IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

No. D15 of 2019

BETWEEN:

Van Dung Nguyen

Appellant

and

The Queen

Respondent

SUBMISSIONS OF NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY SEEKING LEAVE TO BE HEARD AS AMICUS CURIAE

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Basis for seeking leave to be heard

2. The North Australian Aboriginal Justice Agency ("NAAJA") seeks leave to make submissions about a discrete issue falling for consideration in this appeal, namely, a Prosecutor's duty where a defendant has participated in a mixed record of interview ("MROI") and that defendant has social, cultural, linguistic and/or physical characteristics that tend to operate as real and practical disadvantages in the criminal trial process.

3. NAAJA seeks leave to be heard in both Mr Nguyen and Mr Singh's appeals to this Court, D15 of 2019 and D16 of 2019 respectively, and relies on identical submissions.

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Part III: Reasons why leave should be granted

4. At the outset it should be noted that, while not determinative, it is a factor weighing toward a grant of leave that NAAJA was earlier granted leave to be heard as amicus curiae at both Mr Nguyen and Mr Singh's special leave applications. The material NAAJA put before the Court was referred to by both applicants in the oral hearing of the special leave applications.[1] In such circumstances, members of this Court have previously been reluctant to exclude an intervenor (or amicus curiae) from further developing its submissions at the hearing of the appeal.[2]

10 *Principles relating to amicus curiae applications*

5. The Court has a broad discretion to allow amici curiae to be heard.[3] Where parties to litigation are large organisations represented by experienced lawyers, submissions from an amicus curiae will need to "identify with some *particularity* what it is that the applicant seeks to add to the arguments that the parties will advance".[4] Insofar as is presently relevant, French CJ observed in *Wurridjal v The Commonwealth*:

> "The Court may be assisted where a prospective amicus curiae can present arguments on aspects of a matter before the Court which are otherwise unlikely to receive full or *adequate treatment* by the parties because ... it is not in the interests of the parties to present argument on those aspects ... In some cases it may be in
20 the interests of the administration of justice that the Court have the benefit of a *larger view* of the matter before it than the parties are able or willing to offer."[5]

6. The Court will usually afford an amicus curiae the opportunity to be heard where the Court will be "significantly *assisted* by the submissions of the amicus and that any *costs* to the parties or any *delay* consequent on agreeing to hear the amicus is not disproportionate to the expected assistance."[6]

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[1] See *Singh v The Queen; Nguyen v The Queen* [2019] HCATrans 159 (16 August 2019) at lines 281-285, 430-435.
[2] *Commissioner of Taxation v Scully* (2000) 201 CLR 148 at 186-187 [78] per Kirby J.
[3] *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 331 per Dixon J; *Levy v Victoria* (1997) 189 CLR 579 at 604 per Brennan CJ.
[4] *Roadshow Films Pty Ltd v iiNet Limited (No .1)* (2011) 248 CLR 37 at 39 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ (emphasis added).
[5] *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312 per French CJ (emphasis added).
[6] *Roadshow Films Pty Ltd v iiNet Limited (No .1)* (2011) 248 CLR 37 at 39 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ (emphasis added), affirming *Levy v Victoria* (1997) 189 CLR 579 at 604-605 per Brennan CJ.

Application of principles to the present application

7. Applying the above principles, the following considerations weigh towards affording NAAJA the opportunity to be heard as amicus curiae:

   i. NAAJA has identified with *particularity* the discrete issue of on which it seeks to add to what is already advanced by the parties, namely: a Prosecutor's duty where a defendant has participated in a mixed record of interview ("MROI") and that defendant has social, cultural, linguistic and/or physical characteristics that tend to operate as real and practical disadvantages in the criminal trial process.

   ii. This is an issue that is otherwise unlikely to receive *adequate treatment* as it did not assume particular prominence in the court below and it is not the focus of the appellant's written submission in this Court.

   iii. The Court would benefit from the *larger view* offered by NAAJA. The issue on which NAAJA seeks to be heard is not peripheral, and is of considerable public importance, as was recognised by the dissenting judge below.[7]

   iv. Given its institutional expertise, outlined below, NAAJA is in a position to *significantly assist* the Court.

   v. Affording NAAJA an opportunity to be heard in this matter would not impose any appreciable *costs* or *delay* over and above the costs and time normally involved in litigating an appeal in this Court.

NAAJA's institutional expertise – general[8]

8. NAAJA is an Indigenous-led organisation that ensures that Indigenous voices are at the forefront of policy formation and legal service provision in the Northern Territory. In addition to its Indigenous CEO and PLO, NAAJA is governed by a Board of Indigenous directors who reflect the views of Indigenous people across the entire Northern Territory. NAAJA's staff operate under a Cultural Competency Framework and receive quality education and professional development in this area.

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[7] *R v Nguyen* [2019] NTSC 37 at [51]-[54] per Blokland J; *Singh v The Queen* [2019] NTCCA 8 at [104] per Blokland J.

