HIGH COURT OF AUSTRALIA

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

ANTHONY JOHN BROWNLEE APPLICANT

AND

THE QUEEN RESPONDENT

Brownlee v The Queen
[2001] HCA 36
21 June 2001
S82/1998

ORDER

1. Application for special leave to appeal granted.

2. Appeal treated as instituted and heard instanter and dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

A W Street SC with G D Wendler for the applicant (instructed by Galloways)

P S Hastings QC with R J Bromwich for the respondent (instructed by Commonwealth Director of Public Prosecutions)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with C Traill and J S Stellios, intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

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

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with C D Bleby intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for South Australia)

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

CATCHWORDS

Brownlee v The Queen

Constitutional law – Trial by jury – State law permitting reduction during trial of number of jurors – State law permitting separation of jurors after jurors retire to consider verdict – Whether trial "by jury" within meaning of s 80 of Constitution.

Constitutional law – Trial by jury – Waiver of requirements by accused – Whether waiver possible – Whether waiver in fact – Whether leave required to reconsider past authority on constitutional question.

Words and phrases – "trial ... by jury".

Constitution, s 80.
Judiciary Act 1903 (Cth), s 68.
Jury Act 1977 (NSW), ss 22(a)(i), 54(b).

1 GLEESON CJ AND McHUGH J. The applicant was charged with conspiracy to defraud the Commonwealth contrary to s 86A of the *Crimes Act* 1914 (Cth). He was tried, on indictment, in the District Court at Sydney, before Luland DCJ and a jury. He was convicted, and sentenced to a term of imprisonment. Having appealed unsuccessfully against his conviction to the New South Wales Court of Criminal Appeal[1], he now seeks special leave to appeal to this Court.

2 The alleged offence being against a law of the Commonwealth, s 68 of the *Judiciary Act* 1903 (Cth), subject to s 80 of the Constitution, applied to pick up the relevant provisions of the *Jury Act* 1977 (NSW).

3 Section 80 of the Constitution provides:

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

4 Notwithstanding that the applicant's trial was conducted before a judge and jury, and that the verdict of guilty was that of a jury, and that the trial was conducted in accordance with the *Jury Act*, the applicant contends that his trial was not "by jury" within the meaning of s 80 of the Constitution. The grounds of that contention will be examined below. The argument for the applicant necessarily involves the proposition that, in certain respects, contemporary jury trial practice in New South Wales differs from the meaning of the words "trial ... by jury" in s 80 of the Constitution. The applicant was tried according to contemporary standards in New South Wales, and those standards are generally comparable to the standards in other Australian jurisdictions. If a person sought information concerning the current characteristics in Australia of the mode of criminal trial procedure known as trial by jury, the most obvious place to find such information would be in the *Jury Act*, and corresponding legislation of other States and Territories. The argument for the applicant must be, and is, that certain essential characteristics of trial by jury within the meaning of that expression in s 80 of the Constitution, are not reflected in the *Jury Act.*

5 A similar argument succeeded in *Cheatle v The Queen*[2]. This Court unanimously held that a provision of the *Juries Act* 1927 (SA), providing for majority verdicts, was inconsistent with s 80 in its application to a trial for a

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1 *R v Brownlee* (1997) 41 NSWLR 139.

2 (1993) 177 CLR 541.

Commonwealth offence. In that case, the convicted person had been tried by jury, in South Australia, according to current South Australian standards, but not, so the Court held, according to the standards inherent in the constitutional expression, by which unanimity of jury verdict was an essential characteristic of trial by jury. No attempt has been made in this case to argue that *Cheatle* was wrongly decided, or that the reasons of the Court were based upon erroneous principles.

6 To say that a trial before a judge and jury, conducted in accordance with the practice established by legislation in an Australian jurisdiction, is not trial by jury within the meaning of s 80, is to say that the meaning of those words in the Constitution is not determined by, and that the practical application of those words does not vary with, current trial practice. Yet trial by jury, as a mode of criminal procedure, has changed substantially over the centuries, and continues to change. If the constitutional expression has a meaning that is not tied to current trial practice, but has a meaning against which current practice must be measured, in the case of trial on indictment for Commonwealth offences, how is that meaning to be determined?

7 In *Cheatle*, the Court repeatedly used the phrase "requirement of unanimity" in its explication of the constitutional expression. It decided that "history, principle and authority" compelled the conclusion that the expression imported such a requirement[3]. In relation to history, the Court's consideration included, but was not limited to, the law and practice governing jury trials in the Australian colonies at the time of federation. Such inquiry was both proper and necessary. It was not undertaken for the purpose of psychoanalysing the people who were involved in framing the Constitution. It was undertaken because the exercise upon which the Court was embarked involved ascertaining the meaning of an instrument which came into being in a certain manner, at a certain time, and for a certain purpose. Since the instrument was brought into being as an instrument of government, which would need to respond to changing circumstances and conditions over time, it would be wrong to attribute to its reference to the procedure of trial by jury a meaning which treated as frozen in time all the incidents of the procedure as they were known at Federation. Accordingly, the Court did not confine its inquiry to historical circumstances before or at the time of Federation. It also considered issues of legal principle, and English, American and Australian authority.

8 In the resolution of a problem as to the interpretation of the Constitution, the significance of the circumstances surrounding the framing of the instrument will vary according to the nature of the problem. An understanding of the

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3 (1993) 177 CLR 541 at 562.

context in which an instrument was written is ordinarily useful, and sometimes essential, for an understanding of its meaning. To recognize that is not to treat the subjective understanding of the framers, if it is possible to find any such common understanding, as the determining factor in a dispute about interpretation. It is simply to accept the historical context in which an instrument was written, which such an understanding may reflect, as potentially relevant to a question about the meaning of the instrument. Similarly, the genesis of an instrument may throw light upon its meaning. In the case of an ordinary statute, so much is expressly recognized by s 15AB of the *Acts Interpretation Act* 1901 (Cth). The same can apply in the case of the Constitution.

9 Here, the question at issue concerns the meaning of "trial … by jury" in s 80. The question is being asked for the purpose of considering an argument that a trial, conducted in accordance with the standards of contemporary legislation and practice in New South Wales, was not trial by jury within the meaning of s 80. It is relevant to inquire whether there was, at the time of the Constitution, something about criminal law or practice that might justify a conclusion that the words have a meaning such that essential elements of trial by jury were absent in the present case. As the process of reasoning in *Cheatle* demonstrates, that is not the only inquiry to be made. But it is not something that can be ignored. If the meaning of "trial … by jury" is to be determined solely by reference to contemporary standards, there is nothing to argue about. Contemporary standards are reflected in the *Jury Act*. Whether right or wrong, the applicant's argument is that, when used in s 80, the expression embodies different standards.

10 In *Theophanous v Herald & Weekly Times Ltd*[4], Brennan J said that the Constitution "speaks continually to the present and it operates in and upon contemporary conditions". However, in the same passage he pointed out that it speaks in the language of the text, which is to be "construed in the light of its history, the common law and the circumstances or subject matter to which the text applies". That is consistent with the approach to construction that was adopted in *Cheatle*.

11 The contemporary standards as to trial by jury which are reflected in the *Jury Act*, are those of the New South Wales Parliament. If those standards do not satisfy the constitutional requirement, it can only be because the meaning of the constitutional text produces that result. It cannot be because the contemporary judiciary espouses values different from those of the contemporary legislature. The only relevant power of the judiciary, which has its source in the Constitution, is to give effect to the meaning of the Constitution. Judges have no power to

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4 (1994) 182 CLR 104 at 143-144.

formulate and declare their own standards of jury trial, which override those of the legislature.

12 One of the most significant aspects of the history of trial by jury before, and up to, the time of Federation is that it shows that the incidents of the procedure never have been immutable; they are constantly changing. Indeed, trial by jury did not come to the Australian colonies as part of the common law upon European settlement. It was introduced into each of the colonies by legislation, and the legislation varied[5].

13 There are two respects, of relevance to the trial of the applicant, in which the *Jury Act* is said to depart from the requirements of s 80. First, s 22(a)(i) provides that where, in the course of a trial, any member of the jury dies or is discharged by the court whether as being through illness incapable of continuing to act or for any other reason, the jury shall be considered as remaining for all the purposes of that trial properly constituted if, in the case of criminal proceedings, the number of its members is not reduced below 10. Secondly, s 54(b) provides that the jury in criminal proceedings may, if the court so orders, be permitted to separate at any time after they retire to consider their verdict.

14 Both of those provisions came into operation at the applicant's trial. A jury of 12 was empanelled. Over the course of a lengthy trial, two members were discharged. Ten remained. The applicant was convicted by the (unanimous) verdict of those 10. The members of the jury were permitted to separate after they retired to consider their verdict. We are not concerned with the discretionary decisions of the trial judge, as to the discharge of jurors, or their separation during deliberations. Our approval or disapproval of those decisions is not invited, and is irrelevant. Our only concern is whether the provisions of the *Jury Act* referred to above are inconsistent with the trial by jury of which s 80 of the Constitution speaks, and, therefore, inapplicable to a trial on indictment for a Commonwealth offence.

15 It was argued that the conduct of the applicant and his lawyers at the trial meant that he had lost his right to complain about what occurred by waiver. That question only arises if it is concluded that there was, at the trial, a departure from the requirements of s 80. If there was no such departure, then there was nothing to waive. The argument on the point raised factual as well as legal issues.

16 In *Huddart, Parker & Co Pty Ltd v Moorehead*[6], in 1909, O'Connor J said:

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5 Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* (Sup.) 49.

6 (1909) 8 CLR 330 at 375.

> "What are the essential features of a trial by jury? I adopt the following from the definition approved of by Mr Justice Miller in his lecture on the Constitution of the United States … It is the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in a civil litigation or in a criminal process."

17 As the decision in *Cheatle* shows, that is not an exhaustive statement, for it makes no reference to unanimity. However, it is a useful starting point for a consideration of the legal and historical context in which the words "trial … by jury" appeared in the Constitution. That it distinguishes between essential and inessential features is unsurprising. It is unnecessary to recount the evolution of trial by jury in England. Some of the history is set out in *Cheatle*[7]. Over the period from the origin of jury trial up to the end of the nineteenth century, there were many changes in the characteristics and incidents of jury trial, and there have been many since then. In the case of a procedure which has undergone so many changes, it is impossible to contend that all of its characteristics at any given time ought to be regarded as essential. Its history demonstrates that they are not.

18 It is true, as the applicant's argument observes, that at common law, when a juror died or became ill, a fresh jury had to be sworn, although sometimes the remaining jurors were re-empanelled and a fresh juror sworn[8]. But this was inconvenient, and is even more obviously inconvenient in modern times of long trials and increasingly crowded court lists[9].

19 Before Federation, there was legislation in Victoria which empowered a trial judge to order that a criminal trial continue with fewer than 12 jurors[10]. Section 628 of the *Criminal Code Act* 1899 (Qld) provided that if a juror died or became incapable of continuing to act, a criminal trial could proceed with not less than 10 jurors, provided the accused and the prosecutor consented. To like effect was s 625 of the *Criminal Code Act* 1902 (WA). This had been foreshadowed in the Criminal Code Bill of 1899 of Western Australia. In New Zealand, s 408(4) of the *Criminal Code* provided that if one or more jurors

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7 (1993) 177 CLR 541 at 550-552.

8 *Wu v The Queen* (1999) 199 CLR 99 at 106 per Gleeson CJ and Hayne J.

9 199 CLR 99 at 106 per Gleeson CJ and Hayne J.

10 *Juries Act* 1876 (Vic), s 35; *Juries Act* 1890 (Vic) s 88. See also *R v Burns* (1883) 9 VLR (L) 191; *R v Allen* (1886) 12 VLR 341.

became incapable of continuing to act, a criminal trial could proceed with the remaining jurors, provided the accused and the prosecutor consented. Similar legislation was enacted in the other States, and in the United Kingdom, early in the twentieth century[11].

20 There is, therefore, no historical foundation for a claim that the context in which the Constitution was framed suggests that "trial … by jury" in s 80 means a trial at which a verdict is given by no fewer than 12 jurors. On the contrary, modification of this feature of jury trials, to meet the kind of problem to which s 22(a)(i) of the *Jury Act* is addressed, was well known.

21 The function of jury trial is not such as to make it essential that the common law rule be preserved in its full rigour. Adopting a functional approach to questions of the validity of State legislation permitting juries of a lesser number than 12, the Supreme Court of the United States held that such a reduction in numbers was consistent with the corresponding constitutional guarantee. In *Williams v Florida*[12] White J, delivering the opinion of the Court, said:

> "The purpose of the jury trial … is to prevent oppression by the Government … Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12 – particularly if the requirement of unanimity is retained."[13]

22 Those observations apply with even greater force to a system which requires 12 jurors to begin with, but permits the trial to continue with 10 of the

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11 *Juries Act* 1917 (SA), s 109; *Criminal Code Act* 1924 (Tas), s 378(5); *Crimes (Amendment) Act* 1929 (NSW), s 19; *Criminal Justice Act* 1925 (UK), s 15.

12 399 US 78 (1970) at 100.

13 See also *Ballew v Georgia* 435 US 223 (1978); *Brown v Louisiana* 447 US 323 (1980).

original 12 where two have been discharged, and requires a unanimous verdict of the remaining 10. Such a system is not inconsistent with the purposes of trial by jury. In particular, it is not inconsistent with the objectives of independence, representativeness and randomness of selection, or with the need to maintain the prosecution's obligation to prove its case beyond reasonable doubt.

23 Neither history, nor principle, nor authority warrants a conclusion that the meaning of "trial … by jury" in s 80 of the Constitution is inconsistent with the provisions of s 22(a)(i) of the *Jury Act*.

24 The same applies to s 54(b).

25 The statutory provision modifies the common law, but the common law itself changed over time. In *R v Chaouk*[14], Kaye J said:

> "The ancient common law rule was that jurors, once empanelled, were required to remain together until they had delivered their verdict. This involved keeping the jurors confined in the court, separated from all others, without nourishment and fire for their physical comfort. … (I)t is clear that the underlying purpose of the rule was, and remains, to ensure the integrity of the jury's verdict …
>
> In the passage of time, and with changed social conditions and facilities, it was possible to relax some of the rigidity of the rule. This was achieved by legislation …
>
> It is now an exceptional case where jurors are kept together from the commencement of the trial until their discharge after verdict …
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> Nevertheless, the rule remains that there must be no communication, or risk of communication, between outsiders and the jury once they have entered upon their deliberations concerning their verdict. To prevent any such communications, jurors are required to be kept together and separated from other persons. However, some communication by jurors with outsiders is necessary where their deliberations extend beyond the time for a midday meal or overnight. In those circumstances, jurors are subject to the control of keepers sworn to keep them together and separated from outsiders."

26 The effectiveness of jury sequestration has never been absolute. In *R v Young*[15], the English Court of Appeal set aside the verdict of a jury in a murder

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14 [1986] VR 707 at 710.

15 [1995] QB 324.

case because some of the members of the jury, while being kept overnight in a hotel room, used an ouija board to consult the deceased victim as to the identity of his killer. According to the medium, the deceased blamed the accused. This is not an example of modern methods of communication diminishing the effectiveness of procedures designed to safeguard the integrity of a verdict, but it shows that the procedures were never foolproof.

27 One aspect of the jury system that must be capable of changing, and adapting to the circumstances of the time, is the measures that are taken to guard against the danger of jurors being subjected to improper outside influence. That is because the danger itself changes with varying social conditions and methods of communication. Keeping jurors separate during all or part of a trial is only one way of addressing the danger. Jurors are given warnings by trial judges, aimed at reducing the possibility of external influence. Their anonymity is protected so far as practicable. But the potential sources of improper influence are various, and the legislation presently in question is a recognition of the fact that isolating jurors, especially during lengthy trials, may properly be regarded by a trial judge as an unnecessarily oppressive means of achieving the desired end. The ultimate protection in every case must lie in the sense of responsibility of jurors themselves. In 1910, Holmes J, delivering the opinion of the Court, said in *Holt v United States*[16]:

> "… there is force in the judge's view that if juries are fit to play the part assigned to them by our law they will be able to do what a judge has to do every time that he tries a case on the facts without them …"

28 The discretion that is reposed in a trial judge by s 54(b) of the *Jury Act* enables the judge to form an opinion, in the circumstances of a particular case, as to whether separation is incompatible with the need to protect the integrity of the jury's verdict. It is not an essential requirement of trial by jury that there be an inflexible general rule forbidding separation during the whole or any part of a trial.

29 Since s 22(a)(i) and s 54(b) of the *Jury Act* are not inconsistent with the meaning of "trial … by jury" in s 80 of the Constitution, it follows that the applicant's trial was in accordance with the constitutional imperative.

30 Accordingly, no question arises as to whether the conduct of the applicant and his lawyers at the trial was such that, as a consequence of waiver, it is no longer open to the applicant to rely on the arguments he has put to this Court. If the question of waiver had arisen, the decision of this Court in *Brown v The*

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16 218 US 245 (1910) at 249-250.

Queen[17] would have concluded the issue adversely to the respondent, unless the Court had been persuaded to reconsider, and overrule, that decision. The Attorney-General of the Commonwealth, intervening, sought leave to re-open *Brown*. He accepted that he needed leave. Indeed, he also contended that the applicant should be refused leave to re-open two other decisions of the Court which the applicant sought to challenge[18]. Leave to re-open *Brown* was refused.

31 The application for special leave to appeal should be granted but the appeal should be dismissed.

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17 (1986) 160 CLR 171.

18 *Kingswell v The Queen* (1985) 159 CLR 264 and *R v Bernasconi* (1915) 19 CLR 629.

GAUDRON, GUMMOW AND HAYNE JJ.

