 Four of the appellant's co-accused applied for special leave to appeal to this Court from this decision of the Court of Appeal. However, it emerged in that application that the prosecutor had not made "positive use" of the information provided to him by the Chief Commissioner, in the sense that he had not challenged anyone whose name appeared on the list. In dismissing the application for special leave⁵⁵, Brennan CJ, for this Court, observed that "the question of the permissibility of the practice of arming the prosecutor with that information does

51 s 233B(1)(b).

52 *R v Su* [1997] 1 VR 1.

53 Three records of interview had been admitted into evidence which the Court of Appeal found did not comply with the requirements of the *Crimes Act* 1914 (Cth), Pt 1C: *R v Su* [1997] 1 VR 1 at 59.

54 That right is conferred on the Crown by s 34(1B) of the *Juries Act* 1967 (Vic) ("the Act"). It was assumed that it applied to the trial of the accused for federal offences by reason of the *Judiciary Act* 1903 (Cth), s 68. No point was taken in *R v Su*, or in the present appeal, that the provisions of the Act affording the right of peremptory challenge to the Crown was unavailable to the Director of Public Prosecutions for the Commonwealth prosecuting offences against the laws of the Commonwealth pursuant to the *Director of Public Prosecutions Act* 1983 (Cth), s 11(1).

55 *Katsuno v The Queen* unreported, High Court of Australia, 6 June 1997, transcript of proceedings at 23.

not arise" because the police information had not been adverted to by the prosecutor. Accordingly, the convictions of all co-accused were confirmed. However, in compliance with the Court of Appeal's order, the appellant underwent a retrial. The prosecution was fully aware of the appellant's objection to the practice of jury vetting in which it engaged.

71 Before the jury were empanelled for the retrial, the appellant's counsel applied to the trial judge (Judge Byrne) for a direction to the prosecution concerning the receipt and use of information about potential jurors supplied directly or indirectly by the Chief Commissioner. The application was expressed in the alternative. Primarily, it sought an order that the prosecution should not receive, or if received should not use, information in relation to any non-disqualifying convictions of potential jurors⁵⁶ or other information suggesting antipathies or antagonisms towards the Crown or the police. Alternatively, it sought an order that any such information also be provided to the defence. The judge refused each application as he was obliged to do by reason of decisions binding on him⁵⁷.

72 The jury for the second trial were then empanelled. On 12 November 1996 they returned a verdict of guilty. The appellant was convicted. On 18 November 1996, Judge Byrne sentenced him to a lengthy term of imprisonment. He immediately filed an application to the Court of Appeal for leave to appeal against his conviction. Prior to the hearing of that application an agreed statement of facts was prepared, with the cooperation of the Director of Public Prosecutions for the Commonwealth ("the DPP"). This concerned the use which had actually been made, in the selection of the second jury, of the information provided by the Chief Commissioner. That statement of facts is contained in the reasons of Gaudron, Gummow and Callinan JJ ("the joint reasons"). I will not repeat it.

73 The Court of Appeal dismissed the appellant's application for leave to appeal. It rejected several grounds, including one concerned with the selection of the jury⁵⁸. This Court subsequently granted special leave to appeal, limited to argument upon that ground. Because a constitutional question was raised, s 78B notices were given to the Law Officers. Those of the Commonwealth, New South Wales, Victoria, South Australia and Western Australia intervened. The interveners supplied the Court with much historical and other material concerning the practice of "jury vetting" in Australia and information on the procedures

56 That is a conviction other than of the kind provided for by s 4 and Sched 2 of the Act.

57 *R v Robinson* [1989] VR 289; *R v Su* [1997] 1 VR 1.

58 Ground 2 there dealt with related to selection of the jury. See *Katsuno* (1997) 99 A Crim R 350 at 358-367.

followed in all jurisdictions, including those not represented before the Court. From this, it emerged that some form of communication by police to prosecutors concerning non-disqualifying convictions and/or suspected criminal involvement is currently practised in Western Australia, Tasmania and the Northern Territory. It is not practised in New South Wales, Queensland, South Australia or the Australian Capital Territory.

74 In most cases it would be impossible, or at least extremely difficult, for an accused person facing trial, or wishing after conviction to challenge the constitution of the jury, to discover the bases (if any) upon which the prosecutor at the trial had exercised the right to require jurors to "stand aside"⁵⁹ or "stand by"⁶⁰ (where they still exist) or rights of peremptory challenge before the juror entered upon his or her duties as such⁶¹. However, in the present matter, it appears that the DPP was desirous of having an issue resolved which had been a matter of controversy in Victorian courts over the past decade⁶². This was the reason behind the agreed statement of facts. The Court of Appeal, and this Court, were invited to determine the appeal on the basis of the agreed facts. This does not involve the Court in providing to the parties an advisory opinion⁶³. There is no dispute that the issues raised by the appeal arise properly in the disposition of the legal rights of the appellant.

75 Documentation available below and in this Court showed that the juror (Mr G) who was challenged by the prosecutor had two prior involvements with the criminal law. The first had occurred in October 1971 when, according to the record, Mr G would have been 17 years of age. He was shown as having been convicted of shop breaking and stealing at the Magistrate's Court at Northcote in Victoria. The second, in August 1976, when Mr G would have been 21 years of age, involved a charge of trespass for which sentence was deferred by the Liverpool Court of Petty Sessions in New South Wales upon Mr G's entering a recognisance of \$200 to be of good behaviour for one year. A further condition was imposed that he remain away from the Base Hospital at Ingleburn. No other convictions were recorded for Mr G who was 42 years of age at the time of the

59 *Mansell v The Queen* (1857) 8 El & Bl 54 [120 ER 20]. See also *R v Chandler (No 2)* [1964] 2 QB 322 at 334; McEldowney, "'Stand By For The Crown': an Historical Analysis", [1979] *Criminal Law Review* 272.

60 See eg 9 Geo IV c 54 s 9 (1828).

61 The Act, s 34(1B). In Victoria the relevant last moment is when the juror takes his or her seat. See the Act, s 34(2).

62 Since the decision of Vincent J in *In the Trial of D* [1988] VR 937.

63 Forbidden by the Constitution. See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

appellant's second trial. He had thus had no recorded brushes with the law for 20 years.

76 Without objection, this Court was taken to information concerning the convictions of other persons appearing with Mr G on the Chief Commissioner's list supplied to the DPP in connection with the trial of the appellant. Some records showed offences where the person had not been convicted. Some included offences, the charges of which had been dismissed. Some recorded the birth of the person in an identified overseas country. The Court was told that if a person had no convictions (including in the sense of a finding of guilt⁶⁴) that person's name would not be entered on the Chief Commissioner's list nor would that person's record be provided to the prosecutor.

The issues

77 The following issues are raised by the arguments in the appeal:

1. Was the practice followed by the Chief Commissioner in providing, and by the DPP in receiving and using, information concerning non-disqualifying convictions of persons named in the jury panel, lawful according to the provisions of the Act and any other applicable law? Did Victorian law as it stood at the relevant time authorise the practices disclosed by the evidence as they occurred in the selection of the jury which tried the appellant?
2. If not, are the circumstances disclosed by the evidence such that the appellant's appeal should nonetheless be dismissed on the basis that "no substantial miscarriage of justice has actually occurred"⁶⁵?
3. In the event that the practices disclosed were lawful by the Act or any other applicable Victorian law but would contravene s 80 of the Australian Constitution, are such provisions of Victorian law picked up by the *Judiciary Act*⁶⁶ and "applied" to a person such as the appellant when charged with, and tried of, offences against the laws of the Commonwealth? Or would such laws be not "applicable" so as to have no operation in accordance with federal law governing the trial of the appellant in a State court for such an offence?
4. If the practices disclosed were lawful by Victorian law and otherwise picked up and applied to the appellant's trial by the operation of the *Judiciary Act*, are they nonetheless unlawful, in the case of the trial for an offence against

64 *Crimes Act* 1958 (Vic), s 376.

65 *Crimes Act* 1958 (Vic), s 568(1).

66 Especially s 68(1).

the law of the Commonwealth? Do they deprive the appellant, and the community, of an essential feature or requirement of the institution of trial by jury⁶⁷, obligatory by s 80 of the Constitution, such that any law, federal or State, which purported to require or authorise such practices would be unconstitutional and, to that extent, of no legal effect?

78 Various submissions were received concerning the proper approach to the foregoing issues. The respondent DPP (doubtless hoping for a decision on the constitutional question which would guide future practice in those States other than Victoria where jury vetting by police for non-disqualifying convictions occurs) urged that the correct starting point was s 80 of the Constitution and the clarification of its requirements. To like effect were the submissions of some of the interveners and the written submissions for the appellant.