[8] The facts about NAAJA's operational functions in paragraphs [8]-[15] were earlier attested to in the affidavit of Beth Wild, Manager of the criminal law section of NAAJA, dated 18 July 2019, filed in support of NAAJA's application to be heard as amicus curiae in Mr Nguyen's special leave application.

9. NAAJA is the largest legal organisation in the Northern Territory. Together with its predecessor organisations,[9] NAAJA has been representing Indigenous persons in criminal proceedings for 47 years and provides legal assistance in Darwin, Katherine, Tennant Creek and Alice Springs, as well as 30 remote Indigenous communities.

10. Over the last four decades, NAAJA has been instrumental in establishing the minimum standards of fairness expected of the police when interviewing Indigenous people suspected of committing criminal offences. NAAJA has done this through: (a) litigation; (b) legal education; and (c) policy advocacy.

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11. Litigation: NAAJA has acted in numerous cases were questions of fairness, cultural and linguistic barriers and the admissibility of police interviews have been judicialy considered. The following are provided by way of example.

    i. In *Ebatarinja v Deland*, NAAJA's predecessor organisation successfully argued that committal proceedings should not proceed where the defendant was a deaf mute Aboriginal person who was unable to communicate except by using his hands to make simple requests.[10]

    ii. In *R v Anunga*, NAAJA's predecessor organisation appeared in a case that established the minimum standards of fairness required when police interview
20 Indigenous persons suspected of criminal offences.[11] The "*Anunga* rules", as they subsequently came to be known, have since been adopted in the Northern Territory Police General Orders,[12] cited by this Court[13] and courts in every Australian jurisdiction except Tasmania,[14] and the subject of extensive scholarship.[15] The *Anunga* rules were recently discussed extra-curially by Justice Gageler.[16]

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[9] Central Australian Aboriginal Legal Aid Service; Katherine Regional Aboriginal Legal Aid Service; Miwatj Aboriginal Legal Service and North Australian Aboriginal Legal Aid Service.
[10] *Ebatarinja v Deland* (1998) 194 CLR 444.
[11] *R v Anunga* (1976) 11 ALR 412.
[12] Northern Territory Police, "General Order Q2 – Questioning people who have difficulties with the English language – the 'Anunga' guidelines" (1998).
[13] *Cutter v The Queen* (1997) 71 ALJR 638 at 645 per Kirby J.
[14] See, e.g., *State of Western Australia v Gibson* (2013) 243 A Crim R 68 at 70 [3]; *R v Clevens* (1981) 37 ACTR 57 at 63; *SH v The Queen* (2012) 83 NSWLR 258 at 2262 [12]; *R v D* (2003) 139 A Crim R 509 at 512 [11] n.3; *Hall v Police* (1999) 202 LSJS 377 at [194]; *DPP v Natale* [2018] VSC 339 at [47].
[15] See, e.g., Heather Douglas, "Cultural Specificity of Evidence: Current Scope & Relevance of Anunga" (1998) 21 *University of New South Wales Law Journal* 27; Martine B. Powell, "Practical Guidelines for Conducting Investigative Interviews with Aboriginal People" (2000) 12 *Current Issues in Criminal Justice*

iii. More recently, NAAJA has litigated cases confirming the continued relevance of the *Anunga* rules under the uniform evidence legislation.[17]

12. Legal education: NAAJA delivers workshops and information sessions in 31 remote communities, as well as Darwin, Alice Springs and Katherine. NAAJA works with a range of community groups to deliver legal education, including with elders groups, schools, women's safe houses, Night Patrol teams and Community Development Program participants. NAAJA's legal education is designed to increase the understanding and capacity of Indigenous people to engage with the mainstream legal system, including when interacting with police during questioning.

13. Policy advocacy: NAAJA is engaged in wide reaching and meaningful advocacy on the barriers faced by Indigenous people in the Northern Territory legal system. At a national level, NAAJA has made submissions to parliamentary and law reform commissions about the challenges faced by Aboriginal clients who experience cultural and linguistic barriers in the criminal justice system,[18] as well as barriers relating to disability, such as hearing loss and intellectual disability.[19] NAAJA has also made specific submissions on the unfairness that can arise for such people in their interactions with police, especially during recorded interviews. In 2017, NAAJA made submissions and recommendations to the Royal Commission into the Protection and Detention of Children in the Northern Territory on the unfairness experienced by

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181; Les McCrimmon, "The Uniform Evidence Act and the Anunga Guidelines: Accomodation or Annhilitation?" (2011) 2 *Northern Territory Law Journal* 91; Diane Eades, "Communicating the Right to Silence to Aboriginal Suspects: Lessons from Western Australia v Gibson" (2018) 28 *Journal of Judicial Administration* 4.

[16] Justice Stephen Gageler, "Keynote Address to the Third Language and the Law Conference", Alice Springs Supreme Court, 5 April 2019.

[17] See, e.g., *R v BM* (2015) 255 A Crim R 301; *R v BL* [2015] NTSC 85; *R v Bonson* [2019] NTSC 22.

