HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Sebastien Bechaud
Respondent

APPELLANT'S SUBMISSIONS

PART I — FORM OF SUBMISSIONS

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

PART II — STATEMENT OF ISSUES ON APPEAL

2. The ground of appeal raises two questions involving the construction of section 50 of the *Juries Act 2000* (Vic) ('**the Act**'):

    a) Does section 50 of the Act impose a temporal requirement that the separation oath be administered at a time proximate to the jury's separation during deliberations?

    b) Does administering the oath at a different (i.e., earlier) time constitute a fatal and fundamental irregularity in the trial?

PART III — SECTION 78B NOTICES

3. The appellant does not consider that any notice should be given under section 78B of the *Judiciary Act 1903* (Cth) because this matter raises no constitutional issues.

PART IV — CITATION OF REASONS BELOW

4. The judgment of the Court of Appeal ('**the Court below**') is not cited in any authorised report. The medium neutral citation of the decision of the Court below is *Bechaud v The King* [2025] VSCA 306 ('**the judgment below**'). The reasons for sentence of her Honour Judge Gaynor of the County Court ('**the trial judge**') are not published but are included in the Core Appeal Book (**CAB**[1] **61–79**).

PART V — STATEMENT OF FACTS

5. The relevant facts are set out in the reasons of Priest and Kaye JJA at [3]–[11] of the judgment below, and in the reasons of Taylor JA at [31]–[33] of the judgment below (**CAB 85–108**).

6. On the afternoon of Wednesday, 24 July 2024, the respondent was arraigned in the presence of a jury panel and pleaded not guilty to two charges of rape.[2] The jury was empanelled at 3:10pm that same day. On empanelment, the jury swore[3] to faithfully and impartially try the issues in the respondent's trial and to give true verdicts according to the evidence, in accordance with Schedule 3 to the Act.

7. Before the prosecution had opened its case,[4] or the defence had responded,[5] and before any evidence was called, the trial judge gave preliminary directions to the jury (**AFM**[6] **4–14**).

8. The preliminary directions included an admonition that it would be 'a betrayal of your oath, if you were to discuss any of the evidence led for your benefit with anyone other than another member of this jury'[7] and that 'we do not want the opinions of friends and neighbours who are not here to hear the evidence, to see the evidence, to be directed by the rules of law that you will be directed by'.[8] At

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1 Core Appeal Book (restricted), filed 8 May 2026 ('**CAB**').
2 Indictment numbered P10500453 (**CAB 5–7**).
3 In these submissions, a reference to swearing ought to be taken to mean a reference to giving either an oath or an affirmation. The Act also uses 'swear' or 'swearing' to refer to giving an oath or an affirmation: see, e.g., ss 32(4) and 42 of the Act. Likewise, where appropriate, a reference to giving an oath should be taken to also refer to giving an affirmation.
4 *Criminal Procedure Act 2009* (Vic), s 224(1).
5 *Criminal Procedure Act 2009* (Vic), s 225(1).
6 Appellant's Book of Further Material, filed 28 May 2026 ('**AFM**').
7 Transcript of the preliminary directions of Judge Gaynor, T2.4–6 (**AFM 6**).
8 Transcript of the preliminary directions of Judge Gaynor, T2.7–10 (**AFM 6**).

the end of those directions, before the jury left the Court for the day, the trial judge administered the 'separation oath' in the form prescribed by Schedule 5 to the Act, with each juror swearing not to discuss any matter relating directly or indirectly to the evidence in the trial or the deliberations with any person other than another member of the jury.[9]

9. After the prosecution opening address and the defence response, evidence in the trial commenced later the following day, Thursday, 25 July 2024. The judge gave final directions to the jury on Thursday, 1 August and Friday, 2 August 2024. On the afternoon of 2 August 2024, jury keepers were sworn in, and, at 2:34pm that same day, the jury retired to consider its verdicts.

10. On the afternoon of Monday, 5 August 2024, following written communication from the jury, the trial judge administered a perseverance direction.

11. On Tuesday, 6 August 2024, at 4:03pm, the jury returned a verdict of not guilty on charge 1, and a verdict of guilty on charge 2.

12. It is not in dispute that the trial judge did not re-administer the separation oath after the first occasion on Wednesday, 24 July 2024, and did not remind the jury of the contents of that oath.

PART VI — ARGUMENT

A. The statutory construction of section 50 of the Act

13. Section 50 of the Act provides:[10]

> **Court may allow jury to separate after retiring to consider verdict**
>
> (1) Subject to subsection (2) but despite any rule of law or practice to the contrary, the court may—
>
> (a) allow the jury to separate; or
>
> (b) allow an individual juror to separate from the jury if, in the opinion of the court, there is good reason to do so—
>
> after the jury has retired to consider its verdict and before the verdict is given or the jurors are discharged.
>
> (2) A court may allow a jury or juror to separate in accordance with subsection (1) only if each separating juror has taken an oath or made an affirmation in the form of Schedule 5.