The issues

32 At the trial on indictment of the applicant for an offence against a law of the Commonwealth, a jury of 12 was empanelled but, in the course of the trial, the membership of the jury was reduced to 10. Further, the jury was permitted to separate after they had retired to consider their verdict. The applicant contends that each of those circumstances had the result that his trial was not "by jury" within the meaning of s 80 of the Constitution.

33 This application for special leave thus turns upon the operation of s 80 of the Constitution and, in particular, the expression "[t]he trial … shall be by jury". The exposition of the right to jury trial may provide the occasion for the exercise of rhetoric. More prosaically, the constitutional expression identifies a particular legal institution which evolved in England over a long period by a combination of common law and statute and, after some vicissitudes[19], was adopted and developed in the Australian colonies. That development has continued in the Australian States since federation; some of that development the applicant seeks to measure against the requirements of s 80.

34 Looking at the subject shortly after the commencement of the Australian Constitution, but from a federal and State perspective in the United States, Professor A W Scott made observations which are pertinent to the present application. He wrote[20]:

> "Perhaps the most striking phenomenon in the history of our procedural law is the gradual evolution of the institution of trial by jury. The jury as we know it today is very different from the Frankish and Norman inquisition, out of which our modern jury has been slowly evolved through the centuries of its 'great and strange career.'[21] It is different from the assizes of Henry II, that great reformer of procedural law. It is different from the trial by jury known to Lord Coke and to the

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19 See *Wu v The Queen* (1999) 199 CLR 99 at 112 [42]; Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* (Supp) 49 at 52-53.

20 "Trial by Jury and the Reform of Civil Procedure", (1918), 31 *Harvard Law Review* 669 at 669-670. See also *Lipohar v The Queen* (1999) 74 ALJR 282 at 296-297 [81]-[82]; 168 ALR 8 at 28-29.

21 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898), Chs 2-4.

early American colonists who carried to a New World the principles of English jurisprudence.[22] 'To suppose,' says Edmund Burke, 'that juries are something innate in the Constitution of Great Britain, that they have jumped, like Minerva, out of the head of Jove in complete armor is a weak fancy, supported neither by precedent nor by reason.'[23] In England there has been a wonderfully steady and constant development of trial by jury from the Conquest to the present day. In this country surely it was not, by the adoption of our constitutions, suddenly congealed in the form in which it happened to exist at the moment of their adoption."

The facts and the legislation

35 The Commonwealth Director of Public Prosecutions presented in the District Court of New South Wales in Sydney an indictment charging Stephen Wayne Beaufils and Anthony John Brownlee with conspiracy to defraud the Commonwealth contrary to s 86A of the *Crimes Act* 1914 (Cth)[24]. The trial commenced on 29 April 1996 after the empanelment of a jury of 12. The jury, which by then had been reduced to 10 in number, retired to consider its verdict on the afternoon of Wednesday, 3 July 1996. They returned their verdict on the afternoon of Monday, 8 July. The jury had been permitted to separate after each day's deliberations and over the weekend of 6 and 7 July.

36 Appeals were instituted both by Mr Brownlee and Mr Beaufils, but the latter appeal was abandoned. The New South Wales Court of Criminal Appeal (Grove J, Bruce J and Cooper A-J) dismissed Mr Brownlee's appeal[25].

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22 In the seventeenth century the jurors still were expected to decide on their own knowledge of the facts and not merely upon the evidence. Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 170-174.

In the early colonial legislation we see recognition of the function of jurors as witnesses. "It is very requisite that part of the jury, at least, come from [the neighbourhood where the fact was committed] who by reason of their near acquaintance with the business may give information of divers circumstances to the rest of the jury." 2 Hening's Va Stat L 63.

23 Burke, *The Works of the Right Honourable Edmund Burke*, 3 ed (1869), vol 7 at 115.

24 Section 86A was repealed by s 8 of the *Crimes Amendment Act* 1995 (Cth), which substituted the present s 86.

25 *R v Brownlee* (1997) 41 NSWLR 139.

37 The circumstances in which the membership of the jury was reduced were explained as follows by Grove J, who delivered the judgment in the Court of Criminal Appeal. His Honour said[26]:

> "An estimated duration of four to six weeks had been announced. On 23 May 1996, one juror was discharged in the light of acknowledgment that the estimate would be overrun and inevitably clash with travel arrangements previously made by that juror. That order was made by the learned trial judge without objection on behalf of either the Crown or defence. His Honour raised the question of potential difficulties arising out of the extended length of trial and invited the remaining eleven jurors to communicate any problems to him. In response a note was received indicating that another juror wished not to continue as he was a self-employed farmer and yet another expressed concern about his employment situation. The self-employed farmer was discharged from the jury on the application of counsel for the appellant, supported by counsel for the Crown. Counsel for the appellant also applied for discharge of the third juror but this was opposed by the Crown and no order was made.
>
> The trial continued to conclusion with the court being constituted by the presiding judge and ten jurors."

38 For that continuation with reduced numbers, reliance was placed upon s 22 of the *Jury Act* 1977 (NSW) ("the Jury Act") and, for the separation of the jury, upon s 54 of that statute.

39 The applicant sought, out of time, special leave to appeal against the dismissal of his appeal by the Court of Criminal Appeal. On 11 February 2000, this Court (Gaudron, Gummow and Hayne JJ) granted the necessary extension of time but dismissed the special leave application save for so much thereof as raises the issues whether s 68 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") operated at the applicant's trial to pick up s 22 and s 54(b) of the Jury Act. Their Honours ordered that these issues be referred to the Full Bench of the Court and detailed argument upon these issues has now taken place.

40 The District Court was exercising federal jurisdiction invested by s 68 of the Judiciary Act. In particular, sub-s (2) of s 68 provides that the several courts of the State exercising jurisdiction with respect to the trial and conviction on indictment of persons charged with offences against the laws of the State:

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26 (1997) 41 NSWLR 139 at 141.

> "shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth".

41 No question arises here respecting the validity of any law which mandates the empanelling of a jury of less than 12 persons for a trial on indictment of an offence against a law of the Commonwealth[27]. Sections 19, 20 and 21 of the Jury Act deal respectively with the number of jurors in criminal proceedings, civil proceedings and coronial inquests. Section 19 states:

> "The jury in any criminal proceedings in the Supreme Court or the District Court is to consist of 12 persons returned and selected in accordance with this Act."

The term "criminal proceedings" is defined in s 4(1) as meaning proceedings for the prosecution of offenders on indictment and certain proceedings under the *Mental Health Act* 1958 (NSW). The present controversy as to jury numbers arises from reduction in the course of the trial from 12 to 10 and the return of the verdict by that depleted body.

42 The applicant contends that the limitation contained within s 68(2) itself with respect to compliance with s 80 of the Constitution operated to deny any operation to s 22 and s 54(b) of the Jury Act; that s 22 and s 54(b) were not "picked up" at the applicant's trial; that the reliance nevertheless placed upon them at the trial produced the result that the applicant was denied the trial "by jury" mandated by s 80 of the Constitution; and that the Court of Criminal Appeal had been obliged to set aside the conviction.

43 Section 54 of the Jury Act states:

> "The jury in criminal proceedings:
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> (a) shall, unless the court otherwise orders, be permitted to separate at any time before they retire to consider their verdict, and
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> (b) may, if the court so orders, be permitted to separate at any time after they retire to consider their verdict."

44 The complaint here concerns the operation of par (b), separation after retirement to consider the verdict, rather than separation at any earlier stage. In

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27 cf *Williams v Florida* 399 US 78 (1970); *Ballew v Georgia* 435 US 223 (1978).

argument before this Court, there was some debate as to whether, in addition to orders which had been made under par (a) at adjournments, an order under par (b) had been made in terms before the jury retired. This point was not taken in the Court of Criminal Appeal and it is not within the scope of the live issues on this special leave application. Moreover, the record of what transpired at the trial is incomplete. The matter should be approached in this Court on the footing that an order under par (b) was made, the issue being as to its constitutional efficacy.

45 Section 22 of the Jury Act provides:

> "Where in the course of any trial or coronial inquest any member of the jury dies or is discharged by the court or coroner whether as being through illness incapable of continuing to act or for any other reason, the jury shall be considered as remaining for all the purposes of that trial or inquest properly constituted if:
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> (a) in the case of criminal proceedings, the number of its members:
>
> (i) is not reduced below 10,
>
> (ii) is reduced below 10 but approval in writing is given to the reduced number of jurors by or on behalf of both the person prosecuting for the Crown and the accused or each of the accused, or
>
> (iii) is reduced below 10 but not below 8 and the trial has been in progress for at least 2 months,
>
> (b) in the case of civil proceedings, the number of its members is not reduced, in the case of a jury of 4, below 3 or, in the case of a jury of 12, below 8, or
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> (c) in the case of a coronial inquest, the number of its members is not reduced below 4,
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> and if the court or the coroner, as the case may be, so orders."

46 Various issues respecting the construction of s 22 were considered by this Court in *Wu v The Queen*[28], but not with respect to a trial on indictment of an offence against a law of the Commonwealth. At the trial of Mr Brownlee, two

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28 (1999) 199 CLR 99.

members of the jury were discharged for reasons other than incapacity through illness, and the number of members of the jury was not reduced below 10. It thus is apparent that the issue for determination here is focused upon par (a)(i) of s 22. It is unnecessary for the determination of the present application to reach any conclusion respecting the compatibility of par (a)(iii) with s 80, but further reference to it will be made later in these reasons. Paragraph (a)(ii) contemplates reduction to any number below 10 provided there is approval in writing by the prosecution and the accused.

47 It should be noted that the special leave application has been argued on the footing that, as a consequence of the reasoning and decision in *Brown v The Queen*[29], if reduction in jury numbers below 10 cannot stand with the requirement of s 80 for trial "by jury", then, notwithstanding par (a)(iii) of s 22 of the Jury Act, that deficiency could not be remedied by waiver.

48 It also has been assumed that, if any reduction in the course of trial in the number of jurors to below 12 would conflict with the imperative imposed by s 80, that deficiency could not be remedied by waiver. The Attorney-General of the Commonwealth, who intervened in opposition to the special leave application, sought leave to re-open *Brown*. That leave was refused in the course of the hearing. No issue concerning the application to this case of the reasoning in *Brown* or the correctness of *Brown* itself would arise for decision unless in either or both of the respects urged by the applicant for special leave the conduct of his trial had failed to meet what was required by s 80. As will appear, laws in terms of s 22(a)(i) and s 54(b) of the Jury Act are compatible with the command in s 80.

49 In their judgment in *Cheng v The Queen*[30], Gleeson CJ, Gummow and Hayne JJ, after observing that s 80 imposes various imperatives upon trials on indictment of offences against Commonwealth law, added[31]:

> "For example, if a trial is not held in the State where the offence against Commonwealth law was committed (because the locus of the crime in question is determined not by the place where the physical act causing injury was done – the State of trial – but by the place where the injury was sustained) any conviction would be liable to be set aside on the

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29 (1986) 160 CLR 171.

30 (2000) 74 ALJR 1482 at 1487 [29]; 175 ALR 338 at 344.

31 (2000) 74 ALJR 1482 at 1487-1488 [30]; 175 ALR 338 at 344.

ground that the trial had not been held in accordance with the command in s 80[32]. This result would not involve any holding that a particular law was invalid for non-compliance with s 80; rather, the trial process itself would have miscarried. On the other hand, a statute which stipulated in respect of trials on indictment of an offence against Commonwealth law a method of trial other than by jury would represent legislative disobedience to the constitutional command and therefore the law would be invalid."

50 In the present case, if, on its proper construction, s 68 of the Judiciary Act had purported to operate with respect to the trial of the applicant by giving the imprimatur of Commonwealth law to s 22(a)(i) and s 54(b) of the Jury Act, and if those provisions were repugnant to the constitutional requirement that the applicant's trial be "by jury", then, to that extent, s 68 would be invalid. Further, those provisions of the Jury Act nevertheless having been applied and the applicant having been convicted in reliance upon them, the conviction would be liable to be set aside; the trial had not been held in accordance with the command in s 80. However, as has been pointed out, s 68(2) itself is drawn so as to be subject to s 80 of the Constitution. Therefore, no question of the invalidity of s 68 itself arises. Rather, the question is whether, in the events that happened, the trial process miscarried because the trial was not held in accordance with the command in s 80.

51 Nevertheless, it is convenient to approach the issues which arise by asking whether laws in the terms of s 22(a)(i) and s 54(b) of the Jury Act are compatible with the command in s 80 of the Constitution. In our view, the discharge of a juror by the court in reliance upon a provision to the effect of s 22, so that the number of members of a jury of 12 is not reduced below 10, involves no incompatibility with s 80. The same is true of permission to separate by order made under a provision to the effect of s 54(b).

The institution of trial by jury

52 In *Cheatle v The Queen*[33], this Court referred to the legislative steps as a result of which, by 1900, trial by jury was firmly established in each of the federating colonies as "the universal method of trial of serious crime". The Court continued[34]:

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32 cf *Ward v The Queen* (1980) 142 CLR 308.

33 (1993) 177 CLR 541 at 551.

34 (1993) 177 CLR 541 at 552.

> "It follows from what has been said above that the history of criminal trial by jury in England and in this country up until the time of Federation establishes that, in 1900, it was *an essential feature of the institution* that an accused person could not be convicted otherwise than by the agreement or consensus of all the jurors. It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history[35]. In the context of the history of criminal trial by jury, one would assume that s 80's directive that the trial to which it refers must be by jury was intended to encompass that requirement of unanimity." (emphasis added)

53 The expression "the essential features of a trial by jury" earlier had been used by O'Connor J in *Huddart, Parker & Co Proprietary Ltd v Moorehead*[36]. Quick and Garran, in their discussion of s 80 of the Constitution[37], had referred to the decision of the United States Supreme Court in *American Publishing Company v Fisher*[38]. That litigation had concerned the civil jury. The Supreme Court decided that litigants in common law actions in the courts of the Territory of Utah had a right to trial by jury which involved unanimity in the verdict. Delivering the judgment of the Supreme Court, Brewer J said[39]:

> "Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right."

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35 See, eg, *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J; *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 521 per Latham CJ; *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 411-412; *R v Snow* (1915) 20 CLR 315 at 323; *Smith v Alabama* 124 US 465 at 478-479 (1888); and see also Dixon, *Jesting Pilate*, (1965) at 174, 198-202, 203-213.

36 (1909) 8 CLR 330 at 375.

37 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 810.

38 166 US 464 (1897).

39 166 US 464 at 468 (1897). This passage was adopted by Evatt J in *Newell v The King* (1936) 55 CLR 707 at 713.

Earlier, in *Walker v Southern Pacific Railroad*[40], in speaking of the command of the Seventh Amendment to the United States Constitution that "the right of trial by jury shall be preserved", Brewer J had said[41]:

> "Its aim is not to preserve mere matters of form and procedure but substance of right."

The result, as later explained by Brandeis J in *Ex parte Peterson*[42], is that the Seventh Amendment permits the use of new devices "to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice". Later, in *Patton v United States*[43], Sutherland J said that the phrase "trial by jury" in the criminal trial provisions of Art III, s 2, cl 3 and the Sixth Amendment:

> "includes all the essential elements as they were recognized in this country and England when the Constitution was adopted".

54 This distinction between the essential and the inessential has been drawn by *Cheatle* into the constitutional doctrine respecting s 80 of the Constitution. In the present case, the question becomes whether a reduction, for cause shown to the satisfaction of the court, in the number of jurors from 12 to no fewer than 10 and the permission for the jury to separate after they had been charged to consider their verdict involve changes to the details of the conduct of jury trial mandated by s 80 or destroy an essential feature or fundamental thereof. Classification as an essential feature or fundamental of the institution of trial by jury involves an appreciation of the objectives that institution advances or achieves.

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40 165 US 593 (1897).

41 165 US 593 at 596 (1897). See also the judgments of Brandeis J in *Ex parte Peterson* 253 US 300 at 309-310 (1920) and Stone J in *Gasoline Products Co, Inc v Champlin Refining Co* 283 US 494 at 498 (1931).

42 253 US 300 at 309-310 (1920).

43 281 US 276 at 288 (1930).

55 In his judgment in *Ex parte Peterson*[44], Brandeis J referred, with approval, to the article by Professor A W Scott[45], from which a passage has been extracted earlier in these reasons. The learned author also wrote[46]:

> "Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree. The question, it is submitted, should be approached in a spirit of open-mindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not of form."

56 In *Cheatle*, the Court said[47]:

> "Neither the exclusion of females nor the existence of some property qualification was an essential feature of the institution of trial by jury in 1900. The relevant essential feature or requirement of the institution was, and is, that the jury be a body of persons representative of the wider community. It may be that there are certain unchanging elements of that feature or requirement such as, for example, that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State."

57 Subsequently, in *Katsuno v The Queen*[48], Gaudron, Gummow and Callinan JJ, with whose judgment on this point Gleeson CJ agreed, set out that passage, emphasising the third sentence, with its reference to random and impartial selection. Their Honours decided that the jury in *Katsuno* had not been unrepresentative and had been selected from a panel randomly chosen; breaches of the *Juries Act* 1967 (Vic), the State law rendered applicable there by s 68 of the Judiciary Act, had occurred but they had taken place at a point anterior to the

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44 253 US 300 at 310 (1920).

45 "Trial by Jury and the Reform of Civil Procedure", (1918) 31 *Harvard Law Review* 669.

46 (1918) 31 *Harvard Law Review* 669 at 671 (footnote omitted).

47 (1993) 177 CLR 541 at 560.