[18] NAAJA, "Submission on consultations for the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", Submission to the Australian Human Rights Commission, July 2017; NAAJA, "Submission on Youth Detention", Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, July 2017; NAAJA, "Submissions on Pre- and Post-Detention", Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, August 2017; NAAJA, "Submissions to the Australian Law Reform Commission Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples", Submission to the Australian Law Reform Commission, October 2017.

[19] NAAJA, "Access to justice in the criminal justice system for people with disability", Response to the Australian Human Rights Commission Issues Paper, April 2013, August 2013.

young people interviewed by police when facing language barriers, disability and cultural differences.[20]

NAAJA's institutional expertise – advice to suspects prior to interview

14. For many years, NAAJA has provided advice to Indigenous people suspected of criminal offences prior to the offer of an interview by police. This advice has been provided by telephone and, occasionally, in person by a lawyer attending at the police station or watch house.

15. In June 2019, NAAJA's pre-interview advice service was formalised in a Territory-wide Custody Notification Service. This is only the third service of its type in Australia to be provided for in legislation,[21] and comes after years of NAAJA's policy advocacy in this space. The service is intended to ensure that NAAJA is informed whenever an Indigenous person is taken into custody on suspicion of a criminal offence. It is hoped that the scheme will afford the person in custody an opportunity to speak to a NAAJA employee before participating, or declining to participate, in a recorded interview with police. Amongst other things, it was hoped that the Custody Notification Service would provide Indigenous persons suspected of committing an offence with information about the police interview process and the likely consequences of that process. Unfortunately, current prosecutorial practices in occasionally declining to play "mixed statement" records of interview (a practice endorsed in the decision below), mean that NAAJA is unable to provide clear advice to suspects about whether any interview that they participate in will later be played at trial.

Part IV: Submissions

16. In summary, NAAJA submits that:

    i. the requirements of a fair trial, and a trial that is perceived to be fair, vary according to the circumstances of the case and the defendant;

    ii. where:

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[20] NAAJA, "Submissions on Pre- and Post-Detention", Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, August 2017, 23-24; NAAJA, "Submission on Youth Detention", Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory, July 2017, 98.

[21] See *Crimes Act 1900* (ACT), s 187; *Law Enforecement (Powers and Responsibilities) Regulation 2016* (NSW), cl 37.

(a) a defendant has social, cultural, linguistic and/or physical characteristics that tend to operate as real and practical disadvantages in the criminal trial process ("a relevant disadvantage");

(b) that defendant has provided an MROI; and

(c) the MROI does not fall within the third limb in *Pearce*;[22]

the Prosecutor's duty will usually require the leading of the MROI in the Prosecution case; and

iii. where an MROI has been preceded by a positive representation by police that the MROI *will* form part of the evidence before the Court, then the requirements of a fair trial, and a trial that is perceived to be fair, will usually require the leading of the MROI in the Prosecution case.

17. The remainder of these written submissions will address the above three propositions.

(i) The varying requirements of a fair trial, and a trial that is perceived to be fair

18. The requirements of a fair trial, and a trial that is perceived to be fair, vary according to the circumstances of the case and the circumstances of the defendant.[23] It is in this context that the duties of the Prosecutor must be understood.

19. An example of the way in which the requirements of a fair trial vary according to the circumstances of the *case* is that the more serious the offence, the more likely that legal representation will be necessary in order for the trial to be fair.[24] Another example is that, the weaker a defendant's case may appear, the more important it will be that the defendant be afforded adequate opportunity to fully articulate that case to the jury.[25] Yet another example is the extent of the duty of disclosure, which will vary depending on the facts known to the Prosecutor.[26]

20. An example of the way in which the requirements of a fair trial vary according to the circumstances of the *defendant* is illustrated by the varying requirements for the provision of an interpreter depending on the defendant's fluency in English. A

[22] *R v Pearce* (1979) 69 Cr App R 365 at [31].
[23] *Dietrich v The Queen* (1992) 177 CLR 292 at 364 per Gaudron J.
[24] See, generally, *Dietrich v The Queen* (1992) 177 CLR 292.
[25] *R v Saraya* (1993) 70 A Crim R 515 at 516 per Badgery-Parker J (Kirby ACJ and Loveday AJ agreeing).
[26] *Cannon v Tahche* (2002) 5 VR 317 at 340 [57].

defendant unable to speak English or access any interpreter service would obviously be denied a fair trial.[27] However, that does not mean that the requirements of a fair trial require perfect interpretation. The requirements of a fair trial for a non-English speaker must be analysed on a case-by-case basis.[28] It may be that a defendant can receive a fair trial notwithstanding "substantial errors or omissions of interpretation".[29]

21. It is within this context that a Prosecutor's duties are to be understood, particularly the duties to "ensur[e] that the Crown case is presented with fairness to the accused"[30] and the "general obligation ... ultimately to assist in the attainment of justice between the Crown and the accused."[31] In this role as a "minister of justice"[32] the Prosecutor's duties will find varying expressions – together with the varying requirements of a fair trial – depending on the circumstances of the case and the defendant.[33]

