HIGH COURT OF AUSTRALIA

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

PHILIP CHEE MING NG APPLICANT

AND

THE QUEEN RESPONDENT

Ng v The Queen [2003] HCA 20
Date of Order: 13 February 2003
Date of Publication of Reasons: 10 April 2003
M148/2002

ORDER

Application dismissed.

On appeal from the Supreme Court of Victoria

Representation:

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

D J Bugg QC with N T Robinson for the respondent (instructed by Director of Public Prosecutions (Commonwealth))

Interveners:

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

T I Pauling QC, Solicitor-General for the Northern Territory with N Rogers intervening on behalf of the Attorney-General for the Northern Territory (instructed by Director of Public Prosecutions (Northern Territory))

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

R A Pepper intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

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

CATCHWORDS

Ng v The Queen

Constitutional law (Cth) – Law of the Commonwealth – Indictable offence – Trial by jury – Whether State law requiring, by ballot, a reduction in the number of jurors from 15 to 12 prior to commencement of jury deliberations contravenes s 80 of the Constitution – Whether State law exempting foreperson from removal from jury by ballot contravenes s 80 of the Constitution.

Constitution, s 80.
Judiciary Act 1903 (Cth), s 68.
Juries Act 1967 (Vic), ss 14, 14A, 48A.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. The applicant was charged with conspiracy to import into Australia a commercial quantity of heroin contrary to s 233B(1)(cb) of the *Customs Act* 1901 (Cth) ("the Customs Act"). He was tried on indictment in the County Court of Victoria. Section 80 of the Constitution was engaged. The County Court was invested with federal jurisdiction by virtue of s 68(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). That investment of jurisdiction is stated in s 68(2) to be subject both to the other provisions of s 68 and to s 80 of the Constitution. Section 68(1) authorised the County Court to apply the laws of Victoria but only "so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth".

2 The applicant pleaded not guilty. The effect of s 14(2) of the *Juries Act* 1967 (Vic) ("the Juries Act") was that the applicant was to be tried by a jury of 12 or, if the County Court made an order in accordance with s 14A of the Juries Act, by a jury of not more than 15. An order for 15 jurors was made under s 14A. That section stated:

> "A court before which a criminal inquest is to be heard may order the impanelment of up to 3 additional jurors in that inquest before the jury is impanelled for any reason that appears to the court to be good and sufficient."

The making of the order under s 14A in due course attracted the operation of s 48A.

3 The trial lasted nearly four months and the 15 jurors impanelled had remained, none having died or been discharged for cause. Following the summing up by the trial judge, a ballot to reduce the number of jurors to 12 was conducted pursuant to s 48A. This required the conduct of a ballot, to reduce the number to 12 before the jury retired to consider its verdict, by drawing at random the number of juror cards necessary to achieve that result. If the card of the foreperson was drawn, that card was to be kept apart and another card drawn (s 48A(4)).

4 As it happened, the card of the foreperson was the first drawn. That was set aside and three other cards were drawn. The jury of 12, including the foreperson, retired to consider its verdict. The applicant was convicted and sentenced.

5 The applicant applied to the Court of Appeal (Winneke P, Batt and Eames JJA)[1] for leave to appeal against both conviction and sentence. The Court of Appeal dismissed both applications.

6 In this Court, the applicant sought special leave substantially on two grounds. The first was that the Court of Appeal had erred in holding that his sentence was not infected by appealable error. In so far as it turned upon that ground, the application was dismissed in the course of oral argument on 13 February 2003, the Court being of the view that there were insufficient prospects of success to warrant a grant of special leave on that point. The Court then proceeded with oral argument on the balance of the application and at the conclusion of the argument ordered that the application be dismissed. What follows are the reasons for that dismissal.

7 The applicant was tried on indictment for an offence against a law of the Commonwealth, namely the provision of the Customs Act to which reference has been made. The remaining ground of the application for special leave is that the trial had not been "by jury" as mandated by s 80 of the Constitution. Whilst the complaint is put in various ways, its substance is that s 68 of the Judiciary Act, operating according to its terms, did not "pick up" the provisions of s 48A of the Juries Act whereby the jury was reduced from 15 to 12 and the foreperson was "immunised" from that process of reduction.