79 In the development of his arguments before this Court, counsel for the appellant limited his oral submissions to issues (1) and (2). Clearly, before considering issues (3) and (4), it is useful, if not necessary, to clarify precisely what Victorian law permits and requires. Only then is a clear foundation established upon the basis of which consideration might be given to the requirements of s 80 of the Constitution and of those provisions of the *Judiciary Act* which make Victorian law "applicable" to trials in State courts exercising federal jurisdiction.

80 Following this course does not involve any decision on whether the Court should approach a law impugned as unconstitutional, whether federal or State, either presuming it to be valid⁶⁸ or requiring that constitutional validity, when challenged, be affirmatively established. It simply holds that, where the constitutionality of a law is in question, it is usually first necessary to clarify precisely what that law means and thus what duties it imposes or powers it confers⁶⁹. If, in the present case, upon proper analysis, neither the Act nor any other Victorian law authorises the practices described in the agreed facts and if, to the contrary, the Act or such laws forbid what has been done, no question might arise as to issues (3) or (4). There would be no basis, for example, to treat the Act

67 *Cheatle v The Queen* (1993) 177 CLR 541 at 560.

68 As suggested by Murphy J: see eg *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 165. This approach is followed in other federations, at least in respect of federal laws: see the cases collected by Murphy J in *The Tasmanian Dam Case* at 162-167 from the United States, Canada, Malaysia, India and elsewhere.

69 In the United States, if a case may be disposed of on the basis of an interpretation of an unclear State law rather than on the basis of the United States Constitution, the "Pullman exception" allows federal courts to abstain from the exercise of federal jurisdiction: *Railroad Commission of Texas v Pullman Co* 312 US 496 (1941).

as "applicable"⁷⁰ to the trial of the appellant under the *Judiciary Act*. There would be no State or federal law to be incompatible with s 80 of the Australian Constitution. All that would possibly remain would be issue (2) concerning whether the practice, being unlawful, had nonetheless occasioned no miscarriage of justice in the appellant's case.

- 81 The foregoing makes it sensible to deal first with the bases upon which the appellant attacked, and the DPP and some interveners sought to defend, the jury vetting described in the agreed facts. The appellant submitted that what had occurred was not authorised by the Act and indeed was contrary to its provisions. The DPP contended that there was nothing in the provisions of the Act to forbid the Chief Commissioner from providing, and the DPP from using, in selection of the jury, the list of potential jurors with non-disqualifying convictions and the supporting information specifying the details of such convictions. For the DPP, what had occurred was consonant with the Act and consistent (as it was put) with centuries of practice of prosecutors for the Crown, acting in accordance with the common law, in excluding from jury service persons who might, in the Crown's opinion, be unsuitable for empanelment⁷¹ because they might not bring to the task the indifference of attitude essential to the proper performance of the jury's functions⁷².

History of Crown challenges to jurors

- 82 The right of the Crown to challenge or stand aside persons summoned for jury service is an ancient one. One commentator has suggested that the common law originally borrowed the system of jury challenges from Roman law⁷³. However that may be, in England, by the common law, the Crown had an unrestricted right of peremptory challenge⁷⁴. In 1305, this right was cut back by

70 *Judiciary Act*, s 68(1).

71 *R v Robinson* [1989] VR 289 at 297.

72 cf *R v Mason* [1981] QB 881 at 887-888.

73 Molloy, Parliamentary Paper (xv), *Select Committee on Juries (Ireland)* (1873), app 4, referred to in McEldowney, "'Stand By For The Crown': an Historical Analysis", [1979] *Criminal Law Review* 272 at 273. Molloy was draftsman of the *Juries Act (Ireland)* 1871 (UK) (34 & 35 Vict c 65). He suggested that the practice derived from Lex Servilia, dating from 104 BC, under which the accused and accuser would each nominate 100 judices, each rejecting 50 from the other's list thereby leaving 100 to try the accusation.

74 McEldowney, "'Stand By For The Crown': an Historical Analysis", [1979] *Criminal Law Review* 272 at 274.

statute⁷⁵, requiring that "they that sue for the King" who challenge any jurors under summons were obliged to assign "a cause certain" for any challenge which then had to be enquired of as to its truth. The judges subsequently permitted the Crown to require those to whom it objected to "stand by". This practice relieved the Crown of having to show cause in such cases until the jury panel was fully exhausted. In this respect, the position of the Crown was distinguished from that of "a common person"⁷⁶. In due course this right was extended to permit peremptory challenges by the Crown in certain cases without cause shown⁷⁷. This position was questioned during the seventeenth century. It was affirmed by Lord Holt in the trial of Sir Richard Graham⁷⁸. Generally, however, the Crown had to rely on the right to stand potential jurors aside.

- 83 When Blackstone published his *Commentaries*⁷⁹, he acknowledged unlimited challenges for cause of potential jurors both on the part of the King and of the prisoner. In criminal cases, "or at least in capital ones", there was allowed to the prisoner a "capricious species of challenge to a certain number of jurors, without shewing any cause at all", described as "peremptory challenges". This right was allowed *in favorem vitae*, according to Blackstone, out of the "tenderness and humanity to prisoners, for which our English laws are justly famous". Two reasons were assigned to justify such challenges. The first was the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another" and "how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him". The second reason was to cover the case of a challenge for cause where the reason assigned proved insufficient to set aside the juror but where the bare questioning of his indifference might have provoked resentment on that juror's part. However, as to the Crown, Blackstone recorded that, by statute, the King could challenge no jurors without assigning a "cause certain". He need not assign his cause "till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged"⁸⁰. In the case of a felony the number

75 33 Edw 1 stat 4.

76 McEldowney, "'Stand By For The Crown': an Historical Analysis", [1979] *Criminal Law Review* 272 at 275.

77 *Savage v Brooks* (1591) Moo KB 595 [72 ER 781].

78 McEldowney, "'Stand By For The Crown': an Historical Analysis", [1979] *Criminal Law Review* 272 at 276.

79 *Commentaries on the Laws of England* (1769), bk IV at 346-347.

80 Blackstone, *Commentaries on the Laws of England* (1769), bk IV at 347.

of peremptory challenges allowed to a prisoner was cut back by later statute to no more than 20⁸¹.

84 Because by the nineteenth century sheriffs in England were able to return many more jurors than were strictly necessary⁸², the Crown obtained, in practice, a virtually unlimited means of preventing the participation in juries of persons to whom it objected. They were simply stood aside during empanelment. It is in this context that the first legislation of the Australian colonies providing for juries must be understood. With application to what is now Victoria, the *Juries Act* of New South Wales⁸³ incorporated into that colony the English procedures of jury trial⁸⁴. Specifically, rights of challenge were reserved "in all inquests ... wherein the Queen is a party". Those suing for the Queen were obliged to "assign of their challenge a cause certain", provided that, at the prayer of those prosecuting for the Crown, the Court might order any juror to stand by "until the panel shall be gone through". On the other hand, an accused, arraigned for murder or other felony, was allowed 20 peremptory challenges⁸⁵.

85 The foregoing legislation was successively amended and replaced in the nineteenth⁸⁶ and twentieth⁸⁷ centuries by a series of statutes applicable in Victoria. These statutes provided for the disqualification from jury service of designated persons. From England, most of the Australian colonies, including Victoria, inherited disqualifications in the case of men who had been "attainted of any treason or felony or convicted of any crime that is infamous (unless he shall have

81 22 Hen VIII c 14 (1530).

82 McEldowney, "'Stand By For The Crown': an Historical Analysis", [1979] *Criminal Law Review* 272 at 277.

83 11 Vict No 20 (1847). There was an earlier statute of 1840: see 4 Vict No 28.

84 11 Vict No 20 (1847), s 22.

85 11 Vict No 20 (1847), s 24.

86 *Jury Act* 1857 (21 Vict No 19); *Juries Statute* 1865 (28 Vict No 272); *Juries Statute* 1876 (40 Vict No 560); *Juries Act* 1887 (51 Vict No 940); *Juries Act* 1890 (54 Vict No 1104).

87 *Juries Act* 1915 (Vic); *Juries Act* 1915 (No 2) (Vic); *Juries Act* 1928 (Vic); *Juries Act* 1956 (Vic); *Juries Act* 1958 (Vic).

obtained a free pardon thereof), or insolvent and shall not have obtained his certificate, or who is under outlawry, or shall be of bad fame or repute"⁸⁸.