22. The case-dependent nature of the Prosecutor's duties should not, however, prevent this Court from enunciating "a prima facie rule of practice".[34] As has been said in a comparable context:

> "The central thesis of the administration of criminal justice is the entitlement of an accused person to a fair trial according to law. It is obvious that the content of the requirement of fairness may vary ... [however] Where a majority of the Court is firmly persuaded that the absence of a particular warning or direction in defined circumstances will prima facie indicate that the requirement of fairness is unsatisfied ... it is incumbent upon the Court, in the proper discharge of its judicial responsibilities, to enunciate a prima facie rule of practice"[35]

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[27] *Dietrich v The Queen* (1992) 177 CLR 292 at 331 per Deane J; *Ebatarinja v Deland* (1998) 194 CLR 444 at 454 [27]; *Frank v Police* (SA) (2007) 98 SASR 547 at 558 [67]-[68].
[28] *R v Wurrumara* (2011) 213 A Crim R 440 at 444 [21].
[29] *De La Espriella-Velasco v The Queen* (2006) 31 WAR 291 at 324 [117] per Roberts-Smith JA (Pullin JA agreeing).
[30] *Richardson v The Queen* (1974) 131 CLR 116 at 119 per Barwick CJ, McTiernan and Mason JJ. See also *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 per Deane J (a Prosecutor must act "with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one."), quoted with approval in *Dyers v The Queen* (2002) 210 CLR 285 at 293 [11] per Gaudron and Hayne JJ.
[31] *Whitehorn v The Queen* (1983) 152 CLR 657 at 675 per Dawson J.
[32] *R v Lucas* [1973] VR 693 at 705 per Newton J and Norris AJ.
[33] *Jago v District Court of NSW* (1989) 168 CLR 23 at 57 per Deane J.
[34] *McKinney v The Queen* (1991) 171 CLR 468 at 478 per Mason CJ, Deane, Gaudron and McHugh JJ.
[35] *McKinney v The Queen* (1991) 171 CLR 468 at 478 per Mason CJ, Deane, Gaudron and McHugh JJ.

(ii) Prosecutor's duties where a relevantly disadvantaged defendant provides an MROI

23. Where a relevantly disadvantaged defendant provides an MROI – and the MROI does not fall within the third limb in *Pearce*[36] – the Prosecutor's duty will usually require the leading of the MROI in the Prosecution case, notwithstanding any doubts that the Prosecutor might have about the reliability of the exculpatory portions of the MROI. There are three general considerations of fairness that support the acceptance of this prima facie rule of practice:

(a) fist, a preference for the jury, not the Prosecutor, to determine difficult questions of the credibility and reliability of relevantly disadvantaged defendants;

(b) secondly, the necessity of avoiding a perception that the Prosecution is tactically trying to "force into the witness box" a relevantly disadvantaged defendant; and

(c) thirdly, the historical rationale for leading evidence of a defendant's response when "first taxed" is especially salient in the case of a relevantly disadvantaged defendant.

(a) The need for caution when individual Prosecutors act as arbiters of reliability

24. It is well established that decisions as to the evidence to be led in the Prosecution case "must be made with due sensitivity to the dictates of fairness towards an accused person."[37] A decision not to lead relevant evidence "will be justified only by reference to the overriding interests of justice" and "[s]uch situations are likely to be rare."[38]

25. Importantly for the present case, a decision not to lead evidence on the basis that it is unreliable "will only suffice where there are identifiable circumstances which *clearly* establish it; it will not be enough that the prosecutor merely has a suspicion about the unreliability of evidence."[39] In the case of a relevantly disadvantaged defendant who has provided an MROI there will rarely be identifiable circumstances which *clearly* establish the unreliability of the evidence. This is because of the difficulty of making

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[36] *R v Pearce* (1979) 69 Cr App R 365 at [31].
[37] *R v Apostilides* (1984) 154 CLR 563 at 576 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.
[38] *R v Apostilides* (1984) 154 CLR 563 at 576 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.
[39] *R v Apostilides* (1984) 154 CLR 563 at 576 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ (emphasis added).

individual assessments of reliability of relevantly disadvantaged defendants,[40] particularly some Indigenous defendants.

26. Decades of experience of the courts, particularly in the Northern Territory, has shown that there are particular difficulties in accurately assessing the reliability of an Indigenous person's answers to questioning.[41] The difficulties in assessing reliability are heightened where the speaker does not speak English as a first language[42] or experiences significant hearing loss.[43] It will be rare that an Indigenous defendant in the Northern Territory does not engage at least some of these considerations, indeed hearing loss alone affects 90% of Indigenous prisoners in the Northern Territory.[44]

27. In the Northern Territory[45] and elsewhere, special judicial directions have been developed to assist juries in assessing the reliability of things said by Indigenous persons in response to questioning.[46] State court benchbooks will now regularly include such material.[47] It will almost always be safer for a Prosecutor to defer considerations of reliability to a jury of 12 properly instructed persons, rather than for the Prosecutor to personally make that assessment. This is because of the difficulty of assessing the

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[40] See, generally, Martine Powell, "Specialist training in investigative and evidential interviewing: Is it having any effect on the behaviour of professionals in the field?" (2002) 9 *Psychiatry, Psychology and Law* 44, 44 ("the greater the communication and social barriers, the more vulnerable the interviewee is to providing information that is misleading, unreliable and self-incriminating").