8 Of its own force, s 48A could not, and did not purport to, apply in the exercise of federal jurisdiction[2]. Section 68 of the Judiciary Act contains internal limitations to deny to it any operation the validity of which would be impeached by s 80 of the Constitution[3]. The result is that the applicant did not attack the validity of any legislation. Rather, the complaint, as in *Brownlee v The Queen*[4] and *Katsuno v The Queen*[5], was that, in the events that happened, the trial process

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1 [2002] VSCA 108.

2 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 588 [59], 611 [134]; *Macleod v Australian Securities and Investments Commission* (2002) 76 ALJR 1445 at 1447 [10]; 191 ALR 543 at 546; cf *Byrnes v The Queen* (1999) 199 CLR 1 at 31-32 [70]-[72].

3 *Brown v The Queen* (1986) 160 CLR 171 at 178, 200, 218.

4 (2001) 207 CLR 278 at 296 [50].

5 (1999) 199 CLR 40 at 63 [48].

miscarried because it was not conducted in accordance with the constitutional command in s 80 that it be "by jury".

9 *Brownlee* establishes that, whilst the requirement in s 80 of a trial "by jury" is referable to that institution as understood at common law at the time of federation[6], it is the essential features of that institution which have what might be called a constitutionally entrenched status. Further, *Brownlee* also indicates that those essential features are to be discerned with regard to the purpose which s 80 was intended to serve[7] and to the constant evolution, before and since federation, of the characteristics and incidents of jury trial[8]. Accordingly, the circumstance that provisions such as those in ss 14A and 48A of the Juries Act respecting additional jurors were not found in pre-federation legislation is not determinative.

10 In *Brownlee*[9], Kirby J pointed out that it was beyond doubt that in comparison with earlier times criminal trials today typically last longer, are more expensive and involve more complex issues than previously was the case. The applicant's lengthy trial is an example. The trial judge's remarks on sentence concluded on p 5697 of the transcript. Provisions such as those of the Juries Act which the applicant impugns are designed to meet exigencies that may arise in such circumstances.

11 *Brownlee* determined that a trial on indictment for an offence against a law of the Commonwealth which was conducted in accordance with a provision of New South Wales law which permitted the reduction in number of jurors to not below 10 was not at odds with the meaning of trial "by jury" in s 80 of the Constitution. The applicant does not argue for the proscription of a trial by a jury where more than 12 jurors are impanelled. The complaint concerns the operation of the provisions respecting reduction in numbers to 12 before the jury retired to consider its verdict. However, by parity of reasoning, the conclusions which led

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6 *Cheatle v The Queen* (1993) 177 CLR 541 at 549.

7 *Brownlee v The Queen* (2001) 207 CLR 278 at 284-285 [7], 288-289 [21]-[22], 298 [54].

8 *Brownlee v The Queen* (2001) 207 CLR 278 at 284-285 [6]-[7], 287 [17], 291-292 [33]-[34], 299-300 [58], 303 [71].

9 (2001) 207 CLR 278 at 330-331 [148].

to the outcome in *Brownlee* militate in favour of the dismissal of the present application.

12 The applicant referred to the requirement of unanimity. But in *Cheatle* this was expressed as a requirement that "all the persons constituting the jury *at the time the verdict is pronounced*"[10] return a unanimous verdict. There is no prejudice to that principle where there is a discharge by reason of death or incapacity or the excusing of jurors who are ballotted out under the procedures specified in s 48A of the Juries Act. In all these cases, the change in jury composition comes about for reasons unrelated to any view of any of the jurors. Nor, any more than is the case when a juror is removed by death or on account of incapacity, are the remaining jurors "contaminated" in any constitutionally offensive sense.

13 Further, there is no substance in the applicant's contention that there is any "right" enjoyed by each of the 15 jurors impanelled to participate in determination of the verdict. The continued participation in the process of any juror after impanelment is at all times conditional upon the juror remaining qualified and of capacity and on the operation of any relevant laws, such as s 48A of the Juries Act.

14 The applicant directed particular attention to the position under the Juries Act of the foreperson. In particular, the operation in this case of s 48A(4) was said to indicate that the legislation placed the foreperson in a special and protected position not enjoyed by the other 14 jurors who had been impanelled. The selection of that person, in circumstances where he or she cannot be ballotted out under s 48A, does not produce inconsistency with the underlying objective of the requirement that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State[11]. The principle of randomness of selection permits peremptory challenges to potential jurors, consistently with s 80[12], as it does the subjection of all of the panel of 15, apart from the foreperson, to the process of ballotting out under s 48A of the Juries Act. When the jury in the present case retired, it claimed the character of a panel randomly or impartially selected rather than one chosen by the prosecution or by the State.