48 (1999) 199 CLR 40 at 64 [50].

actual selection of the jury and had not denied to the accused his constitutional right to trial by jury[49]. On the other hand, in *Spies v The Queen*[50], Gaudron, McHugh, Gummow and Hayne JJ said there was a real question whether s 68(2) of the Judiciary Act would, consistently with s 80 of the Constitution, "pick up" provisions of State criminal appeal statutes which empowered courts of criminal appeal to substitute, for the verdict of guilty found by the jury in respect of one offence, a verdict of guilty of another offence; the effect of such provisions appeared to be to substitute trial by judge for trial by jury.

Development before federation

58 As with the legal terms "a writ of … prohibition" in s 75(v) of the Constitution and "patents of inventions" in s 51(xviii), an appreciation of the essential characteristics of the legal institution identified as "trial by jury" in prosecutions on indictment is assisted by an understanding of that legal institution at the time of the commencement of the Constitution[51]. That understanding may assist in a perception of the ends sought to be advanced or achieved by the sequestering of the jury and the insistence upon a verdict returned by 12 jurors. The question then is whether these ends are such as to give rise to essential features of the trial by jury stipulated by s 80.

59 At the time of federation, the institution of jury trial had undergone and was continuing to undergo development in various presently significant respects. In England, s 1 of the *Juries Detention Act* 1897 (UK) provided:

> "Upon the trial of any person for a felony other than murder, treason, or treason felony, the court may, if it see fit, at any time before the jury consider their verdict, permit the jury to separate in the same way as the jury upon the trial of any person for misdemeanour are now permitted to separate."

Shortly thereafter, provisions to similar effect were enacted in Western Australia by s 25 of the *Jury Act* 1898 (WA) and in South Australia by *The Juries Separation Act* 1905 (SA). Of such developments, Darling J later said in *R v Twiss*[52] that, although "in the whole course of English history down to 1897 they

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49 (1999) 199 CLR 40 at 65 [52].

50 (2000) 74 ALJR 1263 at 1272-1273 [47]; 173 ALR 529 at 542.

51 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 57 [24]; 176 ALR 219 at 225.

52 [1918] 2 KB 853 at 858.

had been kept locked up", the tendency of legislation had been "to trust jurymen more and to relax the old rule with regard to them."

60 The reference in the 1897 statute respecting separation upon trials for misdemeanour is to the position established by the Court of King's Bench in 1819 in *R v Kinnear*[53]. Abbott CJ referred to the "many instances … of late years, in which such dispersion has been permitted in the case of a misdemeanour"[54]. The Court held that the dispersion of the jury with the permission of the judge in such circumstance did not vitiate the verdict of the jury, at least where there was no suggestion of any misconduct during that separation.

61 The position at common law in cases after the jury decided to retire for the purpose of considering their verdict was described as follows by Sir James Stephen and Herbert Stephen, writing in 1883 in *A Digest of the Law of Criminal Procedure in Indictable Offences*[55]:

> "[A] bailiff is sworn to keep them in some private place without meat, or drink, or fire – candlelight excepted – and neither to speak to them himself (except to ask if they are agreed on their verdict), nor to suffer any other person to speak to them without the leave of the Court."

This situation was ameloriated in England by s 23 of *The Juries Act* 1870 (UK). This allowed the jurors, in the discretion of the judge, the use of a fire and reasonable refreshment, the refreshment to be procured at the expense of the jurors. A more generous provision was recommended in 1897 by Sir Samuel Griffith as s 648 of his draft Criminal Code and was enacted as s 622 of the *Criminal Code* (Q)[56]. However, there remained the strict common law rule that the "jurors may not separate after they embark on their deliberations"[57].

62 In *Wu v The Queen*, Gleeson CJ and Hayne J observed[58]:

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53 (1819) 2 B & Ald 462 [106 ER 434].

54 (1819) 2 B & Ald 462 at 464 [106 ER 434 at 435].

55 Art 293. See also *R v Voss* [1963] VR 22 at 23-24; *R v Gay* [1976] VR 577 at 582-583; *R v Chaouk* [1986] VR 707 at 709-711.

56 See also s 66 of the *Jury Act* 1901 (NSW).

57 *R v Gay* [1976] VR 577 at 583.

58 (1999) 199 CLR 99 at 106 [21].

> "At common law if a juror died or was taken ill a fresh jury had to be sworn[59], although it seems that sometimes the eleven remaining jurors were re-empanelled and a fresh juror sworn in the place of the disabled juror[60]."

63 By 1883, in such circumstances in England it was "not uncommon to swear a new juryman, giving the prisoner his challenges over again, and to read over the Judge's notes of the evidence given, swearing the witnesses afresh, and asking them if the evidence so recorded is true, the prisoner having power to cross-examine further"[61]. In several of the Australian colonies, wider provision was made by statute. In Victoria, s 86 of the *Juries Statute* 1876 (Vic) provided:

> "In the event of the death or illness of any juror during a trial civil or criminal, except for a capital offence, the presiding judge shall have power if he shall think fit to direct that the trial shall proceed with a number reduced in no case to less than five-sixths of the jurors originally impanelled, and the verdict of such remaining jurors shall be a sufficient verdict."

Drunkenness might be of such degree as to be an "illness" within the meaning of this provision[62]. Section 654 of Sir Samuel Griffith's draft Criminal Code of 1897[63] empowered the court, if at any time during the trial a juror became, in the opinion of the court, incapable of continuing to act, and with the consent of the prosecution and of the accused, to discharge that juror and to direct the trial to proceed with the remaining jurors.

64 The state of affairs at the time of federation which is thus disclosed suggests that absolute sequestration of the jury was no longer regarded as an

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59 *Halsbury's Laws of England*, 1st ed, vol 18, par 623.

60 *R v Beere* (1843) 2 Mood & R 472 [174 ER 353].

61 Stephen and Stephen, *A Digest of the Law of Criminal Procedure in Indictable Offences*, (1883), Art 301, fn 1.

62 *R v Allen* (1886) 12 VLR 341.

63 Subsequently enacted as s 628 of the Code (which included a requirement that the number of jurors not fall below 10) and, in Western Australia, as s 625 of the *Criminal Code Act* 1902 (WA). Similar provision had earlier been made in New Zealand by s 408(4) of the *Criminal Code* 1893.

essential element of trial by jury; likewise, the necessity to swear in a fresh jury if a juror died or was taken ill.

Conclusions

65 It may be accepted that what in the past was the strict sequestration of the jury promoted deliberation and attention to the evidence, without distraction of other material not in evidence and the threat of influence by outsiders upon that deliberation. This supported the determination of guilt according to law, with the interposition between the accused and the prosecution of "the commonsense judgment of a group of laymen"[64].

66 However, strict confinement may have retarded rather than encouraged measured group deliberation and, in former times, appeared to be calculated to pressure jurors to reach a unanimous verdict and to do so with expedition. In modern times, the tendency of the law, marked at the time of federation, has been to place more reliance upon the capacity of jurors to heed the directions of the presiding judge as to the conduct of their deliberations, to attend to the evidence and to resist outside influences.

67 We agree with the manner in which the current position was expressed by Grove J in the Court of Criminal Appeal. His Honour accepted the proposition that it is an essential feature of the jury system that the jury should deliberate upon its verdict uninfluenced by an outsider to the trial process. He added[65]:

> "The argument that total and continuing isolation is essential to the meaning of the expression 'trial by jury' where used in s 80 of the *Constitution* rings a little hollow however in the age of mass communication. Actual and potential threats to jury integrity may arise during separations before retirement for deliberation and there is apparent community acceptance that safeguards inherent in the trial process and the supervision of the presiding judge suffice. I perceive no vice in allowing the members of a deliberating jury being dispersed to go about their lawful occasions and reassembling in traditional privacy. It is to be noted that such dispersal occurs as a result of the exercise of discretion in each case and any relevant prevailing circumstances must necessarily be taken into account in deciding whether the jury should or should not remain sequestered.

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64 *Williams v Florida* 399 US 78 at 100 (1970).

65 (1997) 41 NSWLR 139 at 145-146.

> In my view an understanding and construction should be given to the words in s 80 that the framers of the constitutional guarantee intended that a jury exercise its function without fear or favour and without undue influence in the context of community standards and expectations as current from time to time. Section 54 of [the Jury Act] is not incompatible with the constitutional guarantee."

68 There remains the applicant's complaint respecting s 22 of the Jury Act. The origin of the requirement, currently expressed in s 19 of the Jury Act, that the jury in proceedings for the prosecution of offenders on indictment consist of 12 persons rather than some greater or lesser number is lost in the mists of Anglo-Saxon and then Anglo-Norman life and experience[66]. In modern times, the requirement that a jury of 12 be empanelled for a trial on indictment (which may be assumed, for present purposes, to be a central characteristic of trial by jury and mandated by s 80 of the Constitution) is to be supported on utilitarian grounds. It ensures that the trial gets underway with fact-finding entrusted to a group of laymen which is large enough to promote measured deliberation and indicates to the community sufficient participation by its members to vindicate the outcome.

69 Further questions arise where, in the course of the trial, for what appears to the presiding judge to be good reason and in accordance with legislative provision, one or more jurors should be discharged. It may be accepted, as was urged by the Attorney-General of the Commonwealth, that trials in the nineteenth century tended to be much shorter than is so today. This reflects not only the increased complexity of the substantive issues to be tried but the expansion of procedural rights favouring the accused. If, in the circumstances under consideration, a fresh jury must be empanelled, this has consequences not only for the public purse, but also for the individuals involved.

70 In *Wu v The Queen*, Gleeson CJ and Hayne J said[67]:

> "Delay in a trial can work hardship to an accused as well as to witnesses and to jurors. No doubt some persons accused of crime will gladly put off the day of judgment, but delay in the trial of any accused leaves the accused uncertain of his or her fate. That has long been recognised to be a considerable burden upon an accused[68]. And the courts

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66 Forsyth, *History of Trial by Jury*, (1852) at 238-241.

67 (1999) 199 CLR 99 at 106 [19].

68 *Jago v District Court (NSW)* (1989) 168 CLR 23.

> cannot and must not shut their eyes to the consequences of delay upon others – not only to witnesses and jurors but also to all others who seek access to the courts and cannot have their cases tried because of what is happening in cases that are being tried."

71 At the time of federation, legislation in several of the colonies fixed upon the number 10 as the minimum for the remaining jurors whose unanimous agreement would be sufficient to ensure observance of the deliberative process required by the institution of trial by jury. This legislation adapted the institution to what already in the late nineteenth century were perceived to be particular needs, whilst retaining the substantial character of the institution as an efficient instrument in the administration of justice. Current legislation which authorises the discharge of jurors for good cause so that the trial continues with no fewer than 10 jurors is not incompatible with s 80 of the Constitution.

72 It may well be said that questions of degree are involved. However, if 12 be taken as the requisite minimum with which the trial must commence, there is much force in the contention that no reduction below 10 is permissible. Paragraph (a)(i) of s 22 of the Jury Act, which is in issue here, meets that criterion.

73 It follows from what we have said that a real question arises as to whether a trial on indictment for an offence against a law of the Commonwealth may, consistently with s 80 of the Constitution, be continued where a jury of 12 has been reduced below 10, as provided in par (a)(iii) of s 22 of the Jury Act. That speaks of a reduction below 10 but not below eight where the trial has been in progress for at least two months. It also should be emphasised that nothing in these reasons for judgment calls into question under s 80 the use of reserved jurors, under a system such as that considered and upheld in *Ah Poh Wai v The Queen*[69].

74 Special leave to appeal should be granted on the grounds referred to in the order made on 11 February 2000 but the appeal should be dismissed.

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69 (1995) 15 WAR 404 at 415-423, 423-428.

75 KIRBY J. Once again this Court is called upon to give meaning to the "fundamental law"[70] of the "guarantee"[71] of "trial ... by jury" contained in s 80 of the Constitution.

76 Undaunted by earlier[72], and recent[73], rebuffs to others who had relied on s 80 to challenge the validity of a trial at which they were convicted, the present applicant approaches this Court contesting his conviction upon the basis of two alleged defects in his trial. The first is that, during the trial, the jury that convicted him had been reduced from 12 to 10 jurors. The second is that, during deliberations upon their verdict, the jury were not confined together but were permitted to separate. On these grounds, the applicant submits that his trial was not one "by jury", as s 80 of the Constitution requires, and thus that his conviction is invalid.

77 A panel of the Court[74] earlier dismissed all grounds in the application for special leave save those raising the two foregoing points. These points were referred to a Full Court. The Director of Public Prosecutions for the Commonwealth ("the DPP") contested both grounds. He urged that special leave should be refused. The DPP was supported by the Attorney-General of the Commonwealth who intervened. He proposed an additional, and separate, ground for the refusal of special leave, namely that the applicant had waived any objection that he might otherwise have had to the constitutionality of his trial. This argument was embraced, without elaboration, by the DPP. In its path lies a ruling of this Court in *Brown*[75]. That ruling holds that the requirements of s 80, once engaged, cannot be waived by the accused. The Attorney-General of the Commonwealth (with the support of the DPP) sought to argue that *Brown* was

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70 *R v Snow* (1915) 20 CLR 315 at 323 per Griffith CJ.

71 *Brown v The Queen* (1986) 160 CLR 171 at 201 per Deane J ("*Brown*").

72 *R v Bernasconi* (1915) 19 CLR 629; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Kingswell v The Queen* (1985) 159 CLR 264 ("*Kingswell*").

73 *Katsuno v The Queen* (1999) 199 CLR 40; *Re Colina; Ex parte Torney* (1999) 200 CLR 386 ("*Re Colina*"); *Cheng v The Queen* (2000) 74 ALJR 1482; 175 ALR 338 ("*Cheng*"); see also *Wu v The Queen* (1999) 199 CLR 99 ("*Wu*") and *Ah Poh Wai v The Queen* (1996) 14 Leg Rep C24 in which special leave was refused; Simpson and Wood, "'A Puny Thing Indeed' – *Cheng v The Queen* and the Constitutional Right to Trial by Jury", (2001) 29 *Federal Law Review* 95 ("Simpson and Wood").

74 Gaudron, Gummow and Hayne JJ.

75 (1986) 160 CLR 171.

incorrectly decided. At the close of his argument it was stated that: "at least a majority of the Court are of the view that you should not have leave to reopen *Brown*[76]". Once again[77], this ruling presents a question as to whether such leave is required or may, conformably with the Constitution, be imposed on a party who seeks to challenge the correctness of an earlier ruling of the Court about the meaning of the Constitution.

78 A number of State Attorneys-General intervened in the hearing. All of them supported the constitutional validity of the applicant's trial and of the federal law[78] pursuant to which State law[79] had been applied to it. That State law permitted the continuance of the trial with a jury reduced from 12 to 10 jurors and allowed the jury to separate during the trial, including whilst deliberating upon their verdict.

79 In each of the submissions for the States of New South Wales, Victoria and especially South Australia, arguments were advanced concerning the approach to constitutional interpretation that would elucidate correctly the meaning of "trial ... by jury" as it appears in s 80. Indeed, the Solicitor-General for South Australia submitted that the present application required the identification of a consistent principle by reference to which problems as to the meaning of the Constitution, presented by this and future cases, could be decided in a correct and consistent way. Without clarifying this basic matter of approach, (it was suggested) the Court would either persist with, or run the risk of falling into, an error of methodology, inevitably producing erroneous outcomes.

The issues

80 In light of the foregoing arguments, the following issues are presented for decision:

1. Is the practice of the Court of requiring leave, at least in some cases[80], to permit a party to reopen an earlier authority of the Court, consistent with

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76 See transcript of proceedings, 16 November 2000 at lines 3416-3417 per Gleeson CJ.

77 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311; see also *Ha v New South Wales* (1996) 70 ALJR 611 at 614; 137 ALR 40 at 43.

78 *Judiciary Act* 1903 (Cth), s 68.

79 *Jury Act* 1977 (NSW), ss 22, 54.

80 No leave to reopen the matter determined by *Gould v Brown* (1998) 193 CLR 346 was sought, or given, in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 ("*Re Wakim*").

the Constitution, at least where that authority concerns the meaning of the Constitution itself?

2. If not, should the decision in *Brown*[81], to the effect that it is not open to an accused person to waive "trial ... by jury", be reconsidered in the circumstances of this case? If it should, did the applicant in fact waive the objections now propounded to the reduction in the number of his jury and the separation of the jury during their deliberations?

3. If the arguments of waiver are either unavailable to the applicant or rejected, what principle should govern the ascertainment of the content of the phrase "trial ... by jury" in s 80 of the Constitution? Is the meaning of that phrase to be discovered, wholly or mainly, by reference to what, by the common law or by virtue of then enacted statutory provisions, was known to the framers of the Constitution in 1900 concerning the subject of jury trial? Or is the content of the constitutional phrase to be ascertained in some different manner, for example by treating it as an expression of changing content, elucidated by reference to what the words mean, as constitutional words, understood by reading them with today's eyes[82]?

4. Depending on the answer to (3), does the phrase "trial ... by jury" in s 80 of the Constitution require that the "jury" there referred will be, and remain throughout the trial to the announcement of their verdict, a jury of 12 persons, "neither more nor less"[83]?

5. Depending on the answer to (3), does the phrase "trial ... by jury" in s 80 forbid the separation of the jurors during the trial, or at least once the jury have been charged by the trial judge to deliberate upon their verdict?

The facts and common ground

81 So far as is relevant to the foregoing issues, most of the facts are uncontested. Mr Anthony John Brownlee ("the applicant") and a co-accused (who is not involved in these proceedings) were charged with the offence of conspiracy to defraud the Commonwealth, contrary to s 86A of the *Crimes Act*

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81 (1986) 160 CLR 171.

82 *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 396 per Windeyer J.

83 *Thompson v Utah* 170 US 343 at 349 (1898) ("*Thompson*"); *Patton v United States* 281 US 276 at 287 (1930) ("*Patton*").