- 86 The trend of the successive Juries Acts applicable in Victoria was to extend the reach of the duty and privilege of jury service. It was to remove the property qualification, to include women, to narrow the grounds of disqualification for criminal convictions and to enlarge the scope of exemptions of various employment groups. An analysis of the legislation shows that at federation in Australia, in every State, both the Crown and the accused had rights of challenge for cause. In every State, the accused had rights of peremptory challenge. The Crown had rights to stand a potential juror aside. In two States (Western Australia and South Australia) the Crown also enjoyed statutory rights of peremptory challenge⁸⁹. So the position stood when, in 1988, two cases arose in the Supreme Court of Victoria concerning the first two issues raised by this appeal⁹⁰.

The practice of jury vetting

- 87 The DPP submitted that it was inherent in the longstanding existence of the prosecutor's right to take part in the jury selection process and (1) to challenge potential jurors for cause; (2) to require members chosen for service to stand by or stand aside; and (3) more lately, to exercise, where provided, a statutory right of peremptory challenge⁹¹, that some form of scrutiny of the suitability of those chosen randomly by ballot for jury service should be performed. Indeed, the DPP

88 *Juries Statute* 1865 (28 Vict No 272), s 4. See also *Juries Act* 1928 (Vic), s 7; *Juries Act* 1956 (Vic), s 5. A similar provision could be found in s 4 of the *Jury Act* 1912 (NSW), disqualifying men who had been "attainted of any treason or felony, or convicted of any crime that is infamous, unless he has obtained a pardon thereof, or is within the benefit and protection of some Act giving the force and effect of a pardon under the Great Seal for such crime" and men who had been "twice convicted in any part of the British dominions of any treason, felony, or infamous crime".

89 See *Juries Act* 1957 (WA), s 38. Under the Western Australian practice, an officer of the State DPP examines the criminal histories obtained from the Sheriff as provided by the Commissioner of Police. The officer places an "X" against the name of a person still on the jury panel who it is thought may not be impartial between the Crown and the accused. If the perceived lack of impartiality is because of a traffic conviction, a "T" is placed against their name. The DPP of Western Australia also receives a list of names from the Western Australian Police Service's Bureau of Criminal Intelligence. In South Australia the position is governed by the *Juries Act* 1927 (SA). Each accused and the Crown have three peremptory challenges under that Act. See ss 61 and 65. There is no jury vetting.

90 *In the Trial of D* [1988] VR 937; *R v Robinson* [1989] VR 289.

91 The Act, s 34(1B).

argued that prosecutors could not reasonably exercise their functions, nor perform their role of ensuring that the jury empanelled were "indifferent" upon the matter to be tried, without obtaining pertinent information with which to discharge their functions. The United States system of interrogating potential jurors, in a pre-trial voir dire, concerning experiences or attitudes which might impinge on their capacity "conscientiously [to] apply the law and find the facts"⁹² has not been followed in Australia or other Commonwealth countries where jury trial survives⁹³. The exclusion of "unsuitable" jurors had therefore, as a matter of practicality, to depend on the initiatives of the prosecution. Hence, it relied upon the information available from the police. This, it was submitted, reflected the traditional role of the Crown, in whose name prosecutions of serious offences are brought in Australia⁹⁴. It must act as the "guardian of due process" of the criminal trial⁹⁵.

88 Not only is there a diversity of practice within Australia on police "vetting" of jury panels for non-disqualifying convictions and in the provision of this and other information to prosecutors. There is also disagreement in the casebooks concerning the practices followed in England, whose general traditions, in relation to jury trial, have been copied in Australia. The opinions of what happened, and what should happen, in England were sharply divided as witness two leading cases on the issue decided within two months of each other.

89 *R v Sheffield Crown Court; Ex parte Brownlow*⁹⁶ was decided by the English Court of Appeal on a jurisdictional question. However, each member of the Court⁹⁷ expressed himself opposed to the exercise by the Crown of the right to challenge or stand-by a potential juror on the basis of information supplied by the Chief Constable containing full details of criminal convictions recorded against any member of the jury panel. Lord Denning MR considered that such a practice

92 *Lockhart v McCree* 476 US 162 at 178 (1986) citing *Wainwright v Witt* 469 US 412 at 423 (1985). See also *Patton v Yount* 467 US 1025 at 1037 n 12 (1984).

93 In the United States, limits have been accepted out of defence for jury privacy, even where experience and attitudes may be relevant to the indifferent conduct of the trial. See eg Lynd, "Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories", (1998) 46 *UCLA Law Review* 231.

94 According to the indictment exhibited, the DPP prosecuted the appellant in both his trials "for Her Majesty the Queen".

95 *R v Su* [1997] 1 VR 1 at 17.

96 [1980] QB 530.

97 Lord Denning MR, Shaw and Brandon LJJ.

was wholly impermissible and "unconstitutional"⁹⁸. After contrasting the procedures adopted for pre-trial interrogation of potential jurors in the United States, his Lordship said⁹⁹:

"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. Some may be moral. Others not. Some may be honest. Others not. Some may be bad drivers with many convictions for motoring offences. Others may not have a single thing against them. The parties must take them as they come. There are a few exceptions. Some persons are disqualified. ... Another may be banned because the prosecution has asked that he 'stand by for the Crown'. Yet another because the defence have exercised their right of peremptory 'challenge'. But subject to these exceptions, the principle of English law is that jurors should be selected at random."

90 To the same effect were the remarks of Shaw LJ¹⁰⁰:

"It is obvious that the prosecution which has facilities for access to criminal records may in relation to any trial seek information which will enable them to decide whether to ask for a 'stand by' in respect of anyone on a jury panel who appears to them to be undesirable or untrustworthy as a juror. This element of undesirability or untrustworthiness would in the eyes of a prosecuting authority consist of something which indicated that a prospective juror might be ill-disposed to authority or well-disposed to criminals. There would thus supervene upon the process of natural selection devised by the Juries Act 1974 and supplemented by the common law a process of artificial selection derived from the special knowledge available to prosecuting authorities. It needs no elaborate argument to demonstrate that this user of such special knowledge would be an abuse as being contrary to the spirit and principle of jury service."

91 These observations may be contrasted with the decision of the same Court in *R v Mason*¹⁰¹ which quickly followed. There, the police had vetted the convictions of potential jurors. Unknown to the defence, the police had supplied prosecuting counsel with details of non-disqualifying convictions. The Court of Appeal held

98 [1980] QB 530 at 542.

99 [1980] QB 530 at 541.

100 [1980] QB 530 at 545.

101 [1981] QB 881; cf Findlay and Duff, "'Jury Vetting' – Ideology of the Jury in Transition", (1982) 6 *Criminal Law Journal* 138 at 142-143.

that there was no irregularity in the provision of this assistance to prosecuting counsel for the performance of his right to stand aside a juror because that juror had a conviction. Lawton LJ, for the Court, remarked¹⁰²:

"The practice of supplying prosecuting counsel with information about potential jurors' convictions has been followed during the whole of our professional lives, and almost certainly for generations before us. It is not unlawful, and has not until recently been thought to be unsatisfactory. We have not been concerned in any way with, and make no comment upon, the giving to prosecuting counsel of information other than that relating to convictions, or with the desirability of making other inquiries about members of a jury panel."

92 The members of the Court in *Mason* justified their "presumption" in disagreeing with the earlier decision in *Brownlow* by reference to what they considered to have been their ability to examine the issues "in greater depth" than the earlier Court had done¹⁰³.

93 Leaving aside the position in other jurisdictions of Australia, the position in the State of Victoria, a decade after *Brownlow* and *Mason*, came to reflect similar differences of judicial opinion. In a ruling given in the Supreme Court of Victoria in pre-trial proceedings in the case of *In the Trial of D*¹⁰⁴, Vincent J sided with the approach adopted in *Brownlow*. When the practice came to notice whereby the Chief Commissioner had provided the prosecutor with the names of all persons in the jury panel having any prior criminal history, his Honour considered that it was impermissible and unfair for the Crown to use such a list in the process of jury selection. However, this decision was overruled soon after in *R v Robinson*¹⁰⁵. There was a difference in the Full Court of the Supreme Court of Victoria on that occasion. The majority, O'Bryan and Marks JJ, found nothing inconsistent between the provisions of the Act and the conduct of the Chief Commissioner in vetting the panel and supplying his list and supporting information to the prosecutor. On the contrary, they held that doing so was the way by which the Crown's common law right to stand-by persons on a jury panel was rendered

102 [1981] QB 881 at 891.

103 [1981] QB 881 at 891-892.

104 [1988] VR 937.