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10 (1993) 177 CLR 541 at 548 (emphasis added).

11 *Cheatle v The Queen* (1993) 177 CLR 541 at 560; *Katsuno v The Queen* (1999) 199 CLR 40 at 64 [50].

12 *Katsuno v The Queen* (1999) 199 CLR 40 at 50 [4], 65 [51].

15 The Court of Appeal gave detailed consideration of the matter and correctly concluded that the grounds containing submissions respecting the requirements of s 80 of the Constitution should be rejected[13]. There are no prospects of success of an appeal to this Court and accordingly we joined in the order dismissing the application for special leave.

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13 [2002] VSCA 108 at [16]-[30].

16 McHUGH J. I joined in the order dismissing this application for special leave to appeal because an appeal would have had no prospect of success, if leave were granted. Subject to one matter, my reasons for refusing leave are essentially the same as those that caused me to refuse leave in *Fittock v The Queen*[14].

17 In the present case, the applicant relied on a ground not present in *Fittock*. He contended that s 48A(4) of the *Juries Act* 1967 (Vic) gave the foreperson of the selected jurors a privileged position that undermined the constitutional requirement that the panel be selected at random from the community[15]. Under s 48A(4), the foreperson remains a juror even though his or her name is drawn from the ballot held to reduce the number of jurors to 12. The policy behind this immunity is not clear. Ordinarily, the foreperson does no more than pronounce the jury's verdict and regularise the jury's discussion of the issues. There is nothing to stop the jurors changing their foreperson as often as they like. But whatever the policy behind the immunity, the immunity does not affect the randomness of the jury that the Constitution requires.

18 The jurors are selected randomly when their names are drawn by ballot from a list that is representative of the community. The randomness of the panel is no more affected by the foreperson being exempted from the ballot than it is by the order of the judge directing that a particular panel member be discharged for incapacity or other reason. In each case, the requirements of s 80 are met by the selection of the jury by ballot from a list of names that is representative of the community. The random selection of the panel is not affected by a subsequent judicial order discharging a juror or by a statutory command that a juror who has been randomly selected and elected as foreperson is to remain a member of the jury that determines the case.

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14 [2003] HCA 19.

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

19 KIRBY J. This is one of two applications for special leave to appeal referred to the Full Court[16]. Because the applications raised common issues, they were heard together. The common issues concerned the requirements of s 80 of the Constitution which governs jury trial of indictable offences against a law of the Commonwealth.

The scope and course of the hearing

20 One aspect of this application involved a challenge to sentence. Mr Philip Chee Ming Ng ("the applicant") submitted that he had been wrongly penalised in sentence for having defended a criminal charge. That question is potentially an important one[17]. However, neither the sentence imposed on the applicant nor the language employed by the sentencing judge in passing sentence, made this an appropriate occasion to explore that point. The challenge to sentence was therefore dismissed by the Full Court during the hearing.

21 A second preliminary point was also cleared away. At one stage it was thought that this application might provide a suitable vehicle to allow reconsideration of the decision in *Brown v The Queen*[18]. This Court there held that the language and purpose of s 80 of the Constitution precludes an accused person from waiving the right to trial by jury where that section applies. Since *Brown* (in which the Court was divided[19]), doubts have been expressed about the correctness of such a prohibition on waiver[20]. However, in the event, it was accepted by the respondent that waiver could not be raised on the facts of this case. The challenge to *Brown* must therefore await another day.

22 These developments confined the application to the complaint that the provisions of State law allowing "additional" jurors to be empanelled in the applicant's trial were invalid or inapplicable having regard to s 80 of the Constitution. There was no dispute that the applicant's trial in the County Court of Victoria was obliged to conform to the requirements of s 80. Accordingly, the residual question, fully argued, was what s 80 required in the circumstances.

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16 The other application was *Fittock v The Queen* [2003] HCA 19.

17 cf *Cameron v The Queen* (2002) 76 ALJR 382 at 384 [12], 390 [47], 399-400 [93]-[95]; 187 ALR 65 at 68, 76, 88-89.

18 (1986) 160 CLR 171.

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

20 *Brownlee v The Queen* (2001) 207 CLR 278 at 319-320 [120]-[121].