1914 (Cth)[84]. An indictment was presented against the applicant in the District Court of New South Wales. The case was, therefore, indisputably one involving a "trial on indictment of [an] offence against [a] law of the Commonwealth"[85]. The trial commenced on 29 April 1996. A jury of 12 persons were empanelled and the applicant was put in their charge.

82 On 23 May 1996, when it appeared certain that the trial would overrun its initial estimate of four to six weeks, and be likely to last up to eight weeks or even longer, counsel discussed with the trial judge, in the absence of the jury, the significance for the jurors of the extended duration. The prosecutor requested the trial judge to make inquiries of the jury as to whether this overrun would cause "a problem" so that, if it did, this eventuality could be addressed at that time rather than later. One of the jurors had earlier indicated that she was travelling overseas in June 1996. She asked to be excused. In the submissions put by the applicant's then counsel, no objection was taken to that course. Indeed it was described as "blatant commonsense". The judge excused that juror. Notwithstanding specific reference to the provisions of s 80 of the Constitution, counsel, "in the interests of [his] client", joined in the application that the trial judge invite the other jurors to indicate any difficulties which the extended trial would cause.

83 The outcome of this inquiry was a further application on 23 May 1996 by a juror who was self-employed. Counsel for the applicant is recorded as submitting that this juror too "should be discharged"[86]. Undoubtedly, counsel would have been concerned that a reluctant juror, with his mind on other things, might be resentful towards the applicant. The transcript also records that counsel "further submitted that, in the circumstances, his Honour should discharge the jury now". A third juror sought release from jury service. The request was supported by counsel for the applicant but opposed by the Crown. No order for discharge was made.

84 In giving his reasons for discharging the two jurors who were excused, the trial judge noted that counsel for the applicant "continues his stance that I should

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84 The section has been repealed since the trial but this does not affect the issues before the Court.

85 The terms of the Constitution, s 80.

86 The transcript identifies the statement as having been made by counsel for the co-accused. However, it was agreed that the transcript was incorrect in this respect and should be read in the manner stated; see *R v Brownlee* unreported, District Court of New South Wales, 23 May 1996, transcript of proceedings at 815.

discharge the jury"[87]. He declined to take that course. He did so on the basis that "we are left with the requisite number of ten jurors"[88]. The trial continued.

85 During the trial, the jurors were not confined. After each day's hearing, they were permitted to separate to their homes. On several occasions, the trial judge gave the jurors the standard direction not to discuss the trial other than with each other. These directions were given in appropriately strong language.

86 On 18 June 1996, after the jury panel had been reduced to 10 jurors, and whilst the trial was continuing, a note was sent to the judge which was read onto the record. The jury foreman sought release from that responsibility on the ground that, although he did not know the applicant's co-accused personally, one of the witnesses who had been called for that accused was a friend of the foreman's wife. The note went on:

> "[C]oming from a small community and as [the co-accused] has children in sporting events, as I do, I felt very uncomfortable as foreman in being the one to say guilty or not guilty … and not realising there would be a hassle about changing, I thought it would be best for my family. I would still be quite happy to stay with the jury, even as foreman, not knowing about other people's objections."

87 The jury foreman was brought into court. He was questioned by the judge about the contents of his note. In the course of answering the judge's questions, he revealed that he had discussed with his wife the identity of a witness who was a friend of his wife's. Counsel for both accused objected to the foreman continuing as a juror given what had been revealed, namely that, despite the trial judge's directions, he had discussed the trial with someone other than a fellow juror. Notwithstanding these objections, the trial continued.

88 On 3 July 1996, the trial judge completed his charge to the jury. He instructed the jurors to consider their verdict. Without formal order, the jurors were again allowed to separate on that afternoon. They resumed their deliberations on 4 and 5 July. Again without formal order they were allowed to separate after each day as they were over the weekend of 6 and 7 July. They resumed their deliberations on 8 July, on which day they returned with a unanimous verdict that each accused was guilty. It was on the basis of that

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87 *R v Brownlee* unreported, District Court of New South Wales, 23 May 1996 at 3 per Luland DCJ.

88 *R v Brownlee* unreported, District Court of New South Wales, 23 May 1996 at 3 per Luland DCJ.

verdict that the trial judge entered a conviction against the applicant and subsequently sentenced him to a term of imprisonment.

The decision of the Court of Criminal Appeal

89 The applicant appealed to the New South Wales Court of Criminal Appeal. His grounds of appeal did not raise any objection to the specific matters disclosed in the note of the jury foreman. The only grounds relied upon were those now before this Court. Giving the judgment of the Court[89], Grove J dismissed the appeal. His Honour reviewed the history of jury trial and the decision of this Court in *Cheatle v The Queen*[90] which forbids the "utilisation of a provision in State legislation allowing for majority verdict"[91]. He noted that the jury's verdict in question in this case had been unanimous, although that of a jury reduced to 10 jurors. Whilst observing that reasoning in this Court had, from time to time, made mention of "the full twelve" jurors[92], Grove J was unconvinced that the number 12 was "immutable"[93]. What was "essential", in his Honour's opinion, was that the judgment should be "by one's peers rather than judgment by necessarily twelve of one's peers"[94]. On this footing he concluded that it was permissible to invoke the authority of s 22 of the *Jury Act* 1977 (NSW) ("the Jury Act"). That provision was consistent with the requirements of "trial ... by jury" in s 80 of the Constitution. Touching on the approach to interpretation of the latter, Grove J said[95]:

> "I am unpersuaded that the intention of the framers of the constitutional guarantee was that the jury consist of no number other than twelve. Indeed it would have been easy enough to include the expression 'of twelve persons' – or as is more likely in the context of the times 'of twelve men' – if that limitation were intended. I would not presume that at the

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89 *R v Brownlee* (1997) 41 NSWLR 139, Bruce J and Cooper AJ concurring ("*Brownlee*").

90 (1993) 177 CLR 541 ("*Cheatle*").

91 *Brownlee* (1997) 41 NSWLR 139 at 142.

92 *Newell v The King* (1936) 55 CLR 707 at 712 per Latham CJ noted in *Brownlee* (1997) 41 NSWLR 139 at 144.

93 *Brownlee* (1997) 41 NSWLR 139 at 145.

94 *Brownlee* (1997) 41 NSWLR 139 at 145 referring to *Kingswell* (1985) 159 CLR 264 at 299.

95 *Brownlee* (1997) 41 NSWLR 139 at 145.

> time of Federation those responsible for constituting the Commonwealth of Australia were unaware that, for example, in Scotland, in contrast to England, a criminal jury consisted of fifteen (and under Scottish law a majority of those fifteen were sufficient for conviction but in Australia the issue of majority verdict upon a 'federal' indictment is determined by *Cheatle*)."

90 As to the argument that separation during the jury's deliberation was alien to the constitutional prescription, Grove J's reasons took a different direction. Instead of referring to the "intention of the framers", he referred to present realities[96]:

> "The argument that total and continuing isolation is essential to the meaning of the expression 'trial by jury' where used in s 80 of the *Constitution* rings a little hollow however in the age of mass communication. Actual and potential threats to jury integrity may arise during separations before retirement for deliberation and there is apparent community acceptance that safeguards inherent in the trial process and the supervision of the presiding judge suffice. I perceive no vice in allowing the members of a deliberating jury being dispersed to go about their lawful occasions and reassembling in traditional privacy."

91 In this way, the Court of Criminal Appeal concluded that s 54 of the Jury Act was compatible with the constitutional guarantee. The appeal was, for these reasons, dismissed[97]. It is from that judgment that the present application comes to this Court.

92 The questions for decision referred to the Court as now constituted were expressed to be "whether section 68 of the Judiciary Act 1903 (Cth) operated at the trial of the Applicant to pick up (a), section 22 of the Jury Act ... and (b), section 54B [sic] of that Act". No ground of appeal was filed, nor was any application made, raising a specific objection to the continuance of the trial, having regard to the note and answers of the jury foreman. As that issue had not been canvassed in the Court of Criminal Appeal (where a report from the trial judge might have been available or other evidence admitted) it was accepted by the applicant that it could not be canvassed in this Court. The applicant, nonetheless, relied upon the incident as illustrative of the dangers of jury separation.

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96 *Brownlee* (1997) 41 NSWLR 139 at 145-146.

97 *Brownlee* (1997) 41 NSWLR 139 at 146.

The relevant legislation

93 *Trials of federal offences*: Where a State court is exercising federal jurisdiction, as the District Court was in conducting the trial of the applicant, a State procedural law does not apply to the trial of its own force. Federal law is necessary if the State law is to be "picked up" and rendered applicable to such proceedings. This is the purpose of s 68 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act")[98].

94 Section 68(2) expressly refers to s 80 of the Constitution. Strictly this is unnecessary given that the Constitution applies of its own force. Nevertheless, the reference indicates a legislative awareness of the relevance of s 80 in this context. By its own terms, that section, with its reference to "trial ... by jury", to "indictment", and to the holding of the trial "in the State where the offence was committed", sufficiently indicates that legislation, probably State legislation, would be needed to regulate the procedural details of such trials. In every State (and Territory) provision is made by law for the "trial on indictment" of offences[99] and for the detailed regulation of jury trial. Such provisions already existed in Australia at the time of Federation in the colonies that became the States of the Commonwealth. Since that time such laws have been revised and modernised. No general federal law has been enacted to govern the incidents of jury trial of federal offences to the exclusion of State (or Territory) law.

95 *Jury numbers*: In New South Wales, the applicable Act is the Jury Act. Central to the issues in this appeal are two provisions of that Act. The first, s 22, sets out the applicable preconditions and procedures that must be followed to reduce the number of jurors from 12 to a lesser number[100]. This section must be understood in its historical context: the rigid practice that developed in the common law of England[101]; the early struggle in the Australian colonies to establish jury trial of "crimes and misdemeanours … by a jury … of twelve men"[102]; reforms introduced in England to permit the continuance of a criminal

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98 Set out in the reasons of Callinan J at [171].

99 The constitutional "indictment" is sometimes called a "presentment" or "information": *Cheng* (2000) 74 ALJR 1482 at 1501 n 84, 1513-1514 [179], 1529 n 337; 175 ALR 338 at 363, 381, 402.

100 Set out in the reasons of Gaudron, Gummow and Hayne JJ at [45] and in the reasons of Callinan J at [170].

101 *Wu* (1999) 199 CLR 99 at 111 [40].

102 *Jurors and Juries Consolidation Act* 1847 (NSW), s 17; see *Wu* (1999) 199 CLR 99 at 112 [42].

trial notwithstanding the discharge of up to two jurors[103]; and the adoption of similar provisions in New South Wales[104], now reflected, and elaborated, in the Jury Act.

96 The provision of the Jury Act invoked in the trial of the applicant was s 22(a)(i). In suggesting that s 22 was, on its face, incompatible with s 80 of the Constitution, the applicant emphasised that under s 22(a)(iii), the jury could ultimately be reduced without consent from 12 to eight jurors. Furthermore, under s 22(a)(ii), with the written consent of the Crown and of every accused, the jury could even be reduced below that number – theoretically to as few as two jurors (it being impossible to contemplate that one person might be called a "jury"). On this footing the applicant submitted that s 22 of the Jury Act was, by its terms, inapplicable to a "trial ... by jury" complying with s 80 of the Constitution. The provision could not, therefore, be "picked up" by s 68 of the Judiciary Act.

97 The applicant further submitted that, in the case of a "picked up" or surrogate federal law, when applied to a trial on indictment of a federal offence, it was impermissible to invoke the State *Interpretation Act*, in respect of the Jury Act s 22, to permit severance of parts of the section[105]. So much may be accepted. However, s 68 of the Judiciary Act contains its own formula for adaptation and severance of parts of otherwise applicable "laws of a State". The section contemplates, expressly, the adaptation of such laws "to section 80 of the Constitution"[106]. It provides that such laws are to "apply and be applied" but only "so far as they are applicable"[107]. Therefore, should the requirements of s 80 of the Constitution necessitate that a "jury", empanelled to try on indictment an offence against federal law, in no case be reduced below, say, 10 jurors[108], such a result could be secured, quite simply, by the application to the Jury Act s 22 of s 68(1) of the Judiciary Act itself. Sub-paragraph 22(a)(i) of the Jury Act would then be treated as "applicable" whereas sub-pars (ii) and (iii) would be disregarded as inapplicable. The language and structure of s 22 facilitate such differentiation.

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103 *Criminal Justice Act* 1925 (UK), s 15; see *Wu* (1999) 199 CLR 99 at 113 [43].

104 *Crimes (Amendment) Act* 1929 (NSW), s 19.

105 *Interpretation Act* 1987 (NSW), s 31.

106 *Judiciary Act* 1903 (Cth), s 68(2).

107 *Judiciary Act* 1903 (Cth), s 68(1).

108 cf *Ballew v Georgia* 435 US 223 (1978) ("*Ballew*") concerning juries of five and six jurors.

98 *Jury separation*: So far as concerns the separation of the jurors during the trial, the applicable provision of the Jury Act is s 54[109]. This provision dates from 1987[110]. In colonial times, no power existed in New South Wales to permit a jury in criminal proceedings to separate. A provision for that purpose was first added to the *Jury Act* 1912 (NSW) in 1924[111]. It appeared in s 27(3) of that Act and read:

> "(3) Upon the trial of any person for a felony other than murder, treason, or treason felony, the Court may, if it sees fit, at any time before the jury consider their verdict, permit the jury to separate in the same way as the jury upon the trial of any person for misdemeanour are permitted to separate."

99 With these legislative provisions, and their history, in mind, I turn to the issues for determination in this application[112].

The supposed need for leave to re-argue constitutional holdings

100 With due respect to those of a different view[113], in my opinion it is appropriate to deal first with the arguments about waiver. If those arguments are legally available, and applicable to the facts, none of the other constitutional issues needs to be decided.

101 The applicant invoked the decision in *Brown*[114] in which this Court held that an accused could not waive the requirements of s 80 of the Constitution in a trial to which those requirements were otherwise applicable. The applicant suggested that, before the Commonwealth (supported by the DPP) could be heard to challenge the ruling in *Brown*, leave of the Court was required and should not be given. The Solicitor-General of the Commonwealth accepted this impediment. He sought leave. By majority, it was refused. With respect, I do not accept that such leave is required. I regard it as a procedure incompatible with the Constitution.

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109 Set out in the reasons of Gaudron, Gummow and Hayne JJ at [43] and the reasons of Callinan J at [170].

110 *Jury (Amendment) Act* 1987 (NSW), Sch 1(10).

111 *Crimes (Amendment) Act* 1924 (NSW), s 34.

112 See above at [80].

113 See eg reasons of Gleeson CJ and McHugh J at [15], [30].

114 (1986) 160 CLR 171.

102 It has long been accepted that this Court is not bound by its previous decisions. However, where this Court has construed the Constitution in a particular way, and especially where that construction has endured for a time, "great caution" is exercised in giving effect to an opinion contrary to past authority[115]. Strong reasons are required, including in constitutional cases[116], to sustain a departure from settled rulings[117]. Nevertheless, the need to demonstrate such strong reasons to overturn contrary authority should not be elevated to impose a procedural obstacle which could, and sometimes would, operate to prevent such grounds even from being argued.

103 From the early days of this Court the interpretation of the Constitution, as the fundamental law of the nation, was viewed as occupying a special place, so far as the reopening of previous rulings was concerned. The explanation for this position was given by Isaacs J, by reference to the practice of the Privy Council and the Supreme Court of the United States[118]. It was described as deriving from the fidelity which each Justice of the Court owed to "the organic law of the Constitution first of all"[119]. It is to the Constitution and to the laws that are made, or exist, under it that "[o]ur sworn loyalty" is owed[120].

104 This special status of constitutional authority doubtless derives, in part, from the paramount importance of the Constitution to the entire body of the law in Australia. No law in the land, including the common law, may be inconsistent with constitutional precepts[121]. Mistakes occurring at the source can have serious and enduring results downstream. In part, the recognition of a special status for

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115 *Eastman v The Queen* (2000) 74 ALJR 915 at 957 [239]; 172 ALR 39 at 96 ("*Eastman*"); *Nguyen v Nguyen* (1990) 169 CLR 245 at 269.

116 *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (*Thomas' Case*) (1949) 77 CLR 493 at 496; *Hughes and Vale Pty Ltd v State of New South Wales* (1953) 87 CLR 49 at 102.

117 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 620.

118 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278-279.

119 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278.

120 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278.

121 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566.

constitutional decisions derives, historically, from the reservation to this Court of primacy in constitutional decision-making[122], even at the time when the Privy Council was part of the Australian judicature. This was a primacy that has now given way to exclusive superintendence over every part of Australian law. The reservation to each Justice of a right, and obligation, to expound the Constitution may therefore be traced to the evolutionary nature of constitutional law. Sharp changes of authority[123] and acute differences of opinion that sometimes arise[124] illustrate, and reflect, the diversity of views out of which the law, responding to changing times and the changing composition of the Court, emerges over time.

105 If constitutional interpretation in Australia were nothing more than a search for the "intentions" of the framers of the document in 1900, doubtless a single answer would, theoretically, be available as to the meaning of every word of the Constitution. Such meaning would be found in history books; not by legal analysis. But if, as I would hold, the text of the Constitution must be given meaning as its words are perceived by succeeding generations of Australians, reflected in this Court[125], it is imperative to keep the mind open to the possibility that a new context, presenting different needs and circumstances and fresh insights, may convince the Court, in later times and of later composition, that its predecessors had adopted an erroneous view of the Constitution.