105 [1989] VR 289.

effective¹⁰⁶. They also rejected the suggestion of Vincent J that the provision of such information only to the prosecution was unfair¹⁰⁷:

"In our opinion, the long-established practice of supplying the Director of Public Prosecutions and prosecuting counsel with information about potential jurors' convictions is neither unlawful nor unfair. ... Should the practice now be regarded as unfair it is a matter the legislature could easily remedy."

94 The other member of the Full Court in *Robinson*, Nathan J, agreed with the analysis of the majority concerning the requirements of the Act. But he expressed the view that the practice of the prosecution of standing aside jurors "solely on the basis of their name appearing on the list" provided by the Chief Commissioner was "incompatible with the fair and random operation of the jury system and should be discontinued"¹⁰⁸. Nevertheless, Nathan J concluded that the exclusion of the juror who had been stood aside on the basis of a conviction would not have altered the appellant's chance of acquittal in that case. It had resulted in no actual miscarriage of justice. Accordingly, Nathan J agreed in the dismissal of the appeal¹⁰⁹.

95 Following this decision, and before the events in question in these proceedings, there were three developments in Victoria which should be noted. First, in 1993, the Act was amended. Relevantly, the amendment inserted a provision to replace the Crown's facility to require potential jurors to "stand aside". Instead of this right afforded by the common law, there was substituted a Crown right to challenge peremptorily potential jurors up to a specified number, depending upon the number of persons arraigned in the trial¹¹⁰. In the Second Reading Speech, the Minister asserted that the purpose of the amendment was to put the Crown and the accused on an equal footing¹¹¹. Nothing was done by the amendment either to clarify the right of the Chief Commissioner to prepare his list

106 [1989] VR 289 at 297 per O'Bryan and Marks JJ.

107 [1989] VR 289 at 299 per O'Bryan and Marks JJ.

108 [1989] VR 289 at 307.

109 [1989] VR 289 at 308.

110 The Act, s 34(1B). Relevant to the trial of one person (such as that of the appellant), six peremptory challenges are allowed.

111 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 1993 at 1157.

and to supply information to prosecutors nor to alter the law as it had been left after the decision of the Full Court in *Robinson*¹¹².

96 Secondly, in 1995, the Court of Appeal of Victoria delivered its judgment in *R v Su*¹¹³ in which the earlier attempt of the appellant (and his then co-accused) to challenge the system of jury vetting in Victoria was unsuccessful. That Court dismissed that challenge on the basis that no use had been made of the information provided to the prosecution in that case, so that the point of objection did not properly arise. But in the course of dealing with the argument, their Honours observed that the practice complained of had been followed in Victoria "for some 40 years at least"¹¹⁴. Specifically, it had been followed since amendments were made to the previous Act in 1956 to provide the procedure by which the Sheriff could be informed by the Chief Commissioner of those potential jurors who should be removed from the panel as disqualified by virtue of their criminal convictions¹¹⁵. That procedure, now reflected in s 21(3) of the Act, had been endorsed in *Robinson*. The Court of Appeal declined to reconsider *Robinson*, having regard to the facts of the case.

97 Thirdly, in 1996, the Law Reform Committee of the Victorian Parliament conducted an inquiry into the jury system in Victoria resulting in a report¹¹⁶. This considered the "current practice regarding jury vetting", as an earlier Issues Paper had done¹¹⁷. It noted the diversity of judicial opinion in the Victorian

112 [1989] VR 289.

113 [1997] 1 VR 1.

114 [1997] 1 VR 1 at 13.

115 [1997] 1 VR 1 at 14.

116 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996), vol 1 at 31-32.

117 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Issues Paper No 2 (1995) at 42-44.

cases and a report in Queensland¹¹⁸ proposing that jury vetting be forbidden¹¹⁹. The Committee recommended that vetting of jury lists to remove disqualified persons and persons with non-disqualifying criminal convictions should continue in Victoria¹²⁰ but with the provision of the same information to the trial judge and to the defence¹²¹. It proposed that the jury vetting function should be carried out by the Sheriff rather than the Chief Commissioner¹²². Other reforms were also recommended. After argument in this appeal was concluded but before this decision was published, a Bill to amend the Act was introduced into the Victorian Parliament. By cl 89, it would authorise the Chief Commissioner to report to the Director of Public Prosecutions for Victoria or for the Commonwealth any information about any person named on the Sheriff's panel who has been "found guilty of any offence". That Bill has not been enacted. Clause 89, which proposes the insertion of s 21(8) into the Act, expressly excludes any effect on the rights of the appellant. The Bill should be disregarded. It is in this way, but in the context of a trial for an offence against the law of the Commonwealth, that the issues which had earlier divided the Supreme Court of Victoria now come to this Court for resolution¹²³.

Defence of the current arrangements

98 Leaving aside the constitutional arguments, and those arising out of the *Judiciary Act*, the DPP's defence of the procedure of jury vetting revealed in this case followed the line evident in the earlier consideration of the matter by the Victorian courts.

99 First, whilst conceding that nothing in the Act expressly authorised the Chief Commissioner to use the jury panel provided to him by the Sheriff for the purposes

118 Criminal Justice Commission, Queensland, *The Jury System in Criminal Trials in Queensland* (1991) at 26-34.

119 Queensland law now forbids jury vetting. See *Jury Act* 1995 (Q), s 35.

120 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996), vol 1 at 121, recommendation 65.

121 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996), vol 1 at 123, recommendations 66 and 67.

122 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria*, Final Report (1996), vol 1 at 124, recommendation 68.

123 There has been investigation by other law reform bodies on the issue of jury vetting. See eg New South Wales Law Reform Commission, *The Jury in a Criminal Trial*, Report No 48 (1986); New Zealand, Law Commission, *Juries in Criminal Trials Part One*, Preliminary Paper 32 (1998) at 94-95 (pars 380-381).

of the Act, the DPP argued that nothing expressly forbade that use which was thus to be determined (constitutional or federal law apart) by the rules of the common law. Once, for the purposes of the Act, the Chief Commissioner obtained the jury panel from the Sheriff, it was legitimate for him to perform functions with the information so provided incidental to the purposes of his office. These included the provision of relevant information to prosecutors engaged in the trial of persons accused of offences against the laws of Victoria and the provision of support and assistance to those with similar responsibilities in relation to the prosecution of offences against the laws of the Commonwealth. In short, what was not forbidden by the Act or any other law was permitted.

100 Two clues were suggested in the language of the Act to support this conclusion. The first was the power afforded to the Chief Commissioner to "make such inquiries as he sees fit" upon receipt of the jury panel from the Sheriff. As expressed, the duty was not limited to making inquiries concerning the disqualifications provided by the Act¹²⁴. The second clue appeared in the other section upon which the appellant relied (s 67). Whilst disputing that this section applied, the DPP relied on the exculpation afforded to persons, otherwise in breach of s 67, where they have exercised a duty or performed a function under the Act in a forbidden way. By the terms of s 67, it is no offence if such person has acted with "lawful excuse". According to the DPP, the provision by the Chief Commissioner to the prosecutor of the list made by him on the basis of the jury panel provided to him by the Sheriff was done with "lawful excuse"¹²⁵. It was done for a purpose incidental to the Chief Commissioner's policing functions. It was received by prosecutors and used by them for purposes incidental to their functions to uphold the integrity of the trial and to exclude from jury service persons who, although not disqualified by law, were possibly unsuitable for service.

101 Secondly, the DPP submitted that the use by the Chief Commissioner of the information provided to him by the Sheriff had to be understood in the context of an Act which originally contemplated the Crown's right to "stand aside" potential jurors and to challenge jurors for cause¹²⁶. The 1993 amendment had equalised the position of the Crown and the accused under the Act. It permitted to the former a specified number of peremptory challenges¹²⁷. According to this argument, unless the prosecutor were provided with information of the kind otherwise available only to the Chief Commissioner, the prosecution would not be in a position to exercise its rights of peremptory challenge on a proper basis. It would,

124 See the Act, s 21(3).

125 cf *Taikato v The Queen* (1996) 186 CLR 454 at 460-467, 478, 490-492.

126 The Act, s 39.

127 The Act, s 34(1B).

effectively, be confined either to impressionistic reactions to particular jurors, to chance observations in the precincts of the court or to the insubstantial prospect that someone in the prosecution team recognised a potential juror, or that juror's name, as involved in crime, past or present, which would make that person unsuitable for jury service. Because prosecutors for the Crown should not act in a way which was informed either by prejudice or ignorance but should contribute effectively to upholding the fundamental character of the jury as an impartial, representative and randomly selected group of citizens¹²⁸, limiting the prosecutor to instinctive reactions ran counter to old law and modern practice. By ancient tradition and law the Crown should only challenge for cause assigned. Modern prosecutorial guidelines of the DPP forbid challenges, including peremptory challenges, on the basis of prejudice, inherent characteristics or generic considerations of potential jurors shared in common with many citizens¹²⁹.