23 At the end of argument, the Court announced that the application was dismissed. So was the application in the companion proceedings. I agreed in those dispositions. In my view, the Court should explain its reasons by addressing the submissions placed before it. Detailed written and oral argument was received. The representatives of the parties and of several governments appeared. Substantial costs were incurred. The applicant has been sentenced to a significant term of imprisonment. The parties should therefore have the response of the Court to their arguments[21].

24 Additionally, the issue decided concerns the constitutional law of the nation. It involves part of a mosaic of law by which the requirements of s 80 of the Constitution are explained. Apart from the parties and the participating governments, the citizens should know not only what the Court holds, but its reasons for doing so – that being the means by which this Court is rendered accountable to the parties and to the community in such matters[22].

The facts

25 The applicant was charged with conspiracy to import a commercial quantity of heroin into Australia contrary to the *Customs Act* 1901 (Cth), s 233B(1)(cb). He was tried on indictment in the Victorian County Court. The trial attracted federal jurisdiction in accordance with the *Judiciary Act* 1903 (Cth)[23]. Pursuant to that Act, the County Court was empowered to apply to the trial and conviction of the applicant the laws of the State of Victoria so far as they were applicable to the trial of a federal offender[24]. However, a law that contravened s 80 of the Constitution would be inapplicable to such application. It could not be "picked up" by the *Judiciary Act*.

26 At the outset of the applicant's trial, in April 2000, fifteen persons were empanelled to serve as the jury. The jury thus included three "additional" jurors. A challenge to the constitutional validity of this procedure was reserved by the applicant's counsel. The trial proceeded until July 2000 when the summing up of the presiding judge was completed. At that stage a ballot was conducted of all the jurors to reduce their number from fifteen to twelve.

27 The first card drawn in the ballot bore the name of the member of the jury who, at the outset of the trial, had been elected the jury foreperson. In

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21 *Heron v The Queen* [2003] HCA 17 at [23].

22 Gleeson, "Judicial legitimacy", (2000) 20 *Australian Bar Review* 4 at 10.

23 s 68(2).

24 s 68(2)(c).

accordance with the Victorian law, the card bearing his name was put aside. Three further draws were made to eliminate the three "additional" jurors and so to produce the final jury of twelve. So derived, the jury included the foreperson. It was that jury that then retired to consider their verdict. After deliberations of four days, the jury announced their verdict of guilty. In August 2000 the applicant was convicted and sentenced to twenty-five years imprisonment with a non-parole period of twenty years. He sought leave to appeal to the Court of Appeal of the Supreme Court of Victoria. His grounds of appeal included relying on the constitutional issue now before this Court. The Court of Appeal dismissed the application[25]. It rejected the constitutional arguments[26].

The issues

28 The issues arising on the application for special leave were:

(a) *The jury definition issue*: Whether once constituted to include "additional" jurors, the applicant's "jury" comprised a number greater than twelve, entitling him to the verdict of that enlarged "jury", not the verdict of a smaller number of jurors comprising some only of his "jury";

(b) *The unanimous verdict issue*: Whether the impugned law of Victoria involved taking the verdict of some only of the applicant's jurors and, in that way, the acceptance of a non-unanimous jury verdict contrary to the decision of this Court in *Cheatle v The Queen*[27];

(c) *The jury contamination issue*: Whether, if the applicant's "jury" were properly reduced to the twelve jurors from whom the verdict was taken, this meant that persons who were not ultimately members of the "jury", had been permitted to participate in the jury's deliberations although strangers to the jury, thereby offending "essential characteristics" of jury trial, namely jury secrecy and privacy; and

(d) *The random selection issue*: Whether the provisions requiring the participation of the jury foreperson in the verdict of the jury offended against the constitutional requirements of randomness in the selection of the jury and equality of the jurors as between themselves or otherwise infringed the applicant's right to a fair trial.

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25 *R v Ng* [2002] VSCA 108.

26 *R v Ng* [2002] VSCA 108 at [16]-[30].

27 (1993) 177 CLR 541.

Essential and inessential requirements of jury trial

29 *Jury trial in history*: The requirements of s 80 of the Constitution[28] have been considered in many cases decided since the earliest days of this Court. In 1909, O'Connor J[29] adopted for the purpose of explaining s 80 a definition approved by Samuel F Miller in a lecture on the Constitution of the United States from whose provisions s 80 was taken[30].