[41] For a summary of mid 20th century cases considering this issue see Heather Douglas, "Justice Kriewaldt, Aboriginal Identity and the Criminal Law" (2002) 26 *Criminal Law Journal* 204 at 212-214. For more recent commentary on the subject see Diana Eades, "The social consequences of language ideologies in courtroom cross-examination" (2012) 41 *Language in Society* 471.

[42] See, recently, *Wanambi v Whittington* [2019] NTSC 49 at [9], [31].

[43] See Queensland, *Report of the Committee of Inquiry into the Enforcement of Criminal Law in Queensland*, Brisbane, Government Printer, 1977 (Lucas Report) at [114], explaining: "Chronic ear infection has resulted in a large number of Aborigines being made partially deaf. An interrogation might well proceed with the Aborigine hearing only part of the words addressed to him. ... If signs of [deafness] do not appear they may be misinterpreted as surliness, or worse still, the hesitations and the silences of guilt."

[44] Troy Vanderpoll and Damien Howard, "Investigation into hearing impairment among Indigenous prisoners within the Northern Territory Correctional Services" (6 July 2011) at 3 <https://core.ac.uk/download/pdf/30680731.pdf>.

[45] Dean Mildren, "Redressing the Imbalance Against Aboriginals in the Criminal Justice System" (1997) 21 *Criminal Law Journal* 7 at 12-17. For interstate approval of Mildren's model directions see *Bowles v Western Australia* [2011] WASCA 191 at [52].

[46] See generally Diana Eades, "Judicial Understandings of Aboriginal Language Use" (2016) 12 *The Judicial Review* 471 at 480-486.

[47] See, e.g., Judicial Commission of New South Wales, *Equality Before the Law Benchbook* (Sydney, 2006); Queensland Department of Justice, *Aboriginal English in the Courts: A Handbook* (Department of Justice, Brisbane, 2000); Queensland Supreme Court, *Equal Treatment Benchbook* (Supreme Court of Queensland Library, Brisbane, 2005); S Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* (2nd ed, 2008, Australian Institute of Judicial Administration).

reliability of representations made by persons with diverse personal characteristics, the relative advantages that a jury will have in making those assessments vis-à-vis a single Prosecutor,[48] and the institutional preference that those assessments are for the most part left to the jury.[49]

28. In such circumstances – "with due sensitivity to the dictates of fairness towards an accused person"[50] – caution will usually require a Prosecutor to lead an MROI of a relevantly disadvantage defendant rather than make a personal decision as to its unreliability.

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(b) Avoiding the perception of exploiting of a defendant's relevant disadvantage

29. Fairness normally requires the prosecution "to produce all the material evidence which is available to it before putting the defendant on his election as to whether to give or call evidence."[51]

30. Where a Prosecutor decides *not* to lead a defendant's MROI, some defendants will be in a position to easily remedy that deficiency in the evidence by testifying at trial. Other defendants, however, will be *less* likely to be in a position to testify to their advantage, and thus *more* likely to experience a significant forensic detriment as a
20 result of the Prosecutor's decision.

31. Defendants less likely to be in a position to testify to their advantage include those with: low educational or literacy levels; cultural tendencies toward gratuitous concurrence; young age; lack of English fluency; immaturity; mental illness and cognitive impairment.[52]

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[48] As to the jury's function as a collective adjudicator of credibility see Todd E Pettys, "The Emotional Juror" (2007) 76 *Fordham Law Review* 1609 at 1626-1629.
[49] *IMM v The Queen* (2016) 257 CLR 300 at 316 [54] per French CJ, Kiefel, Bell and Keane JJ.
[50] *R v Apostilides* (1984) 154 CLR 563 at 576 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.
[51] *R v Manning* [2017] QCA 23 at [27]. See also *R v Soma* (2003) 212 CLR 299 at 309 [29] per Gleeson CJ, Gummow, Kirby and Hayne JJ.
[52] Victorian Parliament, Scrutiny of Acts and Regulations Committee, *The Right to Silence: Final Report*, (March 1999) at [2.5.2]. Note that while the Committee was there discussing disadvantages experienced in police questioning the propositions hold true for cross-examination.

32. Indigenous defendants in particular are less likely to be able to testify to their advantage because of behaviours such as:[53]

    i. gratuitous concurrence;[54]

    ii. silence or delay in responding to questions;[55]

    iii. avoidance of eye contact;[56]

    iv. non-responsive or indirect answers;[57]

    v. failures to discern implied accusations in questions;[58]

    vi. differences in linguistically embedded assumptions about questions and answers;[59]

    vii. differences in discourse patterns;[60] and

    viii. other cultural assumptions.[61]

33. Importantly, all the above behaviours may have legitimate linguistic or cultural explanations but are liable to be misinterpreted as detracting from credibility. However, such behaviours will be central considerations in a defendant's decision as to whether or not to give evidence.[62] (Equally importantly, however, such behaviours may not

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[53] See generally Diana Eades, "Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications" (2008) 20 *Current Issues in Criminal Justice* 209.