102 Thirdly, the DPP submitted that the practice described in the agreed facts was perfectly fair and in keeping with long custom in Victoria and earlier in England against the background of which the Act had been drawn. The disqualifying convictions, provided by s 4 and Sched 2 of the Act, were such that a very large number of persons who might otherwise be unsuitable for jury service, some of them partial against the prosecution, could be sworn as jurors unless some practical means were afforded to remove them. The inclusion in a jury of a person with a recent but non-disqualifying conviction of an offence, similar to that charged against the accused, could tip the scales unfairly against the prosecution and especially in a State such as Victoria which retains, in the case of State offences, the requirement of unanimity for a jury verdict of guilty¹³⁰. The same would be true in trials on indictment of offences against the law of the Commonwealth where unanimity is constitutionally required¹³¹. It was suggested that members of the community would be surprised to discover that there was no way to remove from a jury panel persons who had been convicted of relevant crimes. In that sense, the jury vetting procedure was said to be inherent in the proper functioning of jury trial in criminal matters. Once the prosecution, like the accused, came to enjoy a right of peremptory challenge, it was entitled to exercise that right on an informed and rational basis as, for a long time, in Victoria and elsewhere, prosecutors had done.

103 Fourthly, the DPP relied upon the fact that the Act had been amended following the decision in *Robinson* and before the vetting complained of in this case. Despite the remarks made in *Robinson*, calling attention to the possibility of

128 *R v Biddle* (1995) 96 CCC (3d) 321 at 341 per Gonthier J.

129 See eg Director of Public Prosecutions (Cth), *Director's Policy in Relation to Jury Selection* (Policy 4.5.1).

130 cf *Juries Bill 1999* (Vic), cl 44(3).

131 *Cheatle v The Queen* (1993) 177 CLR 541.

amendment if Parliament disapproved of jury vetting, no control of the practice had been enacted. On the contrary, the amendment effected in 1993 enlarged the privileges of prosecutors by affording them the power of peremptory challenge. In the case of an accused, the unfettered exercise of that privilege has been upheld by this Court¹³². Nor had the Victorian Parliamentary Committee proposed amendment of the Act to require the discontinuance of the practice of the Chief Commissioner disclosed to it. Against longstanding practice followed in Victoria, and the repeated reference to that practice in decisions of the Victorian courts¹³³, the failure to alter the Act was said to be significant. The DPP submitted that, unless constrained by the Constitution or federal law, this Court should accept that the Victorian Parliament had implicitly agreed in the practice of the Chief Commissioner and prosecutors disclosed by the evidence and approved it as conformable with the Act. Otherwise, Parliament would have taken steps to change or regulate that practice.

The Act forbids the Chief Commissioner's practice

104 The foregoing arguments can have no weight if, properly construed, the Act forbids the course of conduct on the part of the Chief Commissioner and prosecutors disclosed by the agreed facts. To decide whether this is so, it is necessary to consider the bases in the Act by which the appellant challenged the conduct revealed in the evidence.

105 First, there is one argument which, in my opinion, does not succeed. This concerns the requirements of s 67(b) of the Act, previously mentioned. That section relates to "wilful offences by persons under" the Act. It empowers the Supreme Court, in a summary way, to impose such fines as it thinks fit. Section 67 is set out in the joint reasons. I will cite only that part which is presently relevant:

"The Supreme Court may in a summary way impose such fine as is thought fit upon any person exercising any duty under this Act or performing any function under this Act who without lawful excuse the onus of proof of which shall lie upon him –

...

(b) subtracts destroys or permits any person to have access to any such record of jurors summons list panel or card".

132 *Johns (Roger) v The Queen* (1979) 141 CLR 409.

133 *In the Trial of D* [1988] VR 937; *R v Robinson* [1989] VR 289; *R v Su* [1997] 1 VR 1.

106 The appellant's argument was that the Chief Commissioner, provided with the jury panel for the particular purpose mentioned in the Act, was a "person exercising a duty" or "performing a function" under the Act who had permitted strangers to that duty to have access to the jury panel. The Chief Commissioner's only statutory duty, so the argument ran, was to check the panel for disqualifying convictions and to report the result to the Sheriff. Instead, by permitting prosecutors to have access to the panel, together with extraneous information provided by reference to the content of that panel, the Chief Commissioner was in breach of s 67(b). He was liable to punishment accordingly.

107 Although it is true that s 67 does indicate a legislative purpose of the Victorian Parliament to uphold the integrity and confidentiality of specified documents used in connection with jury selection, I agree with the opinion expressed in *Robinson*¹³⁴ that s 67 of the Act is not addressed to the use by the Chief Commissioner of the copy of the jury panel provided to him for his inquiries concerning persons disqualified¹³⁵. There are several indications in the text of s 67 which make it plain that the section is concerned with the integrity of the *original* records, not disclosure of their contents from a *copy* supplied for a separate statutory purpose to the Chief Commissioner. The reference to permitting access must be understood in the context of the other verbs stating the offences provided by s 67(b), namely "subtracts" and "destroys". The fact that the section is concerned with the original records is also demonstrated by the list of documents which are protected, namely the "summons list panel or card". Section 67(a) provides that it is an offence to cause "any alteration omission insertion or misdescription in or falsely [certify] to the correctness of any record of jurors summons list panel or card". The use of the word "such" in par (b) makes it clear that the offence to which that paragraph relates concerns the same records as those described in par (a). Clearly, these are the original records. Were s 67 addressed, in its generality, to the information contained in the copy of the jury panel provided by the Sheriff to the Chief Commissioner under s 21, the provisions of s 21(2) of the Act forbidding the Sheriff or any of his officers to make known to any person the names in any panel would not have been necessary, certainly in those terms. The offence would be covered by s 67(b) if that provision meant what the appellant urged. Section 67(b) has nothing to say about the conduct complained of in this case. The first textual argument of the appellant therefore fails.

108 Secondly, and critically, the appellant referred to the provisions of s 21(3). Read with the principle of statutory construction accepted in recent authority by this and other courts this sub-section is fatal to the Chief Commissioner's practice. The sub-section is set out in the joint reasons. It appears in a statutory provision which, as has been said, obliges the Sheriff and his officers not to make known to

134 [1989] VR 289 at 297 per O'Bryan and Marks JJ.

135 Pursuant to the Act, s 21(3).

any person the names in any jury panel. It appears in an Act which, following ancient procedure, contains many indications of protection of the privacy of jurors and of the anonymity that is necessary to permit and encourage them to perform their functions without fear and with complete integrity.

109 In such a context, it is not difficult to infer that the purpose, and the sole purpose, of forwarding to the Chief Commissioner the copy of the panel from which the jury is to be struck, is the performance by him of the duty specified in s 21(3). Nothing else. The sub-section does not provide the Chief Commissioner with a larger function. It imposes upon him a duty which is highly specific. His role is solely to make inquiries for the purpose of ascertaining the persons disqualified under s 4 of the Act and reporting "the result of those inquiries" to the Sheriff. In such a context, had Parliament's purpose been to clothe the Chief Commissioner with more extensive powers, to use such sensitive information in other and different ways, express language authorising this would have been used.

110 The principle of construction on which the appellant relied is strictly unnecessary given the foregoing analysis of the language of s 21 of the Act. But it does reinforce the conclusion to which that language leads. In *Johns v Australian Securities Commission*¹³⁶ Brennan J stated the principle in which the other members of the Court expressed their agreement¹³⁷. It was a principle which had been reflected in an earlier statement by Sir Nicolas Browne-Wilkinson V-C in *Marcel v Commissioner of Police of the Metropolis*¹³⁸. The Vice-Chancellor there observed:

"Powers conferred for one purpose cannot lawfully be used for other purposes without giving rise to an abuse of power. Hence, in the absence of express provision, the Act cannot be taken to have authorised the use and disclosure of seized documents for purposes other than police purposes."

111 Only by a distortion of language could the purposes of the prosecutors (and in particular of a prosecutor for the DPP of the Commonwealth) be said to be the purposes of the Chief Commissioner. Such purposes could not be included amongst the particular and limited purposes for which the duty had been cast upon the Chief Commissioner by s 21(3) of the Act.

136 (1993) 178 CLR 408 at 423.

137 (1993) 178 CLR 408 at 436 per Dawson J, 453 per Toohey J, 458 per Gaudron J and 468 per McHugh J.

138 [1992] Ch 225 at 234.