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9 Transcript of the preliminary directions of Judge Gaynor, T10.25 (**AFM 14**).

10 Section 50 provided as such both at the time of the trial and at the time of writing.

14. Schedule 5 to the Act is titled 'Oath or affirmation of jurors separating during deliberations'. It provides for an oath or affirmation where each juror swears or affirms that they 'will not discuss with any person other than another member of this jury any matter relating directly or indirectly to the evidence in this trial or the deliberations'.

15. The words of section 50 are clear. They require no gloss. The majority's attempt to read in a temporal (or any other) condition that must be proximate to the jury's separation during deliberations invents a requirement not warranted on a plain reading of the statutory text.

16. In its broader context, section 50 appears within Part 6 of the Act, 'Jury Trials'. Within that Part, there are several provisions where Parliament has made the choice to impose a temporal requirement connected to certain steps or powers that must or might be exercised during a (civil or criminal) jury trial. The choice not to impose such a requirement in relation to section 50, which appears within the same part, should be seen as a considered decision by the legislature.

17. By way of example:

    a. Section 42 provides that '[o]n being empanelled' jurors must take an oath or affirmation 'in open court' in the form of Schedule 3.

    b. Section 43 provides that 'during a trial' a judge may discharge a juror for various reasons without discharging the whole jury.

    c. Section 44(1) provides that 'during a trial' a judge may direct that a trial shall continue after a juror is discharged or dies (provided the requirements of sections 44(2)–(4) are met).

    d. Section 48(1) relevantly provides for a ballot to be conducted in a criminal trial where more than 12 jurors 'have been empanelled and remain at the time at which the jury is required to retire to consider its verdict'. Section 48 goes on to provide for certain procedural steps to occur 'after the verdict is given'[11] and 'each time the jury is required to retire to consider its verdict'.[12]

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11 The Act, s 48(3).
12 The Act, s 48(4).

18. In different ways, these sections provide for temporal, or other, connections with a certain act. So, for example, the initial phrase within section 42 operates adverbially to express timing — when or upon being empanelled, jurors must swear the oath. Section 42 further provides a location, in open court, where the swearing must occur. Likewise, sections 43 and 44(1) contain the same adverbial prepositional phrase ('during a trial') which operates to express a temporal connection between when a judge may exercise a relevant, discretionary power if or when triggered by a certain event.

19. Section 48(1) provides for a complex conditional sentence with coordinated predicates ('have been empanelled and remain') in the present perfect and simple present tenses. There is also an embedded temporal clause ('at the time') containing a relative clause ('the jury is required to retire to consider its verdict') that defines this temporal event. Again, Parliament's intention is clear about *when* a certain event must occur, and subject to what preconditions.

20. Sections 48(3) and 48(4) also operate in clear temporal circumstances. Through the use of a conditional clause ('if…') with an embedded temporal clause in the present simple passive ('after the verdict is given'), section 48(3) provides for a process that must be followed where a verdict is given (event 1), but the trial is not concluded (event 2). Similarly, section 48(4) provides for a future event that must occur (a 'fresh ballot') whenever the temporal event ('is required to retire to consider its verdict') is triggered.

21. In contrast to these provisions, section 50 is silent as to the timing of the oath. The only temporal connection available, referrable to the swearing of an oath or affirmation, from both the heading of the provision and sections 50(1)–(2), is that the oath must be given *prior* to separation. This construction is supported by reading section 50 with the oath or affirmation itself, as contained in Schedule 5 to the Act,[13] because the oath or affirmation to be taken is *not* limited by any sort of temporal, or other, connection with the moment after when a jury has retired to consider its verdict.

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13 *Interpretation of Legislation Act 1984* (Vic), s 36(2).

22. This is further supported by the text, context and a historical analysis of section 50 of the Act. What follows is an explanation of said history, then an analysis of the text and the judgment below, to make good the proposition that the majority in the Court below placed a gloss on the text of section 50 and so erred.

A.1 ***A history of jury separation in Victoria – from strict prohibition to radical reform***

23. A historical analysis provides important context to the present form of section 50 of the Act. Victoria has moved from a position where separation of the jury at any stage was prohibited, and strictly prohibited during deliberations, to the current position where separation (including during deliberations) is the norm.

24. The common law historically took a 'very strict' approach — jurors were not permitted to separate at all between being empanelled and delivering their verdict.[14] Over time this position modified and a discretion was given to a trial judge to permit the jury to separate *before* retiring to consider its verdict in a trial[15] — jurors were permitted to disperse at lunchtime, and to return to their homes overnight during the course of the evidence. At the point the jury retired to consider its verdict, the jurors were sequestered.[16] The prohibition on separation and exposure to any outside influences from that point was jealously enforced.