[54] See *Wanambi v Whittington* [2019] NTSC 49 at [9]. For an early judicial acknowledgment of the dangers of gratuitous concurrence see *R v Aboriginal Dulcie Dumaia* (1951-1976) NTJ 697 (1959) at 697.

[55] See *R v Lawrence* [2016] NTSC 65 at [64]. See also Ilana mushin and Rod Gardner, "Silence is Talk: Conversational Silence in Australian Aboriginal talk-in-interaction" (2009) 41 *Journal of Pragmatics* 2033.

[56] *Wanambi v Whittington* [2019] NTSC 49 at [9].

[57] *Wanambi v Whittington* [2019] NTSC 49 at [9]. See also Rod Gardner, "Question and Answer Sequences in Garrwa Talk" (2010) 30 *Australian Journal of Linguistics* 423; Diana Eades, "Taking Evidence From Aboriginal Witnesses Speaking English" (2015) 126 *Precedent* 44 at 46.

[58] Michael Cooke, *Indigenous Interpreting Issues for Courts* (Australian Institute of Judicial Administration, 2002) 27-28, 29.

[59] Michael Cooke, "A Different Story: Narrative Versus "Question and Answer" in Aboriginal evidence" (1996) 3 *Forensic Linguistics* 273; Diana Eades, "'You gotta know how to talk ...': Ethnography of information seeking in Southeast Queensland Aboriginal society" in Diana Eades, *Aboriginal Ways of Using English* (Canberra: Aboriginal Studies Press, 2013) 20.

[60] Farzad Sharifian, "Schema-based processing in Australian speakers of Aboriginal English" (2001) 1 *Language and Intercultural Communication* 120; Michael Walsh, "Which Way? Difficult Options for Vulnerable Witnesses in Australian Aboriginal Land Claim and Native Title Cases" (2008) 36 *Journal of English Linguistics* 239 at 242-251.

[61] It is not possible to list here all the cultural assumptions and linguistic traits that may play into potential miscommunication between Indigenous defendants and non-Indigenous questioners or listeners. Many of these assumptions and traits may be particular to discrete linguistic groups. For one further example see Joe Blythe, "Self-Association in Murriny Patha Talk-in-Interaction" (2010) 30 *Australian Journal of Linguistics* 447.

[62] It is well known that the considerations to be taken into account by an accused in deciding whether to give evidence "extend well beyond whether the accused has some answer to the charge ... It would, therefore, be wrong to treat the choice as having been made by reference only to whether the accused was guilty." *Azzopardi v The Queen* (2001) 205 CLR 50 at 69 [47]-[48] per Gaudron, Gummow, Kirby and Hayne JJ.

have the same distorting effect in the "free recall" stage of a police interview, where a defendant will typically be given the time and space to provide their version of events without interruption.)

34. As Blokland J explained:

> "it would be unsurprising if in consultation with his counsel the defendant did not give evidence ... because of the possibility of communication difficulties ... It might be thought the defendant would be unlikely to do his own case justice. Given the onus of proof in criminal matters and the potential communication issues, it is not entirely appropriate to resolve all issues of *the appearance of fairness* with reference to the defendant's right to give evidence."[63]

35. The emphasised words in the above passage reveal the danger arising from a Prosecutor's decision not to play an MROI of a relevantly disadvantaged defendant. The danger is the appearance of a strategic decision made in order to "force into the witness box" the relevantly disadvantaged defendant, and thus expose them to cross-examination for which they are ill-equipped not because they are guilty, but because of their personal characteristics.

(c) The importance of a defendant's response when first taxed

36. Historically, it was the practice of a Prosecutor to lead evidence in the Crown case of the defendant's response when "first taxed" with the allegations against them.[64] In England, "the reaction of the accused when first taxed with the incriminating facts" has been held to be "vital relevance" to providing the "general picture" to the jury.[65] That understanding appears to be shared by the Victorian Court of Appeal.[66] In New South Wales, an additional justification was suggested to be the avoidance of the risk that the jury would "speculate as to whether the accused had given any account of his actions

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[63] *Nguyen v The Queen* [2019] NTSC 37 at [54] per Blokland J (emphasis added).
[64] *R v Astill* (unreported, Court of Criminal Appeal, NSW, 25 May 1979; *R v Keevers* (unreported, Court of Criminal Appeal, NSW, No 60732 of 1993, 26 July 1994); *R v H, ML* [2006] SASC 240 at [27] per Vanstone J; *R v Golding* (2008) 100 SASR 216 at 236 [54] per Gray J. See also *R v Pearce* (1979) 69 Cr App R 365; *R v Newsome* (1980) 71 Cr App R 325.
[65] *R v Storey* [1968] Cr App R 884.
[66] See, e.g., *R v Su* [1997] 1 VR 1 at 64 ("Such material is traditionally led by the Crown, whether incriminating or not, both as a matter of fairness and to show the 'first opportunity' response by the accused to the allegations made against him by his accuser."); *R v Pidoto* [2002] VSCA 60 at [49]-[40] per Vincent JA (Batt JA agreeing).

