



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

The King
Appellant

and

Sebastien Bechaud
Respondent

APPELLANT’S REPLY

PART I — CERTIFICATION

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

PART II — REPLY

2. The respondent's submissions ('RS') operate from several flawed premises. *First*, in construing section 50 of the *Juries Act 2000* (Vic) ('the Act'), the respondent imports into his analysis the common law's historic suspicion of separation and distrust of the jury's ability to withstand outside influences (RS [8], [11], [18]). *Secondly*, the respondent doubts both the power of an oath to safeguard against the risk of interference with the jury (RS [18]), *and* doubts that an oath once given endures (RS [29]–[39]). *Thirdly*, the respondent's construction — which not only adopts the majority's approach but also posits a new constructional choice — requires the reading of surplus words into section 50 of the Act (RS [27]–[28], [45]). *Fourthly*, and finally, the nature of a purported miscarriage of justice remains unanswered (RS [51]–[53]).

A. Historic suspicion is not historical context

3. Historical context is important¹ in discerning Parliament's intention as to the purpose of the discretionary power in section 50(1): the starting point is not whether the jury should be permitted to separate, but whether separation — being the *default position* — should *not* occur. Parliament's explicit expectation was that 'the courts will be prepared to allow juries to separate unless there is a real reason not to do so'.² This intention finds expression in the chapeau to section 50(1) where separation is permitted to occur 'despite any rule of law or practice to the contrary'. Adopting the reasoning of this Court in *Brownlee v The Queen*,³ the procedures relating to trial by jury 'never have been immutable; they are constantly changing'.⁴ The law now places more faith in the ability of jurors to follow directions and resist improper influences.⁵ Thus, this Court should reject the respondent's inversion of the inquiry (where separation is *not* the default position) because it relies on the common law's historic suspicion of separation

¹ *R v Rohan (a pseudonym)* (2024) 280 CLR 288, 302 [25] (Gageler CJ, Gordon and Edelman JJ) citing *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ) and the authorities there cited.

² Victoria, *Parliamentary Debates*, Legislative Assembly, 20 October 1993, 1157 (SJ Plowman).

³ (2001) 207 CLR 278 ('*Brownlee*').

⁴ *Brownlee* (2001) 207 CLR 278, 286 [12] (Gleeson CJ and McHugh J).

⁵ *Brownlee* (2001) 207 CLR 278, 302 [65]–[66] (Gaudron, Gummow and Hayne JJ).

and distrust of the jury's ability to withstand outside influences into section 50,⁶ despite Parliament's intention to radically depart from the common law.

A.1 *Misplaced reliance on Birchall*

4. The respondent's contention that the reasoning in *Birchall v The King*⁷ supports his characterisation of section 50 is misplaced. This for three reasons.
5. **First**, the facts in *Birchall* can be readily distinguished:⁸ the jurors left court at the conclusion of the judge's charge on the understanding they would 'commence' deliberations the following morning. When they departed, *no* juror had taken the separation oath. The jurors reassembled later that same day and took the oath. But, in this case, it is undisputed the jurors *were* administered the oath prior to the first occasion on which they left the court after the judge's charge had concluded.
6. **Secondly**, the legal question for resolution differed. In *Birchall*, the appeal concerned the identification of the point in time at which a jury has 'retired to consider its verdict'.⁹ Applying section 50, the Court below held this point was when the jury left the courtroom at the completion of the judge's charge.¹⁰
7. **Thirdly**, the appellant's assertions in this Court are not inconsistent with *Birchall*. In *Birchall*, the Court below concluded that section 50, and its predecessor section 51A, were enacted in the context of well-understood delineations in a criminal trial: arraignment, opening addresses, evidence, closing addresses, the judge's charge, and the jury's deliberations.¹¹ The Court below accepted that Parliament had identified the moment when the judge directs the jury to retire as the 'transition point' for the final stage of the trial.¹² However, this is *not* the same as saying that *Birchall* is authority for the proposition that the separation oath, if given earlier, has no effect. No such issue was addressed, in argument or in *ratio*.

B. The nature of an oath or affirmation

8. The respondent seeks to persuade this Court that the question of the endurance of an oath is a statutory 'presumption' arising from its text (**RS [29]**). Yet, section 50

⁶ Though, see RS [48], where the respondent quotes from *Brownlee* (2001) 207 CLR 278 at [28], which agrees that the question is whether separation is inappropriate.