25. In *R v Chaouk*,[17] for instance, the fact that three jurors travelled from the Court to the accommodation where they were being sequestered in a taxi, unaccompanied by jury keepers, was considered a material irregularity such that the guilty verdicts returned by the jury were set aside, notwithstanding the jurors had apparently not discussed the case whilst travelling in the taxi.

26. This strict common law approach was altered in 1993, when section 51A of the *Juries Act 1967* (Vic) ('**the 1967 Act**') was introduced.[18] Section 51A bestowed a discretion upon a trial judge to allow the jury to separate at any time between

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14 Judgment below, [57] (Taylor JA) (**CAB 96**).

15 Sir John Vincent Barry, 'On the Segregation of Jurors' (June 1953) 6 *Res Judicatae* 139, 155; *R v Gay* [1976] VR 577, 582–583 (Young CJ, Gillard and Murray JJ).

16 *R v Chaouk* [1986] VR 707 ('***Chaouk***'), 710 (Kaye J, with whom Fullagar J agreed at 717 and Hampel J agreed at 717).

17 [1986] VR 707.

18 *Juries (Amendment) Act 1993* (Vic), s 9.

retirement and delivery of its verdict (or being discharged without verdict), provided the separation oath had been administered. Section 50 of the Act is in relevantly identical terms to section 51A of the 1967 Act.

27. The Second Reading speech to the legislation introducing section 51A relevantly said:[19]

> Clause 9 inserts a new section which empowers courts in appropriate circumstances to allow jurors to return home overnight during the jury's deliberation. Although the legislation leaves the decision to separate to the discretion of the court, I understand that the experience following a similar change in New South Wales has been that there have been no instances of attempted interference with a jury, a fear of which has underpinned the traditional practice of the jury lockup. The government therefore would expect that the courts will be prepared to allow juries to separate unless there is a real reason not to do so. A reduction in the number of occasions on which juries are required to be accommodated overnight will yield substantial cost savings in administering the jury system and at the same time will reduce the level of disruption to the lives and routines of jurors involved in lengthy deliberations.

28. It is clear that Parliament intended the introduction of section 51A to occasion a 'very significant' change to the common law approach to jury separation.[20] It is now routine in Victoria that juries separate during deliberations — it is only in a most unusual case that the jury is sequestered during deliberations.[21] This is consistent with the overall purpose of the Act, which is relevantly to provide for the operation and administration of a system of trial by jury that equitably spreads the obligation of jury service amongst the community and makes juries more representative of the community.[22] Both aspects of this purpose are advanced by jurors no longer being sequestered on a regular basis and thus being able to return home to attend to other duties.

29. In *R v Patton*,[23] the Court below gave section 51A a 'workable interpretation',[24] and noted that:[25]

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19 Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1993, 1157–1158 (Sidney James Plowman).

20 Judgment below, [62] (Taylor JA) (**CAB 97**).

21 Judgment below, [90] (Taylor JA) (**CAB 103–104**).

22 The Act, s 1.

23 [1998] 1 VR 7 ('***Patton***').

24 *Patton* [1998] 1 VR 7, 11 (Phillips CJ, Winneke P and Southwell AJA).

25 *Patton* [1998] 1 VR 7, 11 (Phillips CJ, Winneke P and Southwell AJA).

> It can be accepted that, at common law, juries were required to be cloistered after retirement and until verdict. Section 51A however was clearly designed to modify the strictness of the common law practice in favour of convenience to jurors, provided that the requirements imposed by the section were complied with.

30. In *Youssef (a pseudonym) v The Queen*,[26] the Court below considered the radical modification of the common law occasioned by the introduction of section 50 of the Act and its predecessor, and the subsequent authorities on the topic.[27]

31. The Court below observed that the discretion conferred upon the trial judge to allow the jury to separate was directed at safeguarding against the risk of a deliberating jury communicating with outside influences:[28]

> [I]t was a cardinal common law principle that in a criminal jury trial jurors not separate during deliberations. It is also clear that the legislature sought to mitigate the strictness of that principle through the introduction of provisions such as s 50 of the Act. In so doing, however, the legislature was astute to ensure that the separation of a criminal jury after retirement was subject to safeguards specifically designed to promote the integrity of the trial process and to minimise the risk of the jury's communication with third parties. Hence, before permitting the separation of a jury after retirement, a trial judge must affirmatively be of the opinion that there is a 'good reason' to permit separation, and must ensure that an appropriate oath (or affirmation) is taken by the jurors involved that they 'will not discuss with any person other than another member of this jury any matter relating directly or indirectly to the evidence in this trial or the deliberations'.

32. Thus, the strict common law approach was reformed.

A.2 *The proper construction of section 50*

33. Section 50(1) of the Act confers upon a trial judge a discretion to allow the jury (or a juror) to separate after the jury has retired to consider its verdict, but before said verdict is given.