when first challenged by the police."[67] In the Northern Territory, as early as the 1950s, Justice Kriewaldt noted that accounts initially given to police by Aboriginal witnesses (or defendants) were usually more detailed than the testimony subsequently given at various later stages in the proceedings when the witness's story needed to be repeated.[68]

37. Justice Kriewaldt's observations have been confirmed by modern developments in linguistics and neuroscience, such that it is now understood that the re-telling of stories in different contexts and after the passage of time can "involve significant transformations"[69] and distortions.[70] These findings highlight the evidentiary significance of a defendant's response when "first taxed" with allegations and suggest that such evidence ought normally to go before the jury as part of the Prosecution case.

(iii) Prosecutor's duties at trial after pre-interview representation that the interview would be placed before the Court

38. A fair trial requires that the trial be perceived to be fair.[71] As has been explained:

> "A fair trial requires that not only must justice be done but it must be seen to be done. The appearance of a just trial is as important as its actuality. Without the community's confidence the system of justice will be diminished to the detriment of the rule of law."[72]

39. Contrary to the suggestion of the Court below,[73] unfairness in pre-trial processes can bear upon the perception of the fairness of the trial. As was explained in *R v MG*, the question resolves to whether, taking into account any pre-trial processes, "the trial

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[67] *R v Astill* (unreported, Court of Criminal Appeal, NSW, 25 May 1979); *R v Keevers* (unreported, Court of Criminal Appeal, NSW, No 60732 of 1993, 26 July 1994); *R v Familic* (1994) 75 A Crim R 229 at 234 per Badgery-Parker J.

[68] *Kunoth* (1951-1976) NTLJ 420 (1957) at 425. See the discussion in Heather Douglas, "Justice Kriewaldt, Aboriginal Identity and the Criminal Law" (2002) 26 *Criminal Law Journal* 204 at 214.

[69] Diana Eades, "The social consequences of language ideologies in courtroom cross-examination" (2012) 41 *Language in Society* 471 at 475-477, see also 481-482.

[70] Joyce W Lacy & Craig E L Stark, "The neuroscience of memory: implications for the courtroom" (2013) 14 *Nature Reviews Neuroscience* 649 at 651 ("Memory distortions can also occur simply with the passage of time and with repeated recounting of events.").

[71] *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337 at 343 [3] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

[72] *R v MG* (2007) 69 NSWLR 20 at 42 [70].

[73] *R v Nguyen* [2019] NTSC 37 at [18], [23] per Kelly and Barr JJ; *Singh v The Queen* [2019] NTCCA 8 at [40] per Kelly J (Barr J agreeing).

process appears to the ordinary fair minded person to be fair."[74] This analysis extends to evidence-gathering procedures by police that may reflect negatively on the fairness of the trial. Accordingly, in exercising their duties at trial, a Prosecutor should be responsive to the way in which unfairness in the investigatory process may manifest into a perception of unfairness at trial.[75]

40. Where an investigating police officer – an agent of the State – has made a positive representation[76] preceding an interview that the interview will be played at trial, it is productive of a perception of unfairness for the Prosecutor – the embodiment of the State – to resile from that warranty.

41. The perception of unfairness produced in such circumstances will be especially acute in the case of a relevantly disadvantaged defendant, particularly an Indigenous defendant. It is now widely accepted that "Aboriginal suspects are more likely to answer police questions than the general population."[77] History and research has shown that Indigenous suspects are less likely to understand and exercise their right to silence than non-Indigenous suspects.[78] The result is that Indigenous suspects are more likely to be susceptible to participating in interviews on the basis of police representations that the interview *will* be played to the court.

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[74] *R v MG* (2007) 69 NSWLR 20 at 45 [81].

[75] The importance of the Prosecution maintaining the appearance of detachment from any illegality or impropriety in evidence-gathering procedures is reflected in the disclosure requirements with respect to material that the Prosecutor believes may have been unlawfully obtained. See, e.g., Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW), r 91.

[76] For examples of published decisions of Northern Territory courts in which police have made positive representations that an interview will be placed before the court at trial see: *Dumoo v Garner* (1998) 7 NTLR 129 at 132; *Police v Gerard Jawrarla* [2006] NTMC 43 at [22]; *R v BM* (2015) 255 A Crim R 301 at 314 [65]. Police have recently developed a pre-recorded caution in 18 Indigenous languages. That caution is designed to be played to non-English speaking Indigenous people prior to offering those persons the opportunity to participate in an interview with police. Problematically, the pre-recorded caution suggests that anything the witness says in the interview *will* be heard by the court. The English language translation provides: "Police might take your story to court and the judge and other people in court can listen to your story and hear you talking. They *will* listen to your words to decide if you did break the law or if you didn't break the law." Northern Territory Government, Department of Local Government, Housing and Community, "ENG001a – Standardised Audio Police Caution (SAPC) – English front-translation – in custody" <https://dlghcd.nt.gov.au/__data/assets/pdf_file/0007/433393/ENG001a-Standardised-Audio-Police-Caution-SAPC-in-custody.pdf>.