112 In *Johns*¹³⁹, Brennan J extended and explained the foregoing principle:

"Information is intangible. Once obtained, it can be disseminated or used without being impaired, though dissemination or use may reduce its value or the desire of those who do not have it to obtain it. Once disseminated, it can be disseminated more widely. A person to whom information is disclosed in response to an exercise of statutory power is thus in a position to disseminate or to use it in ways which are alien to the purpose for which the power was conferred. But when a power to require disclosure of information is conferred for a particular purpose, the extent of dissemination or use of the information disclosed must itself be limited by the purpose for which the power was conferred. In other words, the purpose for which a power to require disclosure of information is conferred limits the purpose for which the information disclosed can lawfully be disseminated or used."

113 In times of photocopying and modern means of telecommunications, information provided confidentially for a particular purpose may, if used for other purposes, haemorrhage in a fashion that makes the breach of confidentiality practically impossible to retrieve. By the Act, the Sheriff was obliged to provide to the Chief Commissioner a copy of every jury panel made by the Sheriff in respect of which the Sheriff and his officers were bound to strict secrecy. In such a context, the notion that the Chief Commissioner was at liberty to use such a list, and the information within it, for other purposes not specifically authorised by law is clearly unacceptable. This is not a case where the Act is silent on the point. Although the prohibition is not expressly stated, it is inherent in a proper understanding of the meaning and purpose of s 21(3), particularly when that sub-section is read with s 21(2) and with the principle in *Johns*. The use by the Chief Commissioner of the copy jury panel for purposes not authorised by the Act was forbidden by the Act. No amount of history and past practice could alter that conclusion.

114 Thirdly, if any further support were required for this result it might be found in other provisions of the Act. As the Court of Appeal recognised in this case¹⁴⁰, the whole scheme of the Act is designed to place emphasis on the randomness of the selection of the persons ultimately selected for service on a particular jury. Throughout the Act, at every stage on the way to the final selection, the words "at random" are stated¹⁴¹. To introduce into such a random scheme a mechanism for severe reduction of randomness, other than by reference to express

139 (1993) 178 CLR 408 at 423.

140 *Katsuno* (1997) 99 A Crim R 350 at 361.

141 By reference to ss 7, 8, 10, 11, 20, 32 and 33 of the Act.

disqualification¹⁴², ineligibility¹⁴³, or entitlement to be excused¹⁴⁴, suggests, at the least, the need for express statutory provision. Similarly, the care with which the Act provides for the process of selection under conditions safeguarding the disclosure of the names of the potential jurors¹⁴⁵ contradicts the use by the Chief Commissioner of the copy jury list for purposes not expressly authorised. Randomness in the selection of the jurors ultimately chosen is, as Nathan J observed in *Robinson*¹⁴⁶, the quiddity of the jury system as provided by the Act. Yet into that requirement, preserved by the Act, is introduced an element of supposedly informed choice and selection, available only to one side of the record. It finds no support in either the language or structure of the Act.

115 Fourthly, where the Act provides that a previous criminal conviction disqualifies a person from service as a juror, it does so in express terms¹⁴⁷. It does so by reference to relevant and rational criteria, including the seriousness of the criminal conviction, the kind of punishment imposed and the temporal proximity of its imposition. The appellant did not contest the admissibility of such disqualifications for the purposes of s 80 of the Constitution and other federal law. To the extent that a broader range of past convictions might, by the unauthorised procedures adopted between the Chief Commissioner and prosecutors, lead, through peremptory challenges for the Crown, to a broader class of disqualifications, the result is effectively an enlargement of the categories of disqualification beyond those which Parliament has enacted.

116 Such enlargement involves numerous problems. They include, at least potentially in a case such as the present, constitutional problems presented by the requirements of s 80 of the Constitution and the *Judiciary Act*. Yet more mundane problems may also arise, as recognised by Nathan J in *Robinson*¹⁴⁸. The practice described may lead to automatic challenges to potential jurors, otherwise legally qualified, by reference to a view about past convictions based upon stereotyped assumptions about the attitudes of people who, at one time in their past, have had

142 The Act, s 4(2) and Sched 2.

143 The Act, s 4(3) and Sched 3.

144 The Act, s 4(4) and Sched 4.

145 See eg the Act, s 31.

146 [1989] VR 289 at 305.

147 The Act, s 4(2) and Sched 2.

148 [1989] VR 289 at 304-308.

a brush with the law¹⁴⁹. The problem is well illustrated by what happened to the juror Mr G in this case. His name was included in the Chief Commissioner's list. Yet his first offence was committed when he was a juvenile. By Victorian law that offence had no current effectiveness¹⁵⁰. The conviction as a juvenile, being more than 10 years old, was not to be counted as a conviction. Yet it was treated as relevant to disqualification from jury service. So far as the second "conviction" was concerned, although classified as such by Victorian law¹⁵¹, it was, in fact, not a formal conviction at all. The imposition of sentence was suspended upon conditions apparently satisfied. Moreover, that offence happened 20 years before Mr G was summoned for jury service in this case.

117 Upon the basis of the returns of the Sheriff illustrated by this case, approximately eight per cent of the citizens eligible for jury service had some form of past conviction. If, whatever the exact detail of the matter (the seriousness of the conviction, its antiquity and irrelevance), persons are to be effectively removed from the jury service on the basis of the bald statement contained in the Chief Commissioner's list – even when considered with the associated documentation – it is for Parliament to enlarge the disqualifications. It may not be done by the back door by an arrangement between police and prosecutors extraneous to the Act.

118 Fifthly, the provision to the Crown of rights equal to those of the accused in the making of peremptory challenges¹⁵² does not authorise or require the procedure adopted between the Chief Commissioner and the prosecutors here. On the contrary, "peremptory" means what it says. A peremptory challenge depends upon an immediate response to the juror balloted for service. In the case of a prosecutor (unlike the accused) it must be exercised for the proper purposes binding on that prosecutor either by virtue of the traditions of the Crown¹⁵³ or by reason of implications inherent in the Act of the Parliament under which (in the case of the DPP's officers) they derive their powers to act as such¹⁵⁴. The kind of cause which would warrant a prosecutor for the Crown, or the DPP, exercising rights of peremptory challenge include behaviour in court whilst awaiting selection or an antagonistic appearance or a hostile or unsuitable manner. For more substantial challenge for cause, good reason would have to be present. And it is hardly equality in the position of the prosecution and the accused to contemplate that each

149 *In the Trial of D* [1988] VR 937 at 946.

150 *Children and Young Persons Act* 1989 (Vic), s 274.

151 *Crimes Act* 1958 (Vic), s 376.

152 The Act, s 34(1B).

153 *R v Biddle* (1995) 96 CCC (3d) 321.

154 *Director of Public Prosecutions Act* 1983 (Cth), s 11(1).

may exercise its "peremptory" challenges but on a footing made unequal by the provision to one side alone of undigested information. This is especially so where that information supposedly gives rise to an inference that certain citizens, qualified in law to act as jurors, are, by imputed attitude or supposed unsuitability, to be effectively disqualified by the challenge of the Crown.

- 119 To the complaint that this leaves the prosecutor with scant information upon which to exercise the rights of challenge afforded by the Act, the answer is that, in this country, the accused is in exactly the same position. Each side must accept the jury, randomly chosen. Generally speaking, the trend of legislation in this country and elsewhere in relation to jury service has been to expand, and not to contract, the pool of citizens available for selection as jurors¹⁵⁵. In the unlikely event that statutory disqualification were to be expanded to include cases of persons who have not been convicted but are viewed unfavourably by police, even the Chief Commissioner's list would be inadequate. But to enlarge the basis for challenge upon such grounds the clear authority of Parliament would be required.

Disposing of the DPP's arguments

- 120 The result of this analysis is that the procedure of jury vetting disclosed in this case was unlawful. It breached s 21(3) of the Act. That is enough. It was also inconsistent with other provisions of the Act, and with its scheme of providing a jury selected by random process from persons neither disqualified nor exempted. These conclusions are sufficient to require an answer to issue (1) in favour of the appellant. However, it is appropriate, briefly, to respond to the arguments of the DPP set out above.