34. Section 50(2) provides a single condition precedent to the exercise of that discretion — that the separation oath has been administered. A jury (or a juror) may separate during deliberations only where each juror 'has taken' the separation oath as required by section 50(2). The only temporal requirement

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26 [2019] VSCA 240 ('***Youssef***').

27 *Youssef* [2019] VSCA 240, see especially [43]–[56] (Priest, Beach and Weinberg JJA).

28 *Youssef* [2019] VSCA 240, [56] (Priest, Beach and Weinberg JJA); but see the judgment below at [77] (Taylor JA) (**CAB 100**).

imposed by section 50 is that by the time the jury separates during deliberations, the separation oath has been administered to the separating jurors.

35. As observed by Taylor JA below:[29]

> The words 'in accordance with sub-s (1)' in s 50(2) do no more than make the conditional link between the exercise of the discretion and the prior giving of the separation oath. The words 'has taken' use the present perfect tense. That tense connects past actions to the present. The words mean 'before now'. The words 'each separating juror' refer to the jurors at the time at which the jury is separating rather than the time at which each juror gives the separation oath. A juror will become a 'separating juror' at the time of the exercise of the discretion to allow separation, having, at some time prior, given the separation oath. In other words, even if the separation oath is administered after the jury has retired and immediately before the jury first separates, at the time … each juror takes the oath they are not yet a 'separating juror'. He or she is a juror taking the sch 5 'Oath or affirmation of jurors separating during deliberations' so that he or she may become a 'separating juror [who] has taken an oath' so that the judge may allow the jury to separate 'in accordance with sub-s (1)' by then exercising the discretion there reposed.

36. On a plain reading of the Act, the conditional clause ('only if each separating juror has taken an oath') which is in the present perfect tense establishes a completed precondition (the oath-taking) that must exist before the separation can occur. Put another away, the administration of the separation oath is the only prerequisite to a trial judge permitting the jury (or a juror) to separate during deliberations. The only statutory requirement of this condition precedent is that it must occur *before* the jury (or a juror) separates. This is because it *functions* differently in nature and purpose, which stands in contradistinction to various other provisions within Part 6 that provide for specific temporal conditions in connection with certain events.

37. Although the plain words of the Act alone are sufficient to make good the appellant's position, an analysis of the common law in the wake of the preceding provision, section 51A of the 1967 Act, also supports the appellant's argument. Notably, the authorities in the aftermath of the introduction of section 51A are generally silent as to when the oath is to be administered.[30] To the extent that authorities have considered the desirability of the separation oath being

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29 Judgment below, [87] (Taylor JA) (**CAB 103**).

30 Judgment below, [71]–[74] (Taylor JA) (**CAB 99–100**).

administered at a specific time, they have suggested best practice, rather than identifying an edict within the text of the Act.

A.2(a) *The oath, once given, endures*

38. The separation oath needs only be administered once. Once given, it endures.

39. This is because section 50 is premised on the concept that the oath is a sufficient safeguard against risk.[31] Thus, the separation oath is not so weak that it only protects against risk where there have been reminders of its contents or where it is given in close proximity to deliberations.

40. The concept that the separation oath must be given at one specific point in time lest its protection be insufficient to avoid a substantial miscarriage of justice does not find support in either the text of section 50, or in the common law.

41. In *Frendo v The King*,[32] the Court below was of the view that the oath endured in circumstances where it had been given some days (punctuated by a weekend) *before* deliberations commenced.

42. The prosecution had closed its case late on a Friday morning. It was not proposed that the jury sit for the balance of the day. The trial judge administered the separation oath before sending the jury home for the weekend, stating 'I do this when there's a weekend coming up. A couple of beers and a barbeque and it could get started'.[33] The trial resumed the following Monday with closing addresses by both parties and the judge's charge. The jury commenced deliberations that afternoon (although they were permitted to go home at the end of the judge's charge and formally commenced deliberating the following morning), and ultimately returned a verdict at 11:15am on Wednesday. The separation oath was not administered again following the first occasion on the Friday afternoon.[34]

43. The Court below rejected a submission that the trial judge's failure to re-administer the separation oath before allowing the jury to separate at the end of

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31 Judgment below, [98]–[100] (Taylor JA) (**CAB 105–106**).

32 [2024] VSCA 319 ('***Frendo***').

33 *Frendo* [2024] VSCA 319, [130] (Boyce JA, with whom Priest JA agreed at [1] and Taylor JA agreed at [2]).

34 The jury was reminded of its oath on at least one occasion: *Frendo* [2024] VSCA 319, [132] (Boyce JA, with whom Priest JA agreed at [1] and Taylor JA agreed at [2]).

each subsequent day constituted a fundamental irregularity in the trial, holding that section 50(2) required the separation oath to be administered only once and that both the bare terms of section 50 and the approach of the common law[35] supported a conclusion that it was 'strictly unnecessary' to readminister the oath after the first occasion.[36]

44. In *R v Appleby*,[37] when discussing a ground of appeal alleging error where the jury was permitted to separate without the oath being readministered whilst considering verdicts in batches, Callaway JA concluded that the separation oath should only be administered once.[38] Smith AJA concurred, stating that repeated administration of the oath would be 'surplusage', and observed that:[39]

> It would be an unusual phenomenon in the law to have people repeating oaths in the way suggested when the first was in terms adequate for any subsequent situations.