106 I take these to be some of the considerations that lay behind the dissent of Deane J in *Evda Nominees Pty Ltd v Victoria*[126] where his Honour rejected the supposed necessity for a party to secure leave to reargue a constitutional holding. It is a party's right to advance before this Court any argument that may assist the Court to reach the correct exposition of the meaning of the Constitution. It is incompatible with the constitutional function of the Court to impose on a party a procedural obstacle that might impede that party's submissions to the Court on such a subject. The position of interveners may be different. In the present case, it is unnecessary to explore that question. This is because the DPP adopted the Commonwealth's submissions about waiver.

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122 Constitution, s 74.

123 As in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*") (1920) 28 CLR 129 at 141-143; *Cole v Whitfield* (1988) 165 CLR 360.

124 As in *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1.

125 *Payroll Tax Case* (1971) 122 CLR 353 at 396; *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

126 (1984) 154 CLR 311 at 316; see also *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399.

107 There is an additional practical reason why the foregoing should be so. The history of the Court demonstrates, many times, how changes in circumstances and in membership of the Court can alter the outcome of great constitutional questions[127]. Sometimes a minority view on the meaning of the Constitution will be propounded, contrary to authority accepted to that time, only to emerge later as the doctrine of the Court[128]. If a barrier of leave could be imposed by a majority of Justices, to nip in the bud constitutional propositions inimical to their expressed opinions, the advance and change of the Court's understanding of the Constitution, including that held by those for the time being in a minority, could be thwarted[129]. There is no warrant in the text of the Constitution for assigning to some Justices of the Court a right to prevent others, in effect, from even considering, with the benefit of full argument, and deciding, points of constitutional principle which parties before the Court wish to propound. No doubt if a Justice or Justices find that their receptiveness to a new argument is not shared by the majority, they would ordinarily cooperate in the expeditious consideration of the point. The Court might, for practical reasons, impose time limits, require written submissions or implement other like procedures. But the exclusion of argument by a requirement to obtain leave is an impermissible barrier to the elucidation of constitutional meaning. It is incompatible with the text of the Constitution. It is the duty of this Court to uphold the meaning of that text as it is properly understood – not as a majority of Justices for the time being understand it.

108 It follows that no obstacle of obtaining leave exists, or may exist, in this Court to impede the duty of the Court to rule on the argument of the DPP, that the applicant, by his conduct at the trial, waived his objections to the two grounds on which he now relies.

There was waiver and it was fatal to the applicant

109 *There was waiver in fact*: I therefore proceed to consider the argument of waiver. The first question is whether, in the facts shown, what the applicant did, including through his then counsel, amounted to waiver. If it did not, the

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127 A most vivid and recent illustration is found in *Re Wakim* (1999) 198 CLR 511 at 597-598 [179]-[180].

128 Thus Isaacs J dissented from the "reserved State powers" doctrine in *R v Barger* (1908) 6 CLR 41 at 105 and in other decisions prior to the *Engineers' Case* in 1920 when the doctrine was changed.

129 See eg Murphy J's dissent in *Buck v Bavone* (1976) 135 CLR 110 at 132 prior to *Cole v Whitfield* (1988) 165 CLR 360.

argument of waiver, even if legally available, would not avail the DPP and so should not be considered in this matter.

110 For the applicant, so far as the first point (reduction in the number of jurors) was concerned, emphasis was laid upon the fact, as recorded by the trial judge, that counsel had "continue[d] his stance that I should discharge the jury"[130]. However, that was a position adopted only after the discharge of the second juror. The applicant had earlier raised no objection to the discharge of the juror with travel commitments. On the contrary, his counsel actually joined in the request to the judge that he make inquiries of that juror. Although reference was made, during the argument at the trial, to s 80 of the Constitution, the applicant did not then submit that that provision stood as a complete barrier to the applicability of s 22 of the Jury Act. On the contrary, his submissions inferentially accepted that s 22(a)(i) applied and, so far as the first discharged juror was concerned, that she should be relieved of further jury duty. The same position was adopted in respect of the second discharged juror. Counsel for the applicant "submitted that he should be discharged". The subsequent submission that the remaining jurors should be discharged was not a negation of the applicability of s 22 of the Jury Act. It was an invocation of that Act, in effect requesting the trial judge not to order that the trial should continue as "properly constituted". There is therefore no material before the Court to suggest that the applicant did not make an informed choice in advance of the submissions put to the trial judge by his then counsel. Had any such suggestion been made, it would doubtless have been tested at the trial, in the Court of Criminal Appeal or before this Court in disposing of this application.

111 So far as the separation of the jurors is concerned, the transcript of the trial reveals that the judge permitted the jurors to separate each day during the hearing. There is no record of any objection to that course by, or for, the applicant. Specifically, no objection was raised to the separation of the jurors during the four days on which they were deliberating upon their verdict, including during the two intervening weekend days. From the record, it does not appear that the trial judge specifically ordered that the jurors be permitted to separate after they had retired to consider their verdict. Under the Jury Act, such an order is necessary at that stage of the trial[131]. A similar lack of attention to the requirements of the Act was called to notice in *Wu*[132]. There, by majority, this Court did not permit the invalidity of what had occurred, in the absence of an order by the trial judge, to ground a late basis for challenge to the trial, not

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130 *R v Brownlee* unreported, District Court of New South Wales, 23 May 1996 at 3 per Luland DCJ.

131 *Jury Act* 1977, s 54(b).

132 (1999) 199 CLR 99 at 120-121 [61]-[62].

having been raised earlier as a ground of appeal[133]. No such attempt was mounted in this application.

112 It must therefore be accepted that the jury's separation, whilst considering their verdict, was permitted by the trial judge. Certainly, there was no indication of any objection to such separation by, or for, the applicant. This is a circumstance in which the law of waiver applies. If a party (at least one legally represented) wishes to contest a point, that party should, ordinarily, take that point by objection duly recorded during the trial. Doing so permits timely consideration to be given to the objection. The point having been raised in the applicant's trial it would have enlivened the attention of the trial judge and the prosecutor, to the terms of s 80 of the Constitution and s 54(b) of the Jury Act. In the result, no attention was given to the second objection on which the applicant now relies.

113 The inescapable inference is therefore that the applicant was content to have the jury separate (as they had done throughout the trial) to their homes. The want of any objection to that course *might* be explained by oversight. But it might equally have been a tactical decision. A jury, separated from their families and confined to rooms in a hotel or motel, might be under greater pressure to reach a quick decision instead of weighing carefully (as the applicant's jury obviously did over several days) the competing arguments of the parties. Therefore, if waiver of any requirements of jury trial on the part of an accused person is permissible under s 80 of the Constitution, the conduct of the applicant amounted to a relevant waiver of each of the points that he now seeks to advance. But is that conclusion legally relevant?

114 *In law the waiver is effective*: In *Brown*[134] this Court, by a narrow majority[135], held that the terms of s 80 of the Constitution precluded an accused person from electing, pursuant to the *Juries Act* 1927 (SA), s 7(1), to be tried for an indictable offence against a law of the Commonwealth by a judge alone. The essential reason of the majority was that, from its language and context, s 80 of the Constitution established a requirement which was for the protection of the whole community. It was to be distinguished from the provisions of the United States Constitution in respect of which waiver of jury trial by an accused had

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133 (1999) 199 CLR 99 at 121-122 [64]-[66].

134 (1986) 160 CLR 171.

135 Brennan, Deane and Dawson JJ; Gibbs CJ and Wilson J dissenting.

been permitted[136]. Emphasis was placed on the fact that s 80 appears within Ch III of the Constitution[137]; the imperative language of s 80 itself[138]; and the fact that the jury requirement was not, in this country, merely a "right" in "the accused"[139] but a "structural or organizational" mode of trial ordained, as well, for the benefit of society[140]. In such circumstances, it was held that it was not for the accused to waive the mandatory requirement of the section where it was engaged. Still less was it for the accused to waive the interests of society as a whole where the section had been engaged[141].

115 Because, as *Brown* demonstrates, minds can differ on this point, I have hesitated to reach a view different from that expressed in that decision. To some extent, the majority were affected by a view of s 80 of the Constitution that it represents a "constitutional guarantee" and not merely a procedural provision, as it had sometimes been viewed in this Court to that time and since. I do not dissent from this premise. Similarly, I do not find particularly helpful the views of the minority in *Brown* addressed to the "plausible supposition" that the question of waiver "did not enter the minds of the framers of the Constitution"[142] and thus was not part of the concept of "trial ... by jury" which s 80 mandates. However, as I shall elaborate, the essential characteristics of such jury trial are not discovered by searching for the contents of the minds of the framers in 1900, whether for the subjective or "objective" knowledge to be attributed to those gentlemen. The phrase is a constitutional expression. History may assist, particularly as "trial ... by jury" describes a legal proceeding long known in the history of common law countries. But it may not dictate the meaning of the phrase, confining it to understandings of those words as they existed over a century ago.

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136 *Patton* 281 US 276 (1930); *Adams v United States; Ex rel McCann* 317 US 269 (1942); *Singer v United States* 380 US 24 (1965); cf *State of Iowa v Henderson* 287 NW 2d 583 at 585 (1980).

137 *Brown* (1986) 160 CLR 171 at 203 per Deane J (referring to *R v Bernasconi* (1915) 19 CLR 629 at 637), 208 per Dawson J.

138 *Brown* (1986) 160 CLR 171 at 196 per Brennan J, 203 per Deane J.

139 United States Constitution, Sixth Amendment; see *Brown* (1986) 160 CLR 171 at 204 per Deane J, 209 per Dawson J.

140 *Brown* (1986) 160 CLR 171 at 210 per Dawson J.

141 *Brown* (1986) 160 CLR 171 at 197 per Brennan J, 201-202 per Deane J, 208-209, 214 per Dawson J.

142 *Brown* (1986) 160 CLR 171 at 183 per Gibbs CJ; see also at 189 per Wilson J.

116 To hold that an accused, when indicted of an offence against a law of the Commonwealth, cannot, in any circumstances, waive "trial ... by jury" contradicts the fact that, whatever the community wishes, or whatever its interest may be, the accused can indeed cut short "trial ... by jury", even in the middle of such a trial, by an informed and competent decision to plead guilty to all counts of the indictment. When such a decision is made and accepted, the remaining questions in the trial will be decided by a judge sitting alone.

117 Moreover, to adapt and update what was said by Gibbs CJ in *Brown*, to forbid informed waiver on the part of an accused would impose a most capricious operation upon s 80. It would hold that the section demands that an accused person *must* accept trial by jury, although there is an alternative procedure which the accused would prefer to adopt. It would do this notwithstanding the fact that, on this Court's present authority, the procedure of trial by jury only applies where the prosecution in fact proceeds on indictment[143]. Indeed, although it applies, in some circumstances "aggravating factors" can lawfully be reserved to a judge sitting alone and never be passed upon by the jury[144]. If s 80 of the Constitution can so easily be avoided or confined, to the disadvantage of the accused, it is hardly convincing, in the matter of informed waiver, to force the mode of trial provided in the section on the accused, contrary to that accused's interests and desires. In *Cheng*, McHugh J correctly remarked[145]:

> "Many accused persons would not regard the mandatory requirement of a jury trial as conferring any benefit on them. Those charged with offences likely to arouse public indignation, such as cases involving sexual or other crimes against children, for example, or those accused who have raised mental illness as a defence, often prefer trial by judge to trial by jury when they are able to elect for trial by judge. To some accused, trial by jury is not a boon."

118 In addition to these considerations, criminal charges, including those to be tried on indictment against a law of the Commonwealth, often extend today to complex commercial and corporate offences for which trial by judge (or magistrate) alone will be quicker, cheaper and sometimes susceptible to greater rationality and less rhetoric than trial by jury. The instant case, where the trial

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143 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Spratt v Hermes* (1965) 114 CLR 226 at 244; *Kingswell* (1985) 159 CLR 264; *Cheng* (2000) 74 ALJR 1482; 175 ALR 338.

144 *Cheng* (2000) 74 ALJR 1482; 175 ALR 338; cf *Apprendi v New Jersey* 68 USLW 4576 (2000); see also Simpson and Wood, (2001) 29 *Federal Law Review* 95 at 99.

145 (2000) 74 ALJR 1482 at 1508 [150]; 175 ALR 338 at 373.

greatly exceeded the original estimates of time, may be an illustration. Where such criminal accusations depend, substantially, on analysis of written documentation, scrutiny of complex corporate structures and dealings, and the application of detailed and ambiguous statutory provisions, trial by judge (or magistrate) alone may be as much in the interests of the community as of the accused. Not the least relevant consideration is the larger effective facility for appeal against the reasoned decision of a judicial officer when compared with the much more limited facilities of effective appeal from a conviction following a jury verdict. To deny an accused, in such circumstances, the right to waive "trial ... by jury" as provided in s 80 of the Constitution is, in the words of Frankfurter J, delivering the opinion of the Court in *Adams v United States; Ex rel McCann*[146], "to imprison a man in his privileges and call it the Constitution".

119 A final consideration supporting this conclusion is that the decision in *Brown* is inconsistent with the approach which this Court has taken to a different, but somewhat analogous, problem. In respect of apprehended bias on the part of a judicial officer, which likewise concerns not only the party to litigation but also the public, this Court has held that it is possible for the party to waive the complaint[147]. Presumably, such waiver is accepted not only for the party itself but also for the general community whose interest is likewise involved[148].

120 *Conclusion on waiver*: Accordingly, with due respect to the majority in *Brown* who accepted the opposite view, I do not consider that the existence of a privilege to waive "trial ... by jury" is incompatible with the essential characteristics of jury trial or with the purposes for which s 80 of the Constitution provides that mode of trial. It follows that the applicant waived his objection to the reconstitution of the jury by the 10 remaining jurors and to the continuance of the trial with the jury so constituted. He also waived any objection to the separation of the jury whilst they were considering their verdict. On this basis, whilst granting special leave, I would dismiss the appeal against the judgment of the Court of Criminal Appeal.

121 This conclusion strictly relieves me of the obligation to consider the other matters argued in this Court. However, because of the importance of those matters, and because the Court, by a majority, has declined to reopen the ruling

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146 317 US 269 at 280 (1942); see *Brown* (1986) 160 CLR 171 at 189 per Wilson J.

147 *Vakauta v Kelly* (1989) 167 CLR 568 at 587; cf *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 373 referring to *United States v Lustman* 258 F 2d 475 at 478 (1958).

148 *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 307 [170]; 176 ALR 644 at 687.

in *Brown* and to reconsider the basis on which I would resolve the matter, it is appropriate that I should address the applicant's remaining arguments. But first, it is necessary to consider submissions about the proper approach to the construction of s 80 of the Constitution.

The approach to construction: Jury trial in 2001 not 1900

122 I accept the submission, advanced for South Australia, that it is necessary, in elucidating the meaning of s 80 of the Constitution (or any other provision), to have a theory about constitutional interpretation. Otherwise, the result will inevitably be inconsistent decisions reflecting no more than the intuitive responses to the text of the Constitution by different Justices (or of the same Justices at different times).

123 The submissions for South Australia identify a number of suggested inconsistencies in the ascertainment of the meaning of the Constitution if the accepted criterion is what would have been known to, or in the contemplation of, the framers of the Constitution in 1900[149]. By the same token, that State's submission is critical of my own approach[150], which holds that constitutional expressions must be given contemporary meaning, as befits the character of a national basic law, which is extremely resistant to formal amendment, but which must, of necessity, apply to new, unforeseen and possibly unforeseeable circumstances[151].

124 The ambivalence about adopting a 1900 criterion for the content of "trial ... by jury" can be illustrated by reference to many actual decisions of this Court. For example, there is no doubt that, in 1900, unanimity was a requirement for the

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149 Comparing *McGinty v Western Australia* (1996) 186 CLR 140 at 230-232 and *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 118-119 with *Re Wakim* (1999) 198 CLR 511 at 551-554 [40]-[47] and *Eastman* (2000) 74 ALJR 915 at 936-941 [134]-[158]; 172 ALR 39 at 66-74.

150 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 400-401 [132]; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 581-582 [203]; *Re Wakim* (1999) 198 CLR 511 at 599-600 [185]-[186]; *Re Colina* (1999) 200 CLR 386 at 422-423 [96]; *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648 at 669-671 [110]-[118]; 170 ALR 111 at 139-142; *Eastman* (2000) 74 ALJR 915 at 958-959 [242]-[249]; 172 ALR 39 at 96-99; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJR 52 at 79-81 [136]-[143]; 176 ALR 219 at 256-258; *Crampton v The Queen* (2000) 75 ALJR 133 at 154 [114]; 176 ALR 369 at 397.

151 See Simpson and Wood, (2001) 29 *Federal Law Review* 95 at 111-112.

verdict of a criminal jury. So was the fact that all jurors were male[152]. And that they all had to satisfy property qualifications of some kind[153]. Similarly, a very long list of exemptions from jury service was formerly provided[154] which, in New South Wales as elsewhere, have since been substantially curtailed[155]. These provisions reflect the characteristics thought, at the time, to be essential to the type of "right thinking man" who could be trusted with the serious responsibilities of jury service.

125 In *Cheatle*, this Court swept aside the characteristics of trial by jury in 1900 involving only male persons and property owners, describing such requirements as "undesirable"[156]. The explanation given for that conclusion was that such qualifications were not compatible with a "contemporary institution" or "modern democratic society"[157]. I agree both with the conclusion and with the propounded criterion by which, in *Cheatle*, the concept of "trial ... by jury" was, in these respects, adapted to the modern Australian conditions in which Ch III, and s 80 specifically, have to apply. But I point out that, once such considerations are accepted as apt to modify notions concerning the "essential feature of the institution of trial by jury in 1900"[158], it is impossible (except in the realm of fiction) seriously to suggest that the conduct of "trial ... by jury" in 1900 remains the universal criterion for the understanding of those words as they appear in the Constitution today. Either one adheres to the historical notions of 1900, and takes the mind back to what the framers knew and understood about jury trial, or one accepts that the constitutional expression must be given a "contemporary" meaning, as befits a "modern democratic society".