- 121 As to the so-called "clues" in the provisions of the Act which were said to support the preparation from the jury panel of the Chief Commissioner's list and his provision of it to the prosecutors, one of them (the reference in s 67(b) to exculpation for a "lawful excuse") can be ignored. This is because, as I have held, that provision does not apply to the list in question. As regards the suggestion that the words "as he sees fit" in s 21(3) permit the Chief Commissioner to make broad-ranging inquiries beyond those necessary to ascertain disqualification under the Act, I disagree. The sole purpose of the inquiries contemplated by s 21(3) is the report by the Chief Commissioner to the Sheriff. That is limited to the purpose of ascertaining statutory disqualification. In any event, whatever inquiries the Chief Commissioner makes, they could not, for the reasons given, authorise the

¹⁵⁵ Kirby, "Delivering Justice in a Democracy III – The Jury of the Future", (1998) 17 *Australian Bar Review* 113 at 118. The reference is to the reduction of jury exemptions in the United States. See McMahon and Sharp, "A Jury of Your Peers", (1995) 81 *American Bar Association Journal* (October) 40; Spencer, "Repeal of Jury Exemptions Wins Support", *New York Law Journal*, 25 May 1995 (vol 23, no 100) 1.

conversion of the results of those inquiries into the preparation of a list not permitted by the Act.

122 Concerning the suggestion that prosecutors must have a rational and proper basis to make challenges, whether peremptory or for cause, the answer which the Act gives is that they have the same rational bases as are permitted to the accused. By tradition, and possibly by statute in the case of the DPP's prosecutors, they are limited by the controls, partly legal, and partly traditional, which restrain challenges for the prosecution that would be unfair, unreasonable or irrational.

123 As to the claim that the Crown and its prosecutors (and the DPP) have obligations to defend the criminal trial from the participation in juries of persons "unsuitable" to that task, the answer given by the common law and by the Act is that they each put their trust in the random selection of the qualified jurors amongst persons unknown to both sides.

124 The final argument, that the Victorian Parliament had before the jury vetting complained of in this case held back from amending the Act to forbid the practices of the Chief Commissioner and prosecutors well known to it, is unpersuasive. Two answers at least may be given. The first is that courts nowadays pay little heed to the fiction that Parliament's failure to amend a statutory provision, following a court decision, represents an endorsement of a particular judicial interpretation. In *R v Reynhoudt*¹⁵⁶ Dixon CJ described this view as "quite artificial". This Court has repeatedly declined to follow such artificial reasoning¹⁵⁷. Secondly, and in any case, such a fiction could not stand against the clear requirements of the language of the Act from which its obligations must be derived. In issue here are, ultimately, not the inferences to be drawn out of the silences of the statute but those which are to be derived from its affirmative provisions. When these are understood, they forbid the compilation by the Chief Commissioner, from the jury panel provided to him by the Sheriff, of a list of his own for purposes unauthorised by the Act and inconsistent with its provisions. Those provisions therefore forbid the supply of that list to prosecutors, federal or State. They forbid the use of that list by such prosecutors, whether in conjunction with the empanelling of the jury or otherwise. They forbade that use in the disqualification of the potential juror Mr G in the appellant's retrial.

125 There were other quaint practices in Victoria in earlier times which gave or suggested advantages to the prosecution or agencies of the Crown and which later decisions of courts in that State have denied. One, followed for many years, involved the supply to the court, at the stage of sentencing, of a report of a police

¹⁵⁶ (1962) 107 CLR 381 at 388.

¹⁵⁷ See eg *Flaherty v Girgis* (1987) 162 CLR 574 at 594; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329, 351.

officer or other authorised person concerning his inquiries about the prisoner. If contested, such a report or matter within it must now be proved or, if unproved, the report, or the offending part, excluded¹⁵⁸. In *Licata*, Lush J in the Court of Criminal Appeal of Victoria suggested that pre-sentence reports might be withheld from prisoners because of the belief of judges "that the reports would be more illuminating if the authors could feel that they would be given a minimal circulation"¹⁵⁹. However, this opinion has been rejected. It does not represent current practice¹⁶⁰. The general rule in criminal proceedings is, as it should be, one of equality of parties and neutrality of the court. So it should be here.

The trial is vitiated

126 The DPP argued that, should the Court come to the foregoing conclusions, the proviso should nonetheless be applied and the appeal dismissed. There was, so it was submitted, no miscarriage of justice demonstrated by the challenge to, and removal of, the juror Mr G and his substitution by another, unidentified juror. This, it will be remembered, was the view ultimately taken in *Robinson* by Nathan J, although he disapproved of the procedures of jury vetting disclosed in that case and concluded that the automatic requirement that jurors with non-disqualifying convictions should stand aside, under the then Crown procedure, was "repugnant to the basic operation of the system"¹⁶¹.

127 In support of the same conclusion in this case, the DPP mounted a number of arguments. It may be assumed that, by way of the *Judiciary Act*¹⁶², the provisions of the proviso applicable in State trials were incorporated into the determination of the appeal arising out of the trial of the appellant for an offence against the laws of the Commonwealth. The contrary was not suggested.

128 First, the DPP submitted that the section of the Act which had been breached, namely s 21, was one which concerned the provision of information to specified persons and not the composition of the jury as such. This argument must be rejected. Section 21 appears within Pt IV of the Act which bears the heading "Summoning of Jurors". By Victorian law, headings to Parts of an Act form a part

158 *R v Licata* unreported, Court of Criminal Appeal of Victoria, 28 February 1977 at 2 per Kaye J. See also *Robinson* (1969) 53 Cr App R 314 at 318.

159 Unreported, Court of Criminal Appeal of Victoria, 28 February 1977 at 17.

160 *R v Carlstrom* [1977] VR 366; cf Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed (1999) at 163.

161 [1989] VR 289 at 308.

162 s 68(1)(d).

of the Act¹⁶³. Accordingly, the heading to Pt IV makes clear what is otherwise tolerably plain, namely that the steps taken under s 21 are inextricably involved in, and directed towards, the lawful constitution of the jury to try the matter. This conclusion cannot be avoided by an artificial classification of the purposes of s 21.

129 Secondly, the DPP submitted that the sole use that had been made in this case of the information provided by the Chief Commissioner was in the exercise of the prosecutor's undoubted power to challenge jurors peremptorily under the amendment to the Act which had incorporated that power in the Act¹⁶⁴. The motive or reason that lay behind the exercise of the power could not, so it was submitted, alter the validity of that exercise. A court might disapprove of what was done by the Chief Commissioner. It might even find it to be without authority and unlawful. But that would leave untouched the legality of the exercise of the prosecutor's undoubted power to challenge potential jurors, such as Mr G, peremptorily. In such a case, it was argued, a court had no authority to disallow the exercise of the power which was undoubtedly enjoyed by the prosecutor. This argument is also unpersuasive. The power of "peremptory" challenge is given equally by the Act to the prosecutor and to the accused. It was exercised unequally in this case and for a purpose extraneous to that for which the Act afforded peremptory challenges, including to the prosecution. Thus, the use by the prosecutor of the information unlawfully supplied by the Chief Commissioner contaminated the exercise by the prosecutor of his statutory power of challenge. It rendered that exercise unlawful in the circumstances.

130 Thirdly, the DPP suggested that, even if this were so, it was simply speculation as to whether the absence of the challenged juror Mr G, or the presence of his replacement, had any consequences upon the jury's deliberations in what was otherwise a strong Crown case upon which the appellant had been convicted after a lengthy trial having no other admissible defect of a substantive or meritorious kind. Whilst it is true that the impact of the presence or absence of the juror Mr G is a matter of speculation, what is not in doubt is that the constitution of the appellant's jury was affected by the decision made by the prosecutor, by reference to information gathered without lawful authority, provided to the prosecutor outside the terms of the Act and used by him in making the challenge in a way not contemplated by the Act. Undoubtedly, therefore, the appellant's jury was different from what it otherwise would have been if the jurors had been selected by the random procedures contemplated by the Act unaffected by the unlawful steps exposed by this case. He put himself upon the country; but instead he was tried by a jury invalidly chosen. At all times he had made plain his objection to the course followed and his insistence that the jury which tried him should be lawfully and randomly chosen. This was his legal right. This Court

163 *Interpretation of Legislation Act* 1984 (Vic), s 36.

164 The Act, s 34(1B).

should uphold that right. Rights without judicial enforcement where they are denied are puny things – weak reeds that blow in the winds of lip service. The rule of law requires that where serious rights are denied and parties invoke the jurisdiction of the courts, they should ordinarily have redress¹⁶⁵.

- 131 In a series of decisions of Australian courts, stretching back to colonial times, concerned ultimately with the integrity of jury trials, a strict view has consistently been taken where an appellant has shown error in the constitution of the jury empanelled or unlawful conduct on the part of officials or jurors¹⁶⁶. When such matters have come to this Court, it too has insisted upon strict compliance with the law governing the constitution of the jury and the conduct of jury trial. In *Maher v The Queen* this Court stated¹⁶⁷:

"The provisions of the *Jury Act* [1929 (Q)] and of the [*Criminal Code* (Q)] which govern the constitution and authority of the jury as the tribunal of fact in a criminal trial are mandatory... A failure to comply with those provisions ... involves such a miscarriage of justice as to require the conviction to be set aside."