45. Smith AJA further observed that the jury would have understood 'the undertaking when first given was one to avoid any discussion of the whole proceeding', and that it would have been 'desirable, but not necessary' to remind the jury of this undertaking on subsequent separations, as witnesses are reminded that they remain under oath.[40] The undertaking, once given, bound the jury until the conclusion of proceedings.[41]

46. In *Patton*,[42] the Court below affirmed the approach in *Appleby* and rejected the submission that section 51A of the 1967 Act required the jury to give the separation oath on each and every occasion that they separated, holding that:[43]

> To suggest that the section requires a further undertaking on oath on each and every occasion that the jury, within the period contemplated, separates is, in our view, to give the section an interpretation which the words do not command and which would or could lead to an absurd imposition upon the jurors. Once the jurors have sworn on their oath that they will not discuss matters concerning the inquest with persons other than members of the jury,

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35 See, particularly, *Patton* [1998] 1 VR 7.
36 *Frendo* [2024] VSCA 319, [143] (Boyce JA, with whom Priest JA agreed at [1] and Taylor JA agreed at [2]).
37 (1996) 88 A Crim R 456 ('***Appleby***') (see, 481 (Smith AJA) for the procedural history).
38 *Appleby* (1996) 88 A Crim R 456, 459 (Callaway JA, with whom Southwell AJA agreed at 459).
39 *Appleby* (1996) 88 A Crim R 456, 484 (Smith AJA).
40 *Appleby* (1996) 88 A Crim R 456, 485 (Smith AJA).
41 *Appleby* (1996) 88 A Crim R 456, 485 (Smith AJA).
42 [1998] 1 VR 7.
43 *Patton* [1998] 1 VR 7, 11 (Phillips CJ, Winneke P and Southwell AJA).

> it should be assumed that they will understand that such oath will continue to bind them if, within the designated period, they are permitted to separate again.

47. The Court below emphasised that section 51A conferred a discretion upon the trial judge 'despite anything to the contrary in any rule of law or practice', and was therefore clearly intended to depart from the strictness of the old common law approach. The discretion permits the trial judge to allow separation 'at any time', not 'from time to time, upon the giving of an undertaking'.[44] To require repeated administration of the oath would be an 'extravagance not contemplated by the section'.[45]

48. It is well established that the law regards the making of an oath as binding on the conscience.[46] It is a fundamental tenet of the criminal justice system that jurors decide cases according to their oath.[47] The assumption that jurors conscientiously follow the directions of the trial judge is similarly fundamental to the system of trial by jury, and is one on which 'common law countries have staked a great deal', given without it there would be 'no point in having criminal jury trials'.[48]

49. Taylor JA was correct in her observation that it is not the timing of the undertaking in section 50 that is critical, but rather its nature as a solemn, public swearing.[49] The educative effect of jury keepers being sworn in the jury's presence prior to the commencement of deliberations reinforces the solemn nature of the obligation by which the jury is bound, and the fact that it continues to bind each juror.[50]

50. It was for these reasons that Taylor JA concluded that the failure to administer the oath or a reminder at the time of separation did not constitute a serious departure from the prescribed processes of a criminal trial.[51] Taylor JA was

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44 *Patton* [1998] 1 VR 7, 11 (Phillips CJ, Winneke P and Southwell AJA).
45 *Patton* [1998] 1 VR 7, 11 (Phillips CJ, Winneke P and Southwell AJA).
46 *Director of Public Prosecutions v Marijancevic* (2011) 33 VR 440, 455 [52] (Warren CJ, Buchanan and Redlich JJA); Judgment below, [100] (Taylor JA) (**CAB 106**).
47 *R v Dupas (No 3)* (2009) 28 VR 380, 434 [204] (Weinberg JA).
48 *Gilbert v The Queen* (2000) 201 CLR 414, 425–426 [31] (McHugh J).
49 Judgment below, [68] (Taylor JA) (**CAB 98**).
50 Judgment below, [102] (Taylor JA) (**CAB 106–107**), citing *CMG v The Queen* (2013) 46 VR 728, 747 [90] (Redlich JA, with whom Warren CJ agreed at 742 [59] and Coghlan JA agreed at 779 [262]).
51 Judgment below, [104] (Taylor JA) (**CAB 107**).

fortified in this conclusion by fact that there was no basis for any suspicion that a juror had failed to comply with the terms of the oath in the respondent's trial (in contrast with cases such as *Youssef* where there was a known irregularity).[52] This conclusion was correct.