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152 *Jury Act* 1912 (NSW), s 3. The inclusion of women in juries in New South Wales did not occur until 1947: *Jury (Amendment) Act* 1947, s 3(3) inserting s 3A in the 1912 Act.

153 Abolished in New South Wales when entitlement to be enrolled as an elector was substituted as the usual qualification for jury service: *Jury (Amendment) Act* 1947 (NSW), s 2(3)(a) amending s 3 of the 1912 Act.

154 *Jury Act* 1912 (NSW), s 5.

155 *Jury Act* 1977 (NSW), s 6(b), Sch 2. This is a universal development: Kirby, "Delivering Justice in a Democracy III – the Jury of the Future", (1998) 17 *Australian Bar Review* 113 at 118.

156 (1993) 177 CLR 541 at 560.

157 *Cheatle* (1993) 177 CLR 541 at 560.

158 *Cheatle* (1993) 177 CLR 541 at 561.

126 Because, by definition, the world of the framers was not that of today's Australians, it is misleading, and prone to result in serious error, to accept as the applicable principle of constitutional interpretation the "intention" of those who framed it. One thing the framers certainly knew was that they were creating a new polity to be governed indefinitely by a fundamental written law. That document appears in statutory form. Its meaning is therefore uncovered by the general techniques of statutory construction[159]. However, because the Constitution is a special statute of a peculiar kind for particular purposes and unique operation, the rules of construction applicable to it include some that are special, particular and unique. Even with ordinary legislation, expected to have an extended operation, it is increasingly accepted that language lives and meaning adapts to changed circumstances. Words are not necessarily confined to the meaning that would subjectively have been ascribed to them by the Parliament that enacted them[160]. This is even more true of constitutional words and phrases[161]. A recognition of this fact does not render wholly irrelevant the consideration of history – as in the debates that preceded adoption of the Constitution[162]. But it does limit the utility of such searches when the real consideration is what those words and phrases mean in their contemporary institutional setting and as they must operate in accordance with the "accepted standards of a modern democratic society"[163], such as the Constitution was adopted to provide.

127 The siren song of 1900 does not therefore become more attractive by embracing the fiction (propounded by South Australia) that an "intention" of the framers of the Constitution in 1900 can be "objectively" discovered. Some such fictitious reification of the ideas of 1900 would certainly be necessary if countless instances by which this Court has adapted constitutional language to contemporary circumstances were to be explained[164]. Only an explanation of

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159 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 581-582 [203].

160 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 is a good illustration of this.

161 *Re Wakim* (1999) 198 CLR 511 at 553 [45] per McHugh J.

162 *New South Wales v The Commonwealth* (*The Incorporation Case*) (1990) 169 CLR 482 at 511-512; cf *Cole v Whitfield* (1988) 165 CLR 360 at 385.

163 *Cheatle* (1993) 177 CLR 541 at 560.

164 *McGinty v Western Australia* (1996) 186 CLR 140 at 200-201; *Langer v The Commonwealth* (1996) 186 CLR 302 at 342; cf *Sue v Hill* (1999) 199 CLR 462. The reification of legal language is a common professional inclination: *R v Storey* [1998] 1 VR 359 at 380 n 87 noted in *R v Olbrich* (1999) 199 CLR 270 at 282 [30].

such a kind could then justify, for example, the apparent inconsistency between the interpretation of "appeal" in s 73 of the Constitution as excluding, rigidly, the exceptional receipt of evidence by this Court in disposing of an appeal[165] whilst allowing adaptation of the word, beyond 1900 understandings, to include, for example, appeals from an order in a hypothetical case stated or in Crown appeals, unknown in 1900[166]. No fiction could disguise the inconsistencies inherent in such an approach. Either this Court should adhere to construing the words of the Constitution according to the understandings of 1900, or it should accept another approach, such as I favour. In my respectful opinion, a hybrid approach is intellectually incoherent.

128 This is not a theoretical problem in the present application. Indeed, the importance of resolving the approach to constitutional interpretation is illustrated by the two features of "trial ... by jury" which the applicant propounded in objection to his conviction. Take, first, the question of separation of the jury after it has been charged to consider its verdict. I deal with that objection first because, upon it, the law in 1900 is clear and unyielding. In no part of Australia in 1900 would such separation by jurors have been permitted in a "trial on indictment of *any* offence"[167]. If the criterion for the meaning of jury trial, envisaged by s 80 of the Constitution, is what the framers would have regarded as essential to the character of jury trial in 1900, there can be little doubt that they would have considered it unthinkable, bordering on the scandalous, that a jury could separate, go home and reconvene at the very time when they were deliberating on the guilt of the accused in their charge.

129 By definition, in 1900, the trial on indictment of an offence was an extremely serious matter. It exposed the accused, if found guilty, to conviction and punishment, including in many cases, to the punishment of death. The notion that the jurors should be removed from the risk of external influence by anyone outside their number, during such a critical time, would have been axiomatic in 1900. Traditionally, the jury were "locked up" in the courthouse or some convenient location nearby during the entire trial, including any adjournment of the trial[168]. This was done to prevent tampering with, or influencing, the jury[169]; to impress upon the jurors and others the solemn

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165 *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman* (2000) 74 ALJR 915; 172 ALR 39.

166 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289.

167 Constitution, s 80 (emphasis added).

168 *Trial of John Horne Tooke* (1794) 25 St Tr 1 at 131-132; *R v Stone* (1796) 6 TR 527 [101 ER 684].

169 See *Goby v Wetherill* [1915] 2 KB 674.

responsibility which they had assumed; to insulate jurors from rumours and prejudice apt to circulate, especially during a trial for a notorious crime[170]; as well as to promote discussion amongst the jurors leading to their verdict without unnecessary delay. It would have been realised in 1900, as much as today, that such strict rules occasioned inconvenience and hardship, as well as expense, falling at that time principally upon the jurors themselves[171]. Slowly, during the twentieth century, the strict rule was modified. It was modified by statute; but rarely by the judges who were usually reluctant to bring about any change[172].

130 Whereas a discretion in the trial judge to allow jurors to separate was recognised before 1900 in the case of a trial on indictment for a misdemeanour[173], it took legislation to permit any separation at all in a trial on indictment for a felony. This change was not accomplished in England until 1897[174]. Even then, there were important exceptions[175]. The only similar legislation enacted in the Australian colonies before 1900 was the *Jury Act* 1898 (WA)[176]. That Act permitted the jury to separate during intervals of the trial but not in a case where the offence was punishable by death. Similar laws were enacted in a number of the States soon after Federation[177]. But they were not immediately universal. Before 1900, the relaxation of the strict rule of the common law was nowhere extended to the period after the jury had retired to consider their verdict[178].

131 If, then, the criterion of what "trial ... by jury" in s 80 of the Constitution means is what was regarded as an essential character of that mode of trial in

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170 *R v Taylor* [1950] NIR 57 at 71-73.

171 Cornish, *The Jury* (1968) at 145; *R v Chaouk* [1986] VR 707 at 710 ("*Chaouk*").

172 *Ah Poh Wai v The Queen* (1995) 15 WAR 404 at 421.

173 *R v Woolf* (1819) 1 Chitty's Rep 401 at 420-422, 425, 427-428.

174 *Juries Detention Act* 1897 (UK); see *R v Twiss* [1918] 2 KB 853 at 858.

175 *Juries Detention Act* 1897 (UK), s 1 excepting trials for murder, treason and treason felony.

176 s 25.

177 *Juries Separation Act* 1905 (SA); *Criminal Code Act* 1902 (WA), s 618, later re-enacted as s 639; cf *Juries (Amendment) Act* 1993 (Vic), s 9 inserting s 51A into the *Juries Act* 1967 (Vic); *Juries Act* 2000 (Vic), s 50.

178 Barry, "On the Segregation of Jurors", (1953) 6 *Res Judicatae* 139 at 155; *R v Gay* [1976] VR 577 at 582-583.

1900, I do not doubt that this would have included non-separation during deliberation. Indeed, that rule persisted in Australia as one of most stringent observance long after 1900, indeed well into the last decades of the twentieth century. It was regarded as a cardinal feature of jury trial[179]. It was not merely a desirable practice, open to be breached as well as observed[180]. The very language of the statutory provisions, permitting derogations from the strict rule, in the specified cases and subject to the procedural rules laid down, shows how, in 1900, non-separation during deliberation would have been a universally recognised incident of "trial ... by jury"[181].

132 Because the statutory modification of the rule against non-separation had only just been enacted in England, and in one Australian colony, before 1900 (and was then limited to "intervals of the trial" and excluded capital cases) by whatever fiction or reification we choose, it cannot be pretended that the framers of the Constitution would have contemplated separation during deliberation as a feature of jury trial as *they* conceived it. By statute, for the better part of the twentieth century in New South Wales, separation at a time after the jury began to consider their verdict was completely impermissible[182]. The rigour of the rule was illustrated in Australia as late as 1986[183].

133 This discussion demonstrates the dilemma for those who adhere to the 1900 criterion in construing our Constitution[184]. Either they must indulge in false history, laying emphasis on exceptional straws in the wind to ascribe extraordinary prescience to the framers. Or they must embrace counter-factual fictions about what those framers would have intended[185]. Or they are forced to adopt a hybrid criterion that (in respect of the sex and property qualification of

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179 See *Goby v Wetherill* [1915] 2 KB 674 at 675 setting aside a verdict because a town sergeant was present during the jury's deliberations.

180 See *R v Taylor* [1950] NIR 57 at 67-69.

181 *R v Taylor* [1950] NIR 57 at 71-72.

182 See *Jury Act* 1912 (NSW), s 27(3) as amended by the *Crimes (Amendment) Act* 1924 (NSW), s 34.

183 *Chaouk* [1986] VR 707.

184 Further illustrations of their problem are given in *Grain Pool (WA) v The Commonwealth* (2000) 74 ALJR 648 at 669-671 [110]-[118]; 170 ALR 111 at 139-142.

185 Stoljar, "Counterfactuals in Interpretation: The Case Against Intentionalism", (1998) 20 *Adelaide Law Review* 29.

jurors, mentioned in *Cheatle*[186]) gives a passing nod to the intention of the framers in 1900 but hurries back to the attributed features of the "trial ... by jury" as a "contemporary institution" according to the "generally accepted standards of a modern democratic society"[187]. The present application demonstrates vividly why the 1900 criterion is unacceptable. It shows how, at least in *Cheatle* and in respect of s 80 of the Constitution, it is contradicted by the observations of the Court about the "characteristics of trial by jury in 1900" which the Court unanimously discarded because it regarded them as "undesirable"[188].

134 A similar point may be made by reference to a consideration of the applicant's argument that, in 1900, the notion of "trial ... by jury" "intended" by the framers of the Constitution, would have envisaged a verdict of 12, and not 10, jurors. It is true that before 1900 laws had been enacted in two of the Australian colonies[189], and in New Zealand[190], for continuance of a trial in certain limited circumstances where a juror had died or was incapable of continuing to act as such. This had been permitted by a law which provided that a criminal jury of not fewer than 10 jurors of those originally empanelled was permissible. A like provision was adopted in another State of Australia soon after Federation[191]. Analogous laws were enacted elsewhere in later years[192]. However, such laws scarcely afford proof of the development, as at 1900, of a strong exception to the ordinary common law rule. That was a rule that had endured for more than six centuries. By the common law, to convict a person tried on indictment before a jury, the unanimous verdict of 12 jurors was required[193]. In both unanimity and the number of jurors was thought to reside assurances against the risk of a serious miscarriage of justice.

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186 (1993) 177 CLR 541 at 560.

187 *Cheatle* (1993) 177 CLR 541 at 560.

188 *Cheatle* (1993) 177 CLR 541 at 560.

189 *Juries Statute* 1876 (Vic), s 86 (see *R v Burns* (1883) 9 VLR (L) 191 at 194 and *R v Allen* (1886) 12 VLR 341); *Juries Act* 1890 (Vic), ss 37, 88; *Criminal Code Act* 1899 (Q), s 628.

190 *Criminal Code Act* 1893 (NZ), s 408(4).

191 *Criminal Code Act* 1902 (WA), s 625.

192 *Juries Act* 1917 (SA), s 109; *Criminal Code Act* 1924 (Tas), s 378(5); *Criminal Justice Act* 1925 (UK), s 15; *Crimes (Amendment) Act* 1929 (NSW), s 19.

193 *Thompson* 170 US 343 at 349-350 (1898).

135 In so far as there were exceptions to these requirements of jury trial in 1900, provided by statutes in jurisdictions not governed by a fundamental law such as s 80 of the Constitution, they were expressed in terms that differed one from the other. Moreover, they uniformly excluded trials for murder and for certain other capital cases[194]. Certainly, in New South Wales, in 1900, there was no facility at all to accept a verdict from a jury comprising fewer than 12 jurors. If, therefore, the criterion of the "intention of the framers" of the Constitution in 1900 governs this case, it is highly doubtful that the constitutional notion of "trial ... by jury" had, by 1900, been adapted and modified by the statutory alterations made in only two colonies and then with exceptions that otherwise sustained the rule of 12 jurors which had lasted so long.

136 It follows that, on this footing, the applicant has a powerful case to argue that, in the constitutional context, the requirement of 12 jurors was as much entrenched in the history of jury trial, and in the applicable considerations of principle and authority, as the rule of unanimity which *Cheatle* held to be inherent in the very notion of the constitutional jury. But if, on the other hand, the phrase "trial ... by jury" in s 80 of the Constitution is not controlled by what in 1900 the framers "intended", actually or by any fiction, considerations of a broader character, apt to an enduring constitutional phrase performing the purposes envisaged for s 80, may lead to a different conclusion.

137 I reject the approach to constitutional construction that would limit the meaning to be given to jury trial in s 80 to the notions held about that mode of trial by the framers of the Constitution in 1900. A recognition of the difficulties inherent in that approach surfaced in the submissions for New South Wales and Victoria. In the former, it was acknowledged that the drafters of the Constitution intended "evolution" in the nature of the institution to continue. If such "intention" is relevant, it accepts that notions of what "trial ... by jury" might include, accepted in 1900, could not forever govern the meaning of the constitutional expression. Similarly, the submission for Victoria invited this Court to perform a balancing exercise so as to "mould" the requirements of jury trial as contemplated by s 80 to the needs of "any particular case", presumably as those "needs" are judged by reference to contemporary ideas and values.

138 It will take time for the search for constitutional meaning by reference to the imputed "intention of the framers" in 1900 to be abandoned in favour of a search for the essential characteristics of words and phrases having enduring constitutional operation. But, as this Court embarks on the second century of the Constitution, it may be expected that the unreliability of the past criterion, and

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194 *R v Charlesworth* (1861) 1 B & S 460 at 502 [121 ER 786 at 802]; see *Caledonian Collieries Ltd v Fenwick* (1959) 76 WN (NSW) 482 at 488-492 with respect to civil cases.

the demonstrated ambivalence of past practice, will indicate ever more clearly the error inherent in "faint-hearted originalism"[195]. It will show the need for a different principle of interpretation, one appropriate to the task of giving effect to the nation's fundamental law. Without a clear principle, consistently applied, the outcomes of constitutional disputes are bound to evidence inconsistency and to elicit deserved criticism[196].

A verdict from 12 jurors is not constitutionally essential

139 I turn, therefore, to consider the essential characteristics of "trial ... by jury", referred to in s 80 of the Constitution, as that expression is to be understood as a constitutional requirement, viewed in its context in Ch III and from the perspective of contemporary considerations that identify the essential characteristics of that mode of trial in Australia.

140 Various attempts have been made, in this Court and elsewhere, to explain those characteristics that may be taken as incorporated in the constitutional expression. In 1909, O'Connor J, writing of trial by jury under s 80 of the Constitution, described it as "the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in a civil litigation or in a criminal process"[197]. In 1986, Deane J saw as the essence of jury trial the assembly of a panel of "ordinary and anonymous citizens" who were, in a sense, "representative of the general community"[198]. This notion that jurors represent the diversity of the community recurs in numerous decisions of this Court[199]. To some extent there appears to be a tension between the idea that jurors will represent a cross-section of the community and the notion that they will afford an "impartial" mode of trial[200]. However, these

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195 *Eastman* (2000) 74 ALJR 915 at 937 [140]; 172 ALR 39 at 68 per McHugh J referring to an expression used by Scalia J.

196 Simpson and Wood, (2001) 29 *Federal Law Review* 95 at 103-111.

197 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375.

198 *Brown* (1986) 160 CLR 171 at 202.

199 *Cheatle* (1993) 177 CLR 541 at 560; *Kingswell* (1985) 159 CLR 264 at 301-302; *Wu* (1999) 199 CLR 99 at 114 [45].

200 See Art 14.1, *International Covenant on Civil and Political Rights*, done at New York on 19 December 1966; (1980) *Australia Treaty Series* No 23 (entered into force 13 November 1980); (1976) 999 *United Nations – Treaty Series* 171; (1967) 6 ILM 368.

features can be reconciled, as the Supreme Court of Canada explained in *R v Biddle*[201]:

> "[R]epresentativeness is a characteristic which furthers the perception of impartiality even if not fully ensuring it. While representativeness is not an essential quality of a jury, it is one to be sought after. The surest guarantee of jury impartiality consists in the combination of the representativeness with the requirement of a unanimous verdict."