⁷ [2026] VSCA 63 (Boyce, Orr and Kidd JJA) ('*Birchall*').

⁸ See, *Birchall* [2026] VSCA 63, [25]–[42] for a summary of the facts.

⁹ *Birchall* [2026] VSCA 63, [69].

¹⁰ *Birchall* [2026] VSCA 63, [73].

¹¹ *Birchall* [2026] VSCA 63, [89].

¹² *Birchall* [2026] VSCA 63, [90]–[91].

applies despite any rule of law or practice to the contrary. Nothing in section 50, explicit or implied, requires a reminder to be given to a jury.¹³ Likewise, there is nothing in the provision that requires the oath to be taken more than once. It is well-settled that if the separation oath was given on the first occasion a jury separates, it need not be given again on the second occasion.¹⁴ It need not be taken twice because once taken, the oath endures.

9. The respondent's approach further ignores the common law's historical treatment, which attaches great importance to oaths in a criminal trial. For Blackstone, the offence of perjury was especially repugnant because it is a crime committed against a 'lawful oath' as administered by 'some court of justice, having power to administer an oath'.¹⁵ It was punished 'antiently [by] death; afterwards banishment, or cutting out the tongue ... and now it is fine and imprisonment'.¹⁶ The oath was not a mere procedural formality, but a sacred act binding the person's conscience because of the invocation of the Christian deity.¹⁷
10. In *HCF v The Queen*,¹⁸ when considering the oath sworn by jurors to give a true verdict under section 50 of the *Jury Act 1995* (Qld), the majority said an '[a]pprehension of a violation of that oath is not lightly to be inferred'.¹⁹ For a criminal trial on indictment 'proceeds on the assumption that jurors are true to their oath'.²⁰ There is no reason why, as a matter of principle, the same assumption cannot be extended to the separation oath. If jurors may be assumed to follow their oath to render a true verdict, then it must also be assumed jurors adhere to the terms of the separation oath. Each is sworn before the jury as a whole and in open court. Each is equally binding. Each is taken once. Neither requires a reminder.

¹³ A reminder was described as 'desirable, but not necessary' in *R v Appleby* (1996) 88 A Crim R 456, 485 (Smith AJA); 'desirable' in *Youssef (a pseudonym) v The Queen* [2019] VSCA 240 ('*Youssef*'), [64] (Priest, Beach and Weinberg JJA) and was found not to be determinative in *Frendo v The King* [2024] VSCA 319 ('*Frendo*'), [fn 66] (Boyce JA, with whom Priest and Taylor JJA agreed).

¹⁴ *R v Patton* [1998] 1 VR 7 ('*Patton*'), 11 (Phillips CJ, Winneke P and Southwell AJA).

¹⁵ William Blackstone, *Commentaries on the Laws of England* (5th ed, 1773) ('*Blackstone*'), Book IV, Chapter 10, 137 citing Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (1644) ('*Coke*'), Cap 74, 164.

¹⁶ Blackstone, *Commentaries on the Laws of England* (5th ed, 1773), Book IV, Chapter 10, 138.

¹⁷ Coke, *The Third Part of the Institutes of the Laws of England* (1644), Cap 74, 163–164.

¹⁸ (2023) 280 CLR 596 ('*HCF*').

¹⁹ *HCF* (2023) 280 CLR 596, 605 [16] (Gageler CJ, Gleeson and Jagot JJ).

²⁰ *HCF* (2023) 280 CLR 596, 626–627 [88]–[89] (Edelman and Steward JJ). See, also, *R v Glennon* (1992) 173 CLR 592, 603 (Mason CJ and Toohey J). The principle applies in other common law jurisdictions: *R v Corbett* [1988] 1 SCR 670, 692 (Dickson CJ); *Z v DPP* [1994] 2 IR 476, 496 (Hamilton P); *Montgomery v HM Advocate* [2003] 1 AC 641, 674 (Lord Hope of Craighead); *B v The Queen* [2014] 1 NZR 261, 282 [67] (McGrath, Glazebrook and Arnold JJ).