51. The fact that repeated administration of the oath is not mandated no matter how long a jury deliberates (whether they return a verdict after one separation or many, and whether or not they receive perseverance[53] or majority directions in the course of deliberations)[54] militates against the conclusion that the oath does not endure past a jury's retirement. It matters not when the oath is first administered.

52. Whether a trial has a duration of one day, ten days, or ten months, repeated administration of the separation oath is not required.

A.2(b) *The majority erred in their construction of section 50 of the Act*

53. In the judgment below, the majority held that the separation oath:[55]

> must be administered to the jury at a time which is both temporally proximate, and necessarily connected, with the first occasion upon which a jury is permitted to separate while in the course of deliberations of verdict.

54. By importing surplus words into the provision, the majority of the Court below were in error for at least four reasons.

55. ***First***, and most basically, there is simply no warrant for this additional requirement, or gloss, being added to what is contained in the legislation. The task of statutory construction begins with the plain words of the provision.[56] The words of section 50 are unambiguous, and capable of being applied, without any additional words being read in.

56. ***Secondly***, within the same Part, the Act makes clear in other sections when there is to be strict compliance as to a temporal connection or triggering event. For instance, section 42 of the Act requires that '[o]n being empanelled', jurors must

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52 Judgment below, [105] (Taylor JA) (**CAB 107**).

53 *Jury Directions Act 2015* (Vic), ss 64A–64C. See, also, the Act, s 46.

54 The Act, s 46.

55 Judgment below, [22] (Priest and Kaye JJA) (**CAB 89**). See, also, [29] (**CAB 91**).

56 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–382 [69]–[71] (McHugh, Gummow, Kirby and Hayne JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

make an oath or affirmation to faithfully and impartially try the issues in the case. Had Parliament mandated that the separation oath *must* be given at a specific time 'proximate' to deliberations, then it would have specified this in clear and unambiguous language as occurs elsewhere in Part 6.

57. ***Thirdly***, the additional requirement is inherently uncertain in meaning, and unworkable in practice. Often, as is the most common practice in Victoria, when the jury takes the oath, it has not yet retired to consider its verdict.[57] This is because, given the vagaries of trial, the oath is typically administered at the conclusion of the judge's charge. Hence, the separation oath is usually given some time, if not some hours, before the jury might separate, if it separates at all. While presumably the majority would regard this practice as sufficiently proximate to separation; nevertheless, this underscores that the majority implicitly accept that the oath may be administered at a time prior to the actual separation. Thus, it would seem that the majority sought to read a gloss into the language of section 50 in order to temper this (implicit) acceptance.

58. The problem is further illustrated by the decision in *Frendo*.[58] The majority in the judgment below accepted that the separation oath being administered three days (albeit one sitting day) prior to the actual separation during deliberations did not breach the requirement to be 'temporally proximate'.[59] Nor, evidently, did it breach the requirement to be 'necessarily connected' to the jury's separation during the course of deliberations of verdict. So, where then is the line to be drawn? The uncertainty of the answer, or a lack of means by which to answer it, points strongly against the majority's construction.

59. ***Fourthly***, the majority's rationale is unconvincing and misconstrues the language of the Act. The majority considered that because the separation oath is specific to the conduct of the jury during deliberations, it must be administered at a time which is temporally proximate, and necessarily connected, with the separation.[60]

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57 Judgment below, [51] (Taylor JA) (**CAB 95**).
58 *Frendo* [2024] VSCA 319. See [41]–[43] above.
59 Judgment below, [25] (Priest and Kaye JJA) (**CAB 90**).
60 Judgment below, [22] (Priest and Kaye JJA) (**CAB 89**).

But every jury is expected to understand the specific and critical obligations it has sworn by oath to undertake, regardless of when the oath is taken.

60. In particular, the jury takes an oath, immediately after empanelment, that it will:[61]

> faithfully and impartially try the issues between the Crown and [name of the accused] in relation to all charges brought against [name of the accused] in this trial and give a true verdict according to the evidence.

This oath sets out the jury's most fundamental task, a task which is of course performed during deliberations — which might occur days, weeks or months later. The importance of this oath might be thought to exceed the importance of the separation oath. Yet the jury takes this oath as its first action after empanelment. This oath is not taken again, nor is the jury required to be reminded of it at any later stage. There is equally no legislative requirement that the jury be reminded of the separation oath.

61. The only requirement found in section 50 is that the separation oath be administered at some stage prior to separation.[62] On this proper construction, the trial judge complied with section 50 in the present case.

62. The majority approach departs from the clear words of the legislation, and is based upon an interpretation not warranted by the text of section 50.

B. The distinction between 'best practice' and 'fundamental irregularity'

63. The appellant's position is that if there was compliance with the requirements of section 50, there cannot have been any miscarriage of justice. If the analysis set out above is accepted, the appeal must succeed.