141 Obviously, to the extent that the jury were reduced from the conventional number of 12 jurors, typically observed in serious criminal trials in Australia, the risk that the jury might not, even in a general way, be "representative" of the community is increased. There is, then, a danger to the community's perception of the impartiality of the jury and thus to the community's unquestioning acceptance of jury verdicts in serious criminal matters[202].

142 In the United States of America, attempts to explain the essential characteristics of "trial by jury" have typically identified three main considerations. One of these is not presently material and is, in any case, uncontroversial. It is that the jury will participate in the formal process of a criminal trial under the supervision of a judge who has the power to instruct the jury as to the law and to remind them of the facts[203].

143 Secondly, the rule of unanimity of jury verdicts has been held necessary to the United States constitutional requirements[204]. Although there have been occasional suggestions to the contrary[205], the requirement of unanimity has been accepted as an assurance against dilution of the "reasonable doubt" standard observed in criminal trials. If only one juror has a reasonable doubt as to the guilt of the accused, the latter is entitled to the benefit of that doubt, and should not be convicted.

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201 [1995] 1 SCR 761 at 788.

202 *Kingswell* (1985) 159 CLR 264 at 301 per Deane J.

203 *Capital Traction Co v Hof* 174 US 1 at 13-14 (1899); *Patton* 281 US 276 at 288 (1930).

204 *American Publishing Co v Fisher* 166 US 464 at 468 (1897); *Springville v Thomas* 166 US 707 (1897); *Maxwell v Dow* 176 US 581 at 586 (1900).

205 *Johnson v Louisiana* 406 US 356 at 363 (1972); cf *Williams v Florida* 399 US 78 at 138-139 (1970) per Harlan J (diss) ("*Williams*").

144 Thirdly, there has been much debate in the United States authorities concerning the number of jurors necessary to return a verdict in a jury trial envisaged by the Constitution of that country. More than likely, the framers of the Constitution of the United States would have assumed that the agreement of 12 jurors would be required for a valid verdict[206]. Indeed, it was repeatedly said in the older authorities that the constitutional right to trial by jury included the right to the verdict of the 12 men constituting the jury, neither more nor less[207]. In more recent decisions, however, the Supreme Court of the United States has accepted, as constitutionally valid, a Florida law providing for a six person jury in non-capital cases[208]. A Georgia statute envisaging reduction of the number of such jurors to five was later held unconstitutional[209]. In England, the historical source of jury trial as it is practised in Australia and in the United States, provision is now made by statute for the reduction in the number of jurors necessary in some circumstances to a valid trial from 12 to nine[210]. But in England there is no express constitutional norm against which such statutory provisions must be measured. That is what distinguishes the position in Australia and the United States.

145 In judging what the Constitution of the United States required in terms of the minimal number of jurors, so that the process could still answer to the constitutional description of trial by jury, the Supreme Court, following a review of the history of jury trial before and in the early days after the establishment of the United States, has addressed the "relevant inquiry". This was identified as ascertainment of "the function that the particular feature performs and its relation to the purposes of the jury trial"[211]. That "function" was not the "function" of the jury historically determined by the features of jury trial at the time that the Constitution of the United States or, relevantly, the Sixth Amendment, were adopted. It was, instead, the "function" of the jury determined by reference to the way in which that institution had evolved and operates for constitutional purposes in the United States today.

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206 See *Williams* 399 US 78 at 92, 98-99 (1970).

207 *Thompson* 170 US 343 at 349-350 (1898); *Patton* 281 US 276 at 287-289 (1930).

208 *Williams* 399 US 78 (1970).

209 *Ballew* 435 US 223 (1978).

210 *Juries Act* 1974 (UK), s 16; see *Ah Poh Wai v The Queen* (1995) 15 WAR 404 at 412.

211 *Williams* 399 US 78 at 99-100 (1970) per White J for the Court.

146 A similar functional analysis, and not a purely historical one, must be applied in Australia to determine whether, relevantly, the provisions of s 22 of the Jury Act, are inconsistent with the type of jury trial that s 80 of the Constitution envisages, and thus are "inapplicable" to a trial held in accordance with that provision, as envisaged by s 68 of the Judiciary Act. Only if the mode of trial envisaged by s 22 of the Jury Act is functionally incompatible with the essential characteristics of "trial ... by jury", as that phrase is used in the Constitution, will s 22 be regarded as inapplicable. Only then would it follow that there was no valid statutory warrant for the course which the judge took in the present applicant's trial.

147 What, then, are the functional considerations that permit a distinction to be drawn between a trial that answers to the description of "trial ... by jury" and one that does not? The following considerations inform the answer to that question: (1) the jury must be of a size sufficient to promote group deliberation[212]; (2) there must be a sufficient number of jurors to ensure that the commonsense attributed to a lay jury can be given effect[213], so that a cross-section of community opinion will be expressed and shared amongst the jurors[214]; (3) because an important purpose of trial by jury is to guard individuals from the danger of oppression by the government or by the judiciary[215], the jury rendering a verdict in a criminal trial must be, and remain of, a sufficient number to reflect, in a general way, the variety of opinions that exist in the community concerning society, the law and public authority; (4) there must be sufficient jurors to guard against the force of personality of one or more jurors[216] and to ensure the expression, during deliberation, of any differing viewpoints which can then be shared and evaluated by all of the jurors collectively[217]; (5) the number must also be sufficient to reflect, in a general way, those members of, or acquainted with, minorities within the community so that the dangers of prejudice against an accused, who may be a member of one or more of such minorities, are eliminated or at least reduced[218];

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212 *Williams* 399 US 78 at 100 (1970); *Ballew* 435 US 223 at 230 (1978).

213 *Williams* 399 US 78 at 100 (1970); *Ballew* 435 US 223 at 229-239 (1978).

214 *Williams* 399 US 78 at 100 (1970); *Ballew* 435 US 223 at 229 (1978) citing *Apodaca v Oregon* 406 US 404 at 410 (1972) per White J.

215 *Williams* 399 US 78 at 100 (1970) citing *Duncan v Louisiana* 391 US 145 at 156 (1968).

216 *Ballew* 435 US 223 at 235 (1978).

217 *Ballew* 435 US 223 at 232-234, 241-242 (1978).

218 *Ballew* 435 US 223 at 236-237 (1978).

(6) given that contemporary trials, particularly of federal offences, can be extremely complex and lengthy[219], the inconvenience to the community, to jurors and the cost to parties should not needlessly be incurred by unnecessary termination and re-litigation of jury trials where (as will inevitably happen from time to time) jurors die, fall ill or are otherwise incapable of continuing to act[220]; (7) ultimately "trial ... by jury", being a mode of trial envisaged within Ch III of the Constitution, it is essential that it should continue to hold public confidence and "through the involvement of the public, societal trust in the system as a whole"[221].

148 If the foregoing functional considerations are applied to those provisions of s 22 of the Jury Act that were invoked as applicable to the applicant's trial, I am not persuaded that such provisions offend the constitutional requirements for "trial ... by jury" as those requirements are understood in contemporary Australia. It is beyond doubt that, in comparison with earlier times, criminal trials today typically last longer, are more expensive and involve many more complex issues than previously was the case. The present is not an instance where a federal statute, or State law "picked up" and applied to a federal trial by force of the Judiciary Act, has established a universal rule of trial on indictment of a federal offence by a jury of 10 persons. Such a law would certainly depart both from longstanding English and Australian legal prescription. It would also discriminate between the juries presently summoned to try State indictable offences in Australia. The law said to be "applicable" to the applicant's trial was one expressed in undiscriminating terms. It applied, relevantly, in a way similar to legislation now applicable throughout Australia. Such legislation has existed for a very long time. It is sensible. It is designed to meet exigencies which exceptionally, but occasionally, arise, and more so as criminal trials take longer.

149 As experience in the United States illustrates, in constitutional adjudication of this kind, the drawing of lines is unavoidable[222]. But nothing more need be said to dispose of the first ground of the present application than that s 22(a)(i) of the Jury Act, "picked up" by s 68 of the Judiciary Act, falls on the right side of the line. It is valid. Whatever may have been the assumptions and "intentions" of the framers of the Constitution in 1900, viewed in terms of the function that "trial ... by jury" in s 80 of the Constitution fulfils, the

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219 Australian Institute of Judicial Administration, *Report on Criminal Trials*, Report 48 (1985) at 5-8.

220 *Wu* (1999) 199 CLR 99 at 106-107 [21].

221 *R v Sherratt* [1991] 1 SCR 509 at 524.

222 *Ballew* 435 US 223 at 239, 245-246 (1978); Simpson and Wood, (2001) 29 *Federal Law Review* 95 at 106.

provisions of s 22(a)(i) of the Jury Act meet contemporary Australian notions of that mode of trial. Any other conclusion would result in the needless and accidental termination of many jury trials. Nothing would be more likely to undermine the survival of jury trial. An absolute rule that the jury reaching a verdict, on a count charging an indictable crime, must be a jury of 12 jurors is not, therefore, a requirement that s 80 of the Constitution imposes. It follows that the applicant's first ground of objection to his conviction should be rejected.

The Constitution does not forbid juror separation during deliberation

150 By parity of reasoning, I would conclude that, whatever may have been the assumptions or "intentions" of the framers of the Constitution in 1900, viewed with due regard to the functions of "trial ... by jury" by contemporary Australian standards, the separation of jurors during a trial, and even when deliberating on their verdict, is not incompatible with the constitutional requirement.

151 In earlier times, at least in the estimation of some judges, jurors were "comparatively ignorant, subject to the control of their superiors and easily led astray"[223]. In such times, it was easier for the authorities to leave jurors "'without meat or drinke, fire or candle' until they were starved or frozen into agreement"[224]. If they were unable to reach their verdict, the hapless jurors of those days were driven to the county boundary following the assize judge. Such notions are completely incompatible with the treatment of a jury of Australian citizens today. No historical customs of England or of colonial times in Australia, in 1900 or otherwise, could sustain such treatment.

152 Yet it was not only in colonial times that jurors were dealt with in ways that are now regarded as uncivilised. For the first half of the twentieth century, with all male juries, jurors refused separation were often accommodated in dormitory arrangements that would now be regarded as intolerable. The extent of the change is described by Fullagar J in *Chaouk*[225]. What would once have been regarded as a "gross irregularity in the trial" can, therefore, today, be seen

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223 *Stephens v The People* 19 NY Ct App (5 E P Smith) 549 at 554 (1859) per Strong J.

224 *Cheatle* (1993) 177 CLR 541 at 551 citing Coke, *Institutes*, 19th ed (1832) vol 2, 227b(e) noted in *Wu* (1999) 199 CLR 99 at 111 [40].

225 [1986] VR 707 at 715: "A hundred years ago it would be unthinkable that a criminal court jury whilst considering verdict would walk down Lonsdale Street, Melbourne, at the height of the lunch-hour rush on their way to an hotel for luncheon, escorted by two or three jury keepers."

as a necessary accommodation to ensure the operation and survival of jury trial in contemporary Australia.

153 To exclude from a jury parents with young children or persons caring for sick and elderly relatives, because they could not be separated from their domestic responsibilities for long, or even comparatively short, intervals would reduce considerably the cross-section of the community from whom jurors were drawn. Effectively to impose on jurors a requirement to reach a verdict in haste, in order to avoid the domestic inconvenience of prolonged confinement, could also be seriously unjust both to the parties and the community[226]. To the extent that the circumstances of jury service are unreasonably oppressive and disturbing of the home-life of jurors, it is likely that such considerations would, in practice, result in jurors drawn from a narrow class of citizens. Alternatively, jurors might set about their duties in circumstances that were not conducive to their proper performance of such duties[227].

154 It is for reasons such as these that the features of jury trial in Australia continue to evolve. Nothing expressly stated, nor implied or inherent in s 80 of the Constitution forbids such evolution. To the extent that State legislation permits separation, including during the jury's deliberation upon their verdict, such legislation is "applicable" to a "trial ... by jury" as s 80 envisages it. The criterion is not that of the expectation of jury trials held by the framers of the Constitution in 1900. It is the meaning of that expression, as ultimately declared by this Court, and as it operates in contemporary Australia.

155 In saying what I have on juror separation, I do not mean to imply that there will not be cases where it will be proper and necessary to refuse the separation of jurors during a trial, and particularly whilst the jury are considering their verdict. Although the law assumes that jurors will obey judicial instructions not to discuss the trial with persons outside the jury room, realism obliges acknowledgment of the fact that, especially in stressful and emotion-charged cases tried before criminal juries, jurors will sometimes depart from this instruction because they find the burden of total silence psychologically intolerable. The present case revealed a breach of such a judicial instruction, acknowledged by the jury foreman. In the result, that breach had no serious consequences. But to the extent that a trial involves sensational or highly charged circumstances, that may be reported or even commented upon in the media, the old rule of separation during verdict deliberation will usually still be appropriate, notwithstanding the inconvenience that this causes to jurors. Such

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226 See *Robinson* (2000) 111 A Crim R 388 at 397-398 [68]-[77].

227 See *R v Hambery* [1977] QB 924 at 930; *Tyler v United States* 397 F 2d 565 at 568 (1968).

inconvenience is now ordinarily reduced by accommodation cut off from external contact and not in dormitories. Ensuring the integrity of the jury's deliberations, especially after a long trial which would be extremely costly to repeat, remains a judicial obligation.

156 Moreover, under legislation such as s 54(b) of the Jury Act it is essential to remember that, when a jury has been charged to deliberate on their verdict, no separation should occur without an express order by the trial judge. The making of such an order enlivens, as Parliament envisaged, the judicial evaluation of the applicable considerations. That course was not followed in the present case, doubtless because counsel did not draw the terms of s 54(b) of the Jury Act to the notice of the trial judge. Such provisions should not be ignored.

157 Because I would not, for historical, functional or any other reasons, read into s 80 of the Constitution an element of "trial ... by jury" that would forbid absolutely, and whatever the circumstances, separation of the jurors during deliberation upon their verdict, the applicant's second ground of appeal also fails. In the result each of the grounds of appeal relied on by the applicant is rejected.

Orders

158 I therefore agree in the orders proposed by Gleeson CJ and McHugh J.

159 CALLINAN J. The applicant was charged on indictment with conspiring to defraud the Commonwealth contrary to s 86A of the *Crimes Act* 1914 (Cth). All that need be said of the facts of the case alleged against the applicant is that he joined with others to conceal the receipt of rents from several properties, and to deprive the corporate recipients of those rents of any capacity to pay income tax in respect of them.

160 The applicant was jointly tried with another conspirator, Beaufils. Their trial began on 29 April 1996 before Luland DCJ and a jury of twelve. The trial was expected to last four to six weeks. On 23 May 1996 it became apparent that the trial would be prolonged beyond six weeks. The trial judge, on that date, said that he had in mind to discharge one juror who had a commitment on and from 14 June. The prosecutor raised the possibility that in view of the increased length of the hearing other jurors might be similarly inconvenienced, and that possibility should be raised with the jury. After further discussion between his Honour and counsel (including counsel for the applicant who did not object to that course) the trial judge discharged the juror to whom I have referred. He then informed the other jurors of the increased length of the trial and asked whether any of them would be unable to serve for a longer period. Two of them applied to be excused. The trial judge discharged one of those two. He gave brief reasons for doing so. The transcript of the trial does not make this clear but the position seems to have been that the applicant's counsel submitted that the whole of the jury, and not just one of the jurors, should be discharged. The trial then proceeded with ten jurors.

161 On 18 June 1996 a message was relayed to the trial judge by the foreman of the jury that he wished to relinquish his position. According to the court officer who relayed the message, the foreman had told him this:

> "He just requested that he would like to stand down as foreman. Could someone else do the job because he was sort of reluctant to bring down a decision against a man with four little children. He was a bit worried about the consequences. If he went back to Helensburgh people would hate him or something."

162 The applicant, at this point, made another application for discharge of the whole jury. His counsel said:

> "As foreman he has obviously been taking some sort of leading role or pivotal role. I fear that having his background, that the whole process has been contaminated because the jury has really been perhaps without effective direction. He has obviously disclosed to them that he has a bias, that he knows various witnesses."

163 The trial judge then asked the foreman to state his reasons in writing why he wished to relinquish his position as foreman. The foreman provided this note:

> "My only reasons for wanting to change foreman position was that even though I never knew Mr Beaufils personally, I know the witnesses and one is a friend of the wife's and coming from a small community and as Mr Beaufils has children in sporting events, as I do, I felt very uncomfortable as foreman in being the one to say guilty or not guilty and not realising there would be a hassle about changing, I thought it would be best for my family. I would still be quite happy to stay with the jury, even as foreman, not knowing about other people's objections."

164 The trial judge, after some argument, invited the foreman to come into the Court. During questioning by his Honour the foreman admitted that some of his concerns stemmed from a discussion he had had with his wife about the case.

165 Counsel for the applicant continued to submit that the whole of the jury should be discharged. The trial judge did not accede to this submission and the trial proceeded.

166 The jury retired to consider their verdict on 3 July 1996. The jury was, however, allowed to separate, without any formal order, over a weekend before they brought in their verdict, just as they had each evening and at weekends during the course of the hearing.

167 The applicant was convicted on 8 July 1996. He appealed to the Court of Criminal Appeal of New South Wales.[228] The points taken there were that both s 22 and s 54 of the *Jury Act* 1977 (NSW) ("the Act") were in conflict with s 80 of the Constitution. The Court (Grove J, with whom Bruce J and Cooper AJ agreed) dismissed the appeal.

168 After referring to *Cheatle v The Queen*[229] Grove J said[230]:

> "*Cheatle* established that the expression 'trial by jury' as it appears in s 80 necessarily conveyed that a verdict of guilty could only emerge from unanimity. References in the judgment were made to 'the twelve' but they manifested a literary style and did not focus upon any compulsion to have a unanimity of that precise number."