[77] New South Wales Law Reform Commission, *The Right to Silence*, (2018) at 56-57 [2.118].

[78] See generally Australian Law Reform Commission, *Recognition of Aboriginal Customary Law*, Report 31 (1986) at [546]; Alex Bowen, "'You Don't have to Say Anything': Modality and Consequences in Conversations About the Right to Silence in the Northern Territory" (2019) 39 *Australian Journal of Linguistics* 347.

42. In such circumstances – whether or not it is more likely to be true – it is more likely to be *perceived* that:
    i. the defendant was artlessly, and without guile or calculation, attempting to cooperate with the investigating authorities – and thus there can be no proper basis for a Prosecutor not to lead the MROI; and
    ii. that the Prosecutor's decision not to lead the MROI in the Crown case – and thus to depart from a pre-interview representation of investigating officers – was motivated by strategic considerations.

43. Perception (i) is more likely to arise in the circumstances of a relevantly disadvantaged defendant because such defendants will more often *be perceived* as unsophisticated in their interactions in formally recorded police interviews, whether as a result of language, cultural or social barriers (or other matters).

44. Perception (ii) is more likely to arise in the circumstances of a relevantly disadvantaged defendant because such defendants will be readily *be perceived* as less able to testify to their advantage (see discussion above at [31]-[34]) and thus the Prosecutor will be seen to have more to gain, *strategically*, by "forcing into the witness box" such a defendant.

45. The relative likelihood of perceptions (i) and (ii) arising in the case of a relevantly disadvantaged defendant can be helpfully illustrated with reference to Mr Nguyen's interview with police in D15 of 2019. It is to be remembered that Mr Nguyen expressed an understanding in the interview that "whatever I answer will be taken as evidence in the court", and that understanding was confirmed by the two interviewing police officers **[Nguyen AFB 5]**.

46. In respect of perception (i), Mr Nguyen's linguistic barrier (albeit mitigated by the presence of an interpreter) gives him the appearance of an unsophisticated and uncalculating interlocutor with police. The following four illustrative examples are taken from the opening stages of the interview, during which the caution is being administered:
    i. When asked whether it was correct that he did not want anyone else present, Mr Nguyen answered "no", although he appeared to be attempting to convey

affirmative agreement with the proposition that he did not want anyone else present **[Nguyen AFB 2]**.[79]

ii. When asked whether he knew what police wish to question him about, Mr Nguyen gave the apparently nonsensical answer: "Yeah, you ask questions – yeah. So I need to ask question and then I can answer for the interpreter." **[Nguyen AFB 4]**.

iii. When asked whether he understood that he did not have to say anything unless he wished to, Mr Nguyen responded, again nonsensically: "yes I repeat" **[Nguyen AFB 4]**.

iv. When further prompted to explain back the proposition "You do not have to say anything or do anything unless you wish to do so", Mr Nguyen responded: "Whatever you ask me, if I agree I can answer. If I don't agree, I won't answer." **[Nguyen AFB 5]**. This was, of course, a very long way from exhibiting a genuine understanding of the caution. To the contrary, the answer suggests that the criterion in Mr Nguyen's mind for speaking or silence was "agreement" with the question. The response exhibits no understanding or appreciation of: (a) the right to maintain silence, even in response to questions with which Mr Nguyen "agreed"; and (2) the right to respond to questions with which Mr Nguyen did not "agree".

47. In respect of perception (ii), the relevant disadvantages exhibited by Mr Nguyen in the record of interview would, on any view, make him a vulnerable witness in cross-examination. For some of the reasons explained above at [31]-[34], regardless of his guilt or innocence, Mr Nguyen was unlikely to present as a compelling witness in his own case. To the contrary, if his linguistic confusion in his interview was any indicator, Mr Nguyen was at risk of testifying in a manner that was nonresponsive, nonsensical, confusing and internally inconsistent. For the Prosecutor not to lead the MROI in the Prosecution case in such circumstances would likely create the perception – whether or not the reality – that the Prosecutor was seeking to "force into the witness box" the defendant to strategically take advantage of the defendant's vulnerability to cross-examination.

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[79] See and compare the discussion of "negative questions" in Michael Cooke, *Indigenous Interpreting Issues for Courts* (Australian Institute of Judicial Administration, 2002) 24-27, 29.

Part V: Estimated time for argument

48. NAAJA would require no longer than 20 minutes to present its arguments orally.

Dated 18 October 2019

per Philip Boulten SC	per Marty Aust	per Julian R Murphy
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