Rhetorically, an oath once taken must be enforceable; it is no defence to a charge under the Act that a juror was not ‘reminded’ of some matter.²¹

11. Really, what the respondent says is the separation oath operates only for so long because it becomes stale or diluted with time (**RS [26]**). The respondent argues that, in some cases, it cannot mitigate the magnitude of any risk to the jury (**RS [9], [18], [36]**). So, the separation oath must be taken proximate to when the jury commences its deliberations, lest the oath’s effect wane or extinguish.
12. The simple answer is this. The legislature specifically envisaged that the oath *in and of itself* would operate as a safeguard against the risk of interference.²² *Birchall* accepted this point,²³ and recognised a separation oath was a *stronger* safeguard than a judicial direction not to discuss the case with others.²⁴ Indeed, the form of the oath itself is broad, and refers both to deliberations *and* ‘the evidence in this trial’. It is broad enough to safeguard against risk whenever taken.

C. Additional words are superfluous

13. The respondent supports the majority’s read-in words, ‘temporally or factually connected’ or, alternatively, posits reading in the word ‘just’ (**RS [28]**). (The ambiguity in the majority’s approach seems implicitly conceded: **RS [20]**). Neither construction appears implicitly in the text of section 50. Nor is there a justification for reading in any such form of artificial limitation. This goes beyond the attribution of meaning to text, and seeks to remedy gaps or repair it.²⁵ The consequence of reading in ‘just’ may not be too big in the literal sense, but the practical consequences of fettering this discretion remain. No time limit is required to be implied given the past tense usage of ‘has given’ in the text.²⁶
14. The heading to Schedule 5 of the Act also does not indicate a temporal connection of imminence (cf **RS [42]**). Rather, the word ‘during’ links the words ‘separating’ and ‘deliberations’ by creating a connection between the jury’s separation and the deliberations — *not* a connection between the taking of the oath and separation.

²¹ See, e.g., *Juries Act 2000* (Vic), ss 78 or 78A.

²² *Birchall* [2026] VSCA 63, [82] citing *Youssef* [2019] VSCA 240, [56].

²³ *Birchall* [2026] VSCA 63, [82] and [94].

²⁴ *Birchall* [2026] VSCA 63, [107].

²⁵ *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531, 548 [38] (French CJ, Crennan and Bell JJ), 556–557 [65] (Gageler and Keane JJ).

²⁶ Cf, a ‘reasonable time’: *Re Federal Commissioner of Taxation* (1983) 50 ALR 577, 578 (Murphy J). Or, extending time: *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 573 (Dixon J).

15. *Patton* is *not* authority for the position that the oath may *only* be given ‘when the time first arrives’. The Court below ensured that section 51A, as the predecessor to section 50, was given a ‘workable interpretation’ in the context of whether the oath had to be readministered on each subsequent separation.²⁷ But no requirement was prescribed such as to give rise to the necessity of some temporal connection (cf RS [22], [43], [44]). Any expression of an opinion not necessary for the decision should not be regarded as affecting legislation enacted afterwards.²⁸

D. The nature of a purported miscarriage of justice remains unanswered

16. The issue for determination is whether the timing of the oath’s administration, and the jury’s subsequent separation, complied with section 50. The respondent is wrong to answer in the negative, and to conclude the separation oath was not ‘in place’ or ‘employed’ (RS [52], [53]). Nevertheless, if this Court agrees with the respondent, it does not follow that a substantial miscarriage of justice occurred. *Birchall* offers no guidance — the Crown conceded the point without argument, and the consequences of contravening section 50 were not determined.²⁹
17. The respondent suggests a substantial miscarriage arose because of the length of the contravention, and because the jury were not reminded of their oath. However, a reminder was *not* necessary. And any (purported) contravention was *not* protracted as the oath was taken only nine days before the jury commenced deliberations. Two of those days involved closing addresses and directions.
18. Finally, the jury deliberated knowing that all were bound by the separation oath taken at the start of the trial, oblivious to any error.³⁰ There is no suggestion that each juror did otherwise than adhere to the terms of their oath on the basis it endured. No apprehension, or risk of such a contravention, is apparent here.

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²⁷ *Patton* [1998] 1 VR 7, 11.

²⁸ *Williams v Official Assignee of Dunn* (1908) 6 CLR 425, 441 (Griffith CJ); *DPP Reference No 1 of 2019* (2021) 274 CLR 177, 198–199 [51] (Gageler, Gordon and Steward JJ), see also 184–185 [10] (Kiefel CJ, Keane and Gleeson JJ).

²⁹ *Birchall* [2026] VSCA 63, [66] and [134]–[138].

³⁰ *Lyons v Queensland* (2016) 259 CLR 518, 529–530 [33] (French CJ, Bell, Keane and Nettle JJ).