169 His Honour summed up his views in this passage[231]:

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228 *R v Brownlee* (1997) 41 NSWLR 139.

229 (1993) 177 CLR 541.

230 (1997) 41 NSWLR 139 at 142.

231 (1997) 41 NSWLR 139 at 145.

> "In my view the reduction of the number constituting a jury panel from twelve to ten in accordance with the authority of s 22 of the *Jury Act* does not remove the character of the jury so that the ten persons (whose unanimity is essential for any conviction) cease to be an appropriate body of persons representative of the community in whose judgment confidence is reposed. I am unpersuaded that the intention of the framers of the constitutional guarantee was that the jury consist of no number other than twelve. Indeed it would have been easy enough to include the expression 'of twelve persons' - or as is more likely in the context of the times 'of twelve men' - if that limitation were intended. I would not presume that at the time of Federation those responsible for constituting the Commonwealth of Australia were unaware that, for example, in Scotland, in contrast to England, a criminal jury consisted of fifteen (and under Scottish law a majority of those fifteen were sufficient for conviction but in Australia the issue of majority verdict upon a 'federal' indictment is determined by *Cheatle*)."

And, as to the other ground relating to the separation of the jury Grove J said[232]:

> "In my view an understanding and construction should be given to the words in s 80 that the framers of the constitutional guarantee intended that a jury exercise its function without fear or favour and without undue influence in the context of community standards and expectations as current from time to time. Section 54 of the *Jury Act* is not incompatible with the constitutional guarantee. The second ground of appeal should not be sustained."

The application to this Court

170 The applicant seeks special leave to appeal to this Court. He repeats the arguments advanced by him in the Court of Criminal Appeal. The relevant provisions of the Act are as follows:

> "**Continuation of trial or inquest on death or discharge of juror**
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> 22 Where in the course of any trial or coronial inquest any member of the jury dies or is discharged by the court or coroner whether as being through illness incapable of continuing to act or for any other reason, the jury shall be considered as remaining for all the purposes of that trial or inquest properly constituted if:
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> (a) in the case of criminal proceedings, the number of its members:

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232 (1997) 41 NSWLR 139 at 146.

(i) is not reduced below 10,

(ii) is reduced below 10 but approval in writing is given to the reduced number of jurors by or on behalf of both the person prosecuting for the Crown and the accused or each of the accused, or

(iii) is reduced below 10 but not below 8 and the trial has been in progress for at least 2 months,

…

Jury permitted to separate in criminal trials

54 The jury in criminal proceedings:

(a) shall, unless the court otherwise orders, be permitted to separate at any time before they retire to consider their verdict, and

(b) may, if the court so orders, be permitted to separate at any time after they retire to consider their verdict."

171 Reference should also be made to s 68 of the *Judiciary Act* 1903 (Cth) which applies the laws of the states to criminal trials and which provides as follows:

"**Jurisdiction of State and Territory courts in criminal cases**

68(1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

(a) their summary conviction; and

(b) their examination and commitment for trial on indictment; and

(c) their trial and conviction on indictment; and

(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;

and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

(2) The several Courts of a State or Territory exercising jurisdiction with respect to:

(a) the summary conviction; or

(b) the examination and commitment for trial on indictment; or

(c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

…

(5C) The jurisdiction conferred on a court of a State or Territory by subsection (2) in relation to:

(a) the examination and commitment for trial on indictment; and

(b) the trial and conviction on indictment;

of persons charged with offences against the laws of the Commonwealth, being offences committed elsewhere than in a State or Territory (including offences in, over or under any area of the seas that is not part of a State or Territory), is conferred notwithstanding any limits as to locality of the jurisdiction of that court under the law of that State or Territory."

172 The applicant submits that by the time of Federation, both at common law and by statute the constitution of a jury was entrenched as a jury of twelve people. He further submits that the reasoning and decision of this Court in *Cheatle*[233] support a proposition that whatever were the requirements with respect to both the verdict of the jury, and the composition of it, at the time of Federation, should be regarded as indispensable criteria for a jury within the meaning of "jury" as referred to in s 80 of the Constitution. It is appropriate, in my opinion, to have regard to the position in the colonies at Federation. The difficulty for the applicant, however, is that conditions with respect to the composition of a jury and its quarantining from the public during a trial varied from colony to colony, and did not require that a trial be aborted whenever a

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233 (1993) 177 CLR 541.

juror was unable to serve, or became disqualified from continuing to serve as a juror. Section 80 of the Constitution provides as follows:

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

173 The applicant also submitted that the jurisprudence of the United States with respect to the Sixth Amendment[234] of the Constitution of that country was to the same effect as his submissions. Whether that is so need not be explored here because of the difference between the relevant provisions of that amendment and our Constitution, and the different conditions prevailing at the time of Federation in Australia.

174 There was a further submission that the number twelve has and almost from time immemorial, had a special, indeed almost mystical importance and significance; and only a jury of twelve is likely to ensure the high degree of representation of the general community that the Constitution contemplates.

175 An examination of the laws relating to juries of the various colonies shows that these were by no means uniform and did permit a reduction in the number of jurors during a trial[235]. In early colonial New South Wales, criminal cases were heard by a Judge Advocate and six other commissioned army or naval officers[236]. By 1823, statute required that criminal cases be tried by a judge and a jury of seven commissioned officers[237]. The requirement that a criminal jury comprise

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234 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

235 *Criminal Code Act* 1899 (Q), s 628; *Juries Act* 1876 (Vic), s 86; *Juries Act* 1890 (Vic), ss 37, 38.

236 Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* (Supp) 49 at 52. See also *R v Valentine* (1871) 10 SCR (NSW) 113 at 122 per Stephen CJ, 133-134 per Faucett J.

237 4 Geo IV c 96, s 4, and see the discussion in Evatt, "The Jury System in Australia", (1936) 10 *Australian Law Journal* (Supp) 49 at 53.

twelve laymen was only introduced by legislation in 1839, which was amended in 1847[238].

176 In Tasmania, military juries were used until at least 1834 in criminal matters. By the *Jury Act* 1834, civilian juries of twelve replaced military juries as the triers of fact in both the Supreme Court, and Quarter Sessions in certain proceedings, but military juries were not finally abolished until 1841[239].

177 In Western Australia, rules in relation to juries (including eligibility and exemptions from jury service) were introduced in 1830, and applied at the first sitting of Quarter Sessions in July 1830[240]. By the *Jury Act* 1832 every petty jury for the trial of any issue in any Criminal Court was to consist of twelve men[241] between the ages of twenty-one and sixty years[242] who met property qualifications[243]. Provision was also made for the composition of grand juries[244].

178 In Queensland at Federation, provision for the composition of the jury was dealt with both in the *Jury Act* 1867[245] and the *Criminal Code* enacted by the *Criminal Code Act* 1899. The *Jury Act* 1867 required criminal juries to be comprised of twelve male jurors[246] selected by random ballot[247]. Every man

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238 See *Jury Trials Act* 1839 (NSW), s 40 and *Jurors and Juries Consolidation Act* 1847 (NSW), s 17.

239 See the discussion in Castles, *An Australian Legal History*, (1982) at 273-275.

240 Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979*, (1980) at 15.

241 2 Will IV c 3, s 1.

242 2 Will IV c 3, s 2.

243 2 Will IV c 3, s 2.

244 2 Will IV c 3, ss 1 and 2. The *Jury Act* 1832 also expressly applied to Western Australian juries the same rules and forms as were applicable to juries in the Courts of Record at Westminster Hall or in the Courts of Quarter Sessions of the Peace, to the extent that those rules and forms were not amended by the Act itself: s 1. The *Jury Act* 1832 was partly repealed and replaced by the *Jury Act* 1858 (22 Vict c 7) which contained the same number, gender, age and property qualifications for jurors, but which also included a residential qualification: s 2.

245 As amended prior to 1900 by the *Jury Act of 1867 Amendment Act* 1868 (Q), the *Jurors Act* 1877 (Q), the *Jury Act* 1884 (Q) and the *Juries Act* 1898 (Q).

246 *Jury Act* 1867 (Q), s 24.

between twenty-one and sixty years of age[248] who resided within a jury district was eligible for jury service if he had real estate to the clear value of two hundred pounds, yearly income of fifty pounds in real estate, clear yearly income of one hundred pounds in lands held by lease for twenty-one years or more, if he occupied land assessed of an annual value of not less than twenty-five pounds, if he held land as a tenant at a rent of not less than fifty pounds per year, or if he occupied Crown lands with a clear annual value of twenty-five pounds.

179 In Pt VIII, the *Criminal Code* contained provisions dealing with practice and procedure in relation to juries. In the Draft Criminal Code, Sir Samuel Griffith "endeavoured to embody in the Draft a complete statement of the existing written and unwritten rules respecting procedure after committal, and ... added some rules which dispose[d] of difficulties that not unfrequently [arose] and [had] not been authoritatively settled[249]". Notes included in the Printing of the Draft Criminal Code in 1897 revealed the source of, or referred elsewhere to provisions analogous to, each of the provisions Sir Samuel Griffith had included[250]. Where a draft clause reflected "undoubted Common Law" Sir Samuel noted that this was the case[251], and when a draft clause was entirely new, Sir Samuel also indicated that this was so[252].

180 Under the Queensland *Criminal Code*, as at 1899, a jury could be discharged after being sworn if the trial was adjourned, if the jury could not agree on the verdict, or in the event of an emergency, if the Court considered it necessary[253]. A juror could also be discharged in two other situations: first, if it

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247 *Jury Act* 1867 (Q), s 16.

248 *Jury Act* 1867 (Q), s 1.

249 See Wilson and Graham, *The Criminal Code of Queensland and the Criminal Practice Rules of 1900*, (1901) at xviii.

250 See Griffith, *Draft of a Code of Criminal Law prepared for the Government of Queensland*, (1897) at xiv.

251 See Griffith, *Draft of a Code of Criminal Law prepared for the Government of Queensland*, (1897) at xiv.

252 See, for example, cl 642 of the Draft Criminal Code of 1897, which dealt with the discharge of a juror by the Court and which, Sir Samuel noted, was "to some extent new": see Griffith, *Draft of a Code of Criminal Law prepared for the Government of Queensland*, (1897) at 284.

253 Section 626 enacted under the *Criminal Code Act* 1899 (Q). This provision reflected cl 652 of the Draft Criminal Code of 1897. In his notes to cl 652, Sir Samuel Griffith said that this clause reflected the present law, citing *Winsor v The*

(Footnote continues on next page)

appeared at any stage that a juror was not indifferent between the Crown and the accused; or, for any other reason, ought not to be allowed to continue as a juror. The Court could then direct a juror be discharged and another juror sworn in his place[254]. Secondly, if a juror died, or became incapable of continuing to act as a juror, the Court in its own discretion, or at the request of the accused with the consent of the Crown, could discharge the juror. The Court could then direct that the trial proceed with the remaining jurors, provided that no fewer than ten jurors remained[255].

181 In Victoria, although a jury of twelve men was required at the outset, in the event of the death or illness of any juror during a trial, except of a capital offence, the trial judge could direct that the trial proceed with not fewer than five-sixths of the jurors originally empanelled, and the verdict of those remaining jurors would be a valid one[256].

182 Before Federation the position at Common Law was not entirely clear[257]. In general it appears to have been that if a juror died or was taken ill, a fresh jury had to be sworn[258] but there was no absolute rule to this effect. It was possible for the trial to proceed, with the consent of the accused, notwithstanding that one

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Queen (1866) LR 1 QB 390: see Griffith, *Draft of a Code of Criminal Law prepared for the Government of Queensland*, (1897) at 287.

254 Section 615 enacted under the *Criminal Code Act* 1899 (Q). This section was based upon cl 642 of the Draft Criminal Code of 1897, although draft cl 642 referred to the juror by his own admission indicating that he was not impartial, as well as to the juror being discharged if for any other reason he ought not be allowed to act as a juror. In his footnote to cl 642, Sir Samuel Griffith said: "[T]his is to some extent new. The same result may, however, be obtained indirectly if the accused has not been given in charge to the jury": see Griffith, *Draft of a Code of Criminal Law prepared for the Government of Queensland*, (1897) at 284.

255 Section 628 enacted under the *Criminal Code Act* 1899 (Q). This section reflected cl 654 of the Draft Criminal Code of 1897.

256 *See Juries Act* 1890 (Vic), s 37 and s 88.

257 That this was so is clear from the Draft Criminal Code of 1897 prepared by Sir Samuel Griffith, in which it was noted in relation to some of the provisions concerning juries that the common law position was unclear, or alternatively, that difficulties that had arisen at common law but had not been authoritatively resolved required the creation of a new rule.

258 See the discussion by Kirby J in *Wu v The Queen* (1999) 199 CLR 99 at 111-112 [41].

of the jurors had become incapable of continuing as a juror[259]. On other occasions, the procedure adopted was that the juror concerned was discharged, a fresh juror was sworn to replace that juror, and the evidence already adduced at the trial was read out, and confirmed by the witnesses under oath[260].

183 What I have so far said, although it is not a comprehensive statement of the situation throughout Australia at Federation, is sufficient to demonstrate that there was no absolute rule that only a jury of twelve people as originally constituted could bring in a valid verdict, and therefore to dispose of the applicant's principal argument.

184 Furthermore, there is no reason in principle why a jury of twelve persons should necessarily be considered more representative of the community than a jury of ten persons or fourteen, although there may come a point at which a somewhat smaller number could not, in a real sense, be regarded as a jury, a matter that it is unnecessary to decide in this case.

185 It has been held in this Court that s 80 is not a guarantee of trial by jury for all serious offences against a law of the Commonwealth, but applies only when there is a trial on indictment, a matter to be determined by the Parliament[261]. In short, those who drafted the Constitution always contemplated that the Parliament would have the right to determine a basic matter relating to trial by jury or otherwise for federal offences. By parity of reasoning it is easy to accept that other conditions, relating to a jury, for example, their number, sex, and age,

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259 See the comments of, and authorities referred to, by Wilson J in *Brown v The Queen* (1986) 160 CLR 171 at 188.

260 *R v Beere* (1843) 2 M & Rob 472 [174 ER 353], referred to in *Wu v The Queen* (1999) 199 CLR 99 at 106 [21] per Gleeson CJ and Hayne J. See also *R v Charlesworth* (1861) 1 B & S 460 at 497-504 [121 ER 786 at 800-803] per Cockburn CJ and the discussion of the conflict between the views of Lord Coke and practice in the case of jurors who are ill or who die in the course of a trial, or who are unable to reach a verdict: cf also *Winsor v The Queen* (1866) LR 1 QB 390 at 394-395 per Erle CJ.

261 *Cheng v The Queen* (2000) 74 ALJR 1482 at 1489 [38], 1490-1492 [49]-[57] per Gleeson CJ, Gummow and Hayne JJ, 1497 [86] per Gaudron J, 1503 [122], 1504 [125]-[129], 1505 [132], 1506 [143], 1508-1509 [152] per McHugh J and 1535 [283] per Callinan J; 175 ALR 338 at 346, 348-350, 358, 366, 367-368, 369, 370, 374, 410; *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 396 [24] per Gleeson CJ and Gummow J, and the cases discussed at 435-439 [129]-[136] per Callinan J; cf at 422 [95] and 423 [97] per Kirby J.

and the need or otherwise for property qualifications would not be as they were in 1900[262], even if there had then existed universal rules about these conditions.

186 It follows that the applicant's argument with respect to the reduction in the number of the jurors fails. That conclusion makes it unnecessary for me to decide, whether, as the Crown submits, the applicant waived, or was able to waive trial by a jury of fewer than twelve members.

187 I turn now to the applicant's argument that the separation of the jury after they commenced their deliberations infringed s 80 of the Constitution.

188 Juries were kept together during a trial at the time of Federation, and often, in situations that modern Australians would find abhorrent. It is also true that a very strict approach would be taken once a jury had commenced its deliberations to ensure that jurors not be subjected to the possibility of external influence in arriving at their verdict.

189 But before Federation, legislative provisions were introduced into a number of jurisdictions, including Queensland and Western Australia, expressly permitting a jury to separate, at least prior to the commencement of its deliberations[263].

190 No doubt it is, in general, desirable that, at least from the time that a jury's deliberations begin, they remain together. But the fact that a jury may, and has separated, will not necessarily impair or destroy the essential character of the jury as a jury. If in fact, by reason of separation a juror or jurors act improperly or become subjected to influences to which they should not have been subjected, that circumstance will require consideration and an appropriate response by a trial judge. There was no point taken in this Court that anything of that kind occurred in this case, either because of the foreman's earlier indiscretions or otherwise. Accordingly this ground also fails.

191 Because of the conclusion that I have reached on this argument, again it is unnecessary for me to consider any question of waiver by the applicant of any right to have the jury kept together and segregated from the community. And as

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262 See *Eastman v The Queen* (2000) 74 ALJR 915 at 940-941 [155] per McHugh J, 958 [243] per Kirby J; 172 ALR 39 at 73, 97.

263 See, for example, the reference to the *Juries Detention Act* 1897 (UK) cited in *Ah Poh Wai* (1995) 15 WAR 404 at 421 per Malcolm CJ. In the same case, reference was made at 426 by Pidgeon J to the *Jury Act* 1898 (WA), s 25 of which permitted the jury to separate during the intervals of the trial, other than in cases involving indictable offences punishable by death.

there was no submission based on the fact that the trial judge made no formal orders regarding the separation of the jury, a matter which may go beyond mere form as was pointed out in *Wu v The Queen*[264], it is also unnecessary to discuss the significance, if any, of the omission of such an order in this case.

192 I would allow the application for special leave and I would dismiss the appeal.

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264 (1999) 199 CLR 99 at 120-121 [61]-[62].