64. As a further issue, the majority judgment appears to elide the distinction between technical compliance and best practice. For the avoidance of doubt, these submissions now address the question as to whether, on the facts of this case, could any purported non-compliance with section 50 have resulted in a fundamental irregularity (and therefore a substantial miscarriage of justice).

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61 *Juries Act 2000* (Vic), s 42 and sch 3.

62 Judgment below, [93] (Taylor JA) (**CAB 105**).

65. The concept of what constitutes a fundamental irregularity is analysed, before argument is made that no such fundamental irregularity occurred (or could have occurred) in this case.

B.1 When will an irregularity amount to a fundamental irregularity?

66. In *Director of Public Prosecutions (Vic) v Smith*,[63] this Court was called upon to consider a question of law regarding whether a meeting, in the absence of the accused, between the trial judge, counsel for the prosecution and defence and the complainant, constituted a 'fundamental irregularity in the trial process, such as to constitute a serious departure from accepted trial processes'.[64] The Court below opined that such a meeting was contrary to the principles of open justice, and therefore constituted a fundamental irregularity that could not be waived.[65]

67. This Court proceeded on the assumption that the reference to 'fundamental irregularity' in the question of law was:[66]

> intended to distinguish between a fundamental irregularity that necessarily involves a miscarriage of justice (such that an appeal against conviction under s 276 of the *Criminal Procedure Act* must be allowed)[67] whether or not the irregularity realistically could have affected the verdict of guilt, and a non-fundamental irregularity that realistically could not have affected the verdict of guilt (such that there has been no substantial miscarriage of justice).

68. This Court found there had been no fundamental irregularity — it could not be concluded that a fair-minded lay observer might reasonably apprehend that the trial judge would not bring an impartial mind to the resolution of the questions they were called on to decide.[68] This was so even though the Court concluded that a risk of irregularity existed, which could have been avoided if the meeting did

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63 (2024) 419 ALR 212 ('***Smith***').

64 *Smith* (2024) 419 ALR 212, 215–216 [10] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

65 *Smith* (2024) 419 ALR 212, 216 [12] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), referring to *Director of Public Prosecutions v Smith* [2023] VSCA 293.

66 *Smith* (2024) 419 ALR 212, 233–234 [89] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) (citations omitted).

67 Section 276(1)(b) of the *Criminal Procedure Act 2009* (Vic) provides that an appeal against conviction must be allowed where 'as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice'. The language of section 276 was considered by this Court in *Baini v The Queen* (2012) 246 CLR 469.

68 *Smith* (2024) 419 ALR 212, 234 [91] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), citing *Charisteas v Charisteas* (2021) 273 CLR 289, 296 [11] (Kiefel CJ, Gageler, Keane, Gordon and Gleeson JJ), applying *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

not occur and minimised if the meeting had been recorded (i.e., the Court considered that the meeting in the form it occurred in did not constitute best practice, but nonetheless did not amount to a fundamental irregularity).[69]

69. In *HCF v The Queen*,[70] when considering irregularities in juror conduct, this Court endorsed the observations of Beech-Jones CJ at CL (as his Honour then was) as to what errors or irregularities will amount to a miscarriage of justice:[71]

> [I]f the error or irregularity "is properly characterised as a 'failure to observe the requirements of the criminal process in a fundamental respect' then it would follow that the conviction would not stand regardless of any assessment of its potential effect on the trial", but otherwise there is no miscarriage unless the error or irregularity is "prejudicial in the sense that there was a 'real chance' that it affected the jury's verdict ... or 'realistically [could] have affected the verdict of guilt' ... or 'had the capacity for practical injustice' or was 'capable of affecting the result of the trial'".

70. In *HCF*, this Court observed that there will be an inherently substantial miscarriage of justice where there has been (or there is a reasonable apprehension that there has been) failure to observe the requirements of the criminal process in a fundamental respect, such that the integrity of the trial process has been undermined.[72]

71. In *R v T*,[73] Southwell AJA quoted Brennan, Dawson and Toohey JJ in *Wilde v The Queen*, holding that the irregularity which occurred in that case was such that the conviction should be quashed as it constituted:[74]

> such a departure from the essential requirements of the law that it goes to the root of the proceedings ... the accused has not had a proper trial and ... there has been a substantial miscarriage of justice.

72. Accordingly, a fundamental irregularity is an irregularity that necessarily involves a substantial miscarriage of justice. It is an irregularity such that a fair-

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69 *Smith* (2024) 419 ALR 212, 235 [97] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

70 (2023) 280 CLR 596 ('***HCF***').

71 *HCF* (2023) 280 CLR 596, 599 [2] (Gageler CJ, Gleeson and Jagot JJ), citing *Zhou v The Queen* [2021] NSWCCA 278, [22] (Beech-Jones CJ, with whom Davies J agreed at [30] and Wilson J agreed at [31]).

72 *HCF* (2023) 280 CLR 596, 601 [7] (Gageler CJ, Gleeson and Jagot JJ).