The Court in *Maher* went on to emphasise that failure to conform to such law, even where the trial may otherwise have been impeccable, will be classified as a "failure to observe the requirements of the criminal process in a fundamental respect"¹⁶⁸. By its very nature, jury selection involves a process performed before the finalisation of the jury's constitution. While it is true that past decisions had involved errors which occurred after the jury had been constituted, the strict approach reflected in *Maher* necessarily extends to jury selection itself – a process which inevitably and directly affects the constitution of the panel of those who will try the accused. This is particularly critical where the unlawful conduct involves a denial of basic procedural fairness and equality before the law, as was the case here¹⁶⁹.

- 132 In *Robinson*, the Victorian Full Court recognised, correctly, that a departure from prescribed procedures of a jury trial, going to the root of the conduct of that

165 cf *Wu v The Queen* [1999] HCA 52 at [82].

166 *R v Short* (1898) 15 WN (NSW) 140. *R v Dempster* [1924] SASR 299; *R v Screen and McCarthy* (1924) 41 WN (NSW) 20; *R v Ashton* (1944) 61 WN (NSW) 134.

167 (1987) 163 CLR 221 at 233.

168 (1987) 163 CLR 221 at 234. See also *Johns (Roger) v The Queen* (1979) 141 CLR 409 at 429.

169 See *R v Screen and McCarthy* (1924) 41 WN (NSW) 20; *R v Ashton* (1944) 61 WN (NSW) 134.

trial, could vitiate the validity of the outcome of the trial although otherwise the trial was without flaw¹⁷⁰. Therefore, the proper approach to the issue raised by the appellant is not to look beyond his complaint to the suggested substance and other merits of his trial. It is not to indulge in the self-fulfilling and always unsatisfactory classification of requirements as "mandatory" or "directory". It is to ask whether the failure of which the prisoner complains amounts to a default in observing the requirements of the criminal process in a fundamental respect.

- 133 Fourthly, the DPP urged that the answer to the foregoing question should be in the negative. He relied on the assessment of Nathan J in *Robinson* that the previous cases in which a fundamental departure from legal requirements had been shown were cases in which it could be demonstrated that particular persons had taken part as jurors in the trial of the accused without observance of procedures governing such participation. On this footing, the non-participation of the potential juror Mr G was said to be in a different class. This was because it could never be proved what effect his particular presence might, or might not, have had. It is true that there is no exact holding of this Court on the present point. However, a like question came before the Court of Appeal of Queensland in *R v Mentink*¹⁷¹. That Court concluded that in such a case it was, in theory, possible that a differently composed jury might have reached a different result so that the "anatomy of the trial" was affected¹⁷². I agree with this conclusion. The jury, being as enigmatic as the Sphinx¹⁷³, necessarily involves a dialogue between all of its members. If the constitution is changed, the dynamics of that dialogue are changed. Alter that composition and the anatomy of the constitutional tribunal¹⁷⁴ which is at the heart of the trial process and the trial itself is changed. To the extent that it is, the requirements of the criminal process in a fundamental respect are affected. The law ordinarily provides a sanction for departures from its requirements. It does not rest satisfied with empty findings that its obligations have been defied but without redress to those who have complained.

170 [1989] VR 289 at 295.

171 [1996] 1 Qd R 532.

172 *R v Mentink* [1996] 1 Qd R 532 at 540-541.

173 *Ward v James* [1966] 1 QB 273 at 301 per Lord Denning MR; *MacKenzie v The Queen* (1996) 190 CLR 348 at 365.

174 The description used by Latham CJ in *Hocking v Bell* (1945) 71 CLR 430 at 440 citing *Mechanical and General Inventions Co and Lehwess v Austin and the Austin Motor Co* [1935] AC 346 at 373. See also Lord Denning MR's description of jury vetting as "unconstitutional": *R v Sheffield Crown Court; Ex parte Brownlow* [1980] QB 530 at 542.

134 Fifthly, the DPP nonetheless submitted that the proviso should be applied¹⁷⁵ for absence of an established and actual miscarriage of justice in this case. That argument cannot be accepted. The proviso presupposes the conduct of a trial by a lawfully constituted tribunal¹⁷⁶. It would not be available to cure a process which does not qualify as a "trial" at all because of some fundamental defect. And where an accused has been deprived of some essential step in the criminal process, that, without more, is a miscarriage of justice¹⁷⁷. No other approach is conformable with the repeated and recent authority of this Court on the application of the proviso (and its equivalents) in criminal appeals¹⁷⁸.

135 Finally, the DPP urged that it could not be within the contemplation of Parliament that a breach of the Act in such a manner would invalidate verdicts at which a jury otherwise lawfully arrived. It was submitted that, in so far as the Act forbade the collection and provision of such information by the Chief Commissioner and its use by prosecutors, its terms were directory only. In support of this approach, it was argued that, otherwise, this Court would have to face the spectre of large numbers of challenges to cases concluded by jury verdicts which may have been affected, in a way similar to this case, by selection of a jury upon the basis of information supplied by the Chief Commissioner to prosecutors, federal and State.

136 There are several answers to this submission. Most such cases would, as a matter of practicality, lack the essential element that distinguishes this appeal. That was the ability of the appellant to prove not only that the list was supplied to the prosecutor by the Chief Commissioner but that it was used and actually affected the constitution of the jury in his particular case. In default of an ability to prove such facts, the prospect of reopening concluded matters would be negligible. Moreover, the point was expressly reserved by the appellant in this case at his trial. As in *Cheatle*¹⁷⁹, this Court must deal with the point as the law requires. Assuming that the distinction between directory and mandatory provisions is a valid and applicable one, compliance with the law governing the constitution of a jury is such an important consideration for the integrity of jury trials that it is unsafe to assume that provisions of the Act in that regard are anything but mandatory. The

175 *Crimes Act* 1958 (Vic), s 568(1).

176 *R v Hall* [1971] VR 293 at 299.

177 *R v Hall* [1971] VR 293 at 299 citing *R v Neal* [1949] 2 KB 590; *R v Furlong* [1950] 1 All ER 636; *R v McGill* [1967] VR 683 at 686.

178 See eg *Wilde v The Queen* (1988) 164 CLR 365 at 373; *Holland v The Queen* (1993) 67 ALJR 946 at 951-952; 117 ALR 193 at 200-201; *KBT v The Queen* (1997) 191 CLR 417 at 423-424; *Green v The Queen* (1997) 191 CLR 334 at 346-347.

179 (1993) 177 CLR 541.

spectre presented by the DPP is unconvincing. Taking it to its logical conclusion, it would dictate the necessary outcome of the case despite the very proper efforts adopted by the DPP to ensure that the issue was presented for final judicial determination.

- 137 Accordingly, issue (2) must also be determined in favour of the appellant. In conformity with law, it is not possible, in my opinion, to apply the proviso to save the validity of the jury trial out of which the verdict of guilty was reached and upon which the conviction of the appellant rests. That trial was flawed because the constitutional tribunal which conducted it was shown not to have been lawfully chosen.

Constitutional and other objections do not arise

- 138 In light of my conclusions on issues (1) and (2), issues (3) and (4) do not arise. If Victorian law did not authorise the procedures which were followed in the conduct of the appellant's trial, such law was not picked up and applied to that trial, in a court exercising federal jurisdiction, by the provisions of the *Judiciary Act*¹⁸⁰. Similarly, because there was no applicable law of the State of Victoria to contradict whatever requirements may be imposed by the terms of s 80 of the Australian Constitution relevant to procedures of jury vetting, no issue is presented which requires the application of that section to strike down an inconsistent Victorian law.

- 139 This outcome leaves the constitutional issue unresolved in those jurisdictions of Australia, beyond Victoria, where practices of jury vetting exist and are applied in the trial of persons charged with offences against the laws of the Commonwealth. The solution to any uncertainty (which would also have the merit of ensuring uniformity in the practice of federal prosecutors throughout Australia) is in the hands of the DPP for the Commonwealth. For any judicial clarification of the issues of constitutional and federal law, another case must be awaited.

Orders

- 140 In my opinion, the appeal should be allowed. The orders of the Court of Appeal of the Supreme Court of Victoria should be set aside. In place of those orders, it should be ordered that the appellant have leave to appeal to that Court, that the appeal be allowed, and that the appellant's conviction be quashed and a new trial ordered.

¹⁸⁰ s 68(1)(c).