73 (1996) 86 A Crim R 293.

74 *R v T* (1996) 86 A Crim R 293, 302–303 (Southwell AJA, with whom Callaway JA agreed at 294 and Smith AJA agreed at 303) citing *Wilde v The Queen* (1988) 164 CLR 365, 373 (Brennan, Dawson and Toohey JJ).

minded lay observer would consider there has been a serious departure from the rules for a fair trial, such that there has not been a proper trial at all.

B.2 No fundamental irregularity occurred

73. The majority found that the trial judge's failure to take a separation oath or affirmation from the jury 'at times sufficiently proximate to its separation during deliberation constituted a fatal and fundamental irregularity in the trial'.[75] Regardless as to whether this Court adheres to the view that there was purported non-compliance with section 50 of the Act, in and of itself, the purported non-compliance cannot constitute a fundamental irregularity.

74. ***First***, the swearing of the separation oath occurred about nine days prior to when the jury retired to consider its verdict. Given that two of those days involved the judge's directions, there is no risk that the jury might not have understood the solemn and binding nature of swearing this oath or affirmation.

75. ***Secondly***, as was observed by Taylor JA in the judgment below, there is no reason to suspect that the integrity of the jury's deliberations was undermined by what occurred in this case.[76] There is no evidence at all (unlike in cases such as *Youssef*) that there was any event which exposed the jury to contamination during their deliberations.

76. ***Thirdly***, and ***finally***, section 50 of the Act should not be construed such that *any* (purported) non-compliance, without regard to the facts of the individual case, equates to a 'fundamental irregularity'.[77] Where Parliament has provided for the taking of an oath or affirmation and where such was actually taken, as occurred here, this instance of (purported) non-compliance cannot be considered to occasion a substantial miscarriage of justice.[78]

C. Conclusion

77. A trial judge's power to permit a jury to separate after retiring to consider its verdict is a creature of statute, and the majority's reliance on the historical

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75 Judgment below, [21] (Priest and Kaye JJA) (**CAB 89**).
76 Judgment below, [105] (Taylor JA) (**CAB 107**).
77 See, by contrast, *Birchall v The King* [2026] VSCA 63, [134]–[138] (Boyce, Orr and Kidd JJA).
78 *Awad v The Queen* (2022) 275 CLR 421, 430 [18]–[20] (Kiefel CJ and Gleeson J), 447–8 [86]–[91] (Gordon and Edelman JJ).

scepticism of separation was misplaced and led them into error. The previous common law position has been swept aside, and the issue in this case falls to be determined by the text, context and history of section 50 of the Act.

78. The asserted necessary temporal connection between oath and separation does not arise from the legislation, and so it simply does not exist.

79. As a matter of construction, the only requirement of section 50 is that the oath has been administered at some time prior to separation during deliberations. Thus, the trial judge complied with the requirements of this provision in permitting the jury to separate, post-retirement, because the prescribed oath had already been given.

PART VII — ORDERS SOUGHT

80. The orders sought by the appellant are:

a) Appeal allowed;

b) The orders of the Court below made on 4 December 2025 are set aside; and

c) The appeal to the Court below is dismissed.

PART VIII — ESTIMATE OF TIME FOR ORAL ARGUMENT

81. The appellant estimates that up to two hours will be required to present its oral submissions in this matter (including reply).

Dated: 28 May 2026

Brendan Kissane
Director of Public Prosecutions
(03) 9603 7666
director@opp.vic.gov.au

Liam McAuliffe
Crown Prosecutor
(03) 9603 7666
liam.mcauliffe@opp.vic.gov.au

Rebecca Barrett
Counsel for the Appellant
(03) 9225 7000
rebecca.barrett@vicbar.com.au

ANNEXURE TO APPELLANT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates
1	*Criminal Procedure Act 2009* (Vic)	Compilation No. 113	ss 224(1), 225(1) and 276	Current version, s 276 relevantly identical to that which was considered in *Smith* and *Baini*	All relevant times
2	*Interpretation of Legislation Act 1984* (Vic)	Compilation No. 134	s 36(2)	Current version	All relevant times
3	*Juries Amendment Act 1993* (Vic)	–	s 9	Version assented to, inserting s 51A into *Juries Act 1967* (Vic)	26 November 1993
4	*Juries Act 1967* (Vic)	Compilation No. 45	s 51A	Last version before repeal, s 51A relevantly identical to that which was considered in *Chaouk*, *Appleby* and *Patton*	13 September 2000
5	*Juries Act 2000* (Vic)	Compilation No. 60	ss 1, 32(4), 42, 43, 44, 46, 48, 50, schs 3 and 5	Current version, all cited sections relevantly identical to the time of trial and judgment below Section 50 relevantly identical to that which was considered in *Youssef* and *Frendo*	All relevant times
6	*Jury Directions Act 2015* (Vic)	Compilation No. 17	ss 64A–64C	Current version	All relevant times