30 Relying on Miller's definition, O'Connor J described trial by jury 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"[31]. Although this definition was advanced as representing "the essential features" of trial by jury, it was not "an exhaustive statement"[32]. Thus this Court in *Cheatle*[33] held that unanimity in a jury's verdict is an essential characteristic. That decision rendered inapplicable in a trial to which s 80 of the Constitution applies State laws providing for majority jury verdicts.

31 In the course of decisions over nearly a century the elaboration of s 80 has given rise to some of the "sharpest divisions of opinion"[34] in this Court about the meaning of the Constitution. Some members of the Court have considered that s 80 is little more than a procedural provision, easily circumvented by the expedient of excluding the crime in question from the requirement of trial on indictment or by exempting aggravating features of the crime from the definition of the "offence", trial of which alone must take place "on indictment"[35]. On the

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28 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."

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

30 United States Constitution, Art III, s 2, cl 3 and Seventh Amendment. See *Patton v United States* 281 US 276 at 288 (1930).

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

32 *Brownlee* (2001) 207 CLR 278 at 287 [17].

33 (1993) 177 CLR 541.

34 *Cheng v The Queen* (2000) 203 CLR 248 at 306 [173].

35 *Kingswell v The Queen* (1985) 159 CLR 264; cf *Cheng* (2000) 203 CLR 248 at 307 [174].

other hand, other members of the Court have regarded s 80 as a "fundamental law"[36] or as a constitutional "guarantee"[37]. I am of the latter persuasion[38].

32 Doubtless the conception of the character of s 80, its role in Ch III of the Constitution and its function as a safeguard of basic rights, has influenced the approaches taken by successive judges to the requirements of the section in respect of what trial by jury means in a given case.

33 Because trial by jury connotes a particular kind of legal proceeding, known to the common law of England and in the Australian colonies before the adoption of the federal Constitution, the expression is not at large. At least for the purposes of s 80, it cannot mean anything that a legislature, federal, State or Territory, chooses to enact under the label of "trial … by jury"[39]. Clearly, historical considerations will help to mark out the boundaries of the proceeding which s 80 permits. Nevertheless, from past decisions it is also clear that s 80 does not require the conduct of criminal trials to comply with every feature of that mode of trial as it existed in 1900. To this extent, the incidents of jury trial are not immutable. Some may change to meet contemporary needs and to adapt to modern circumstances and conditions[40]. The decisions of this Court deny the adoption of an "originalist" approach to the construction of s 80 of the Constitution, whether categorised as "enthusiastic", or "reluctant", "faithful" or "faint-hearted"[41].

34 It is important to adopt a consistent methodology of interpretation so as to avoid the justifiable criticism that a judicial decision in a particular case amounts to nothing more than a statement of the judge's whims or intuition, disguising unarticulated value judgments[42]. The provision of reasons that respond to the

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

37 *Brown* (1986) 160 CLR 171 at 201 per Deane J.

38 cf 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.

39 *Brownlee* (2001) 207 CLR 278 at 284 [6], 317-318 [115], 321 [125].

40 *Brownlee* (2001) 207 CLR 278 at 286-287 [12]-[17], 291 [33].

41 *Eastman v The Queen* (2000) 203 CLR 1 at 44 [140] per McHugh J referring to an expression ("faint-hearted" originalism) used by Scalia J of the Supreme Court of the United States; cf *Brownlee* (2001) 207 CLR 278 at 327 [138].

42 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 at 107.

arguments of the parties, however irksome, is a discipline protecting parties, and the public, from ill-considered or merely instinctive responses. Convenience in the conduct of trials or the disturbance of settled expectations cannot ultimately decide large constitutional conflicts. Least of all can such considerations govern provisions such as s 80 which appear in Ch III regulating the Judicature of the nation in identified matters of federal concern[43].

35 In recent decisions addressing s 80, this Court has focussed upon a functional analysis of the jury rather than an historical scrutiny of what the founders of the Commonwealth expected or intended jury trial to involve[44]. In my view, this is the correct way to go about giving meaning to s 80. It is the one I adopted in approaching the present application.

36 *Inessential characteristics*: What then is the contemporary answer to the question posed by O'Connor J in 1909 concerning the "essential features of a trial by jury"[45]? Some features that may have been regarded as essential or invariable in 1900 can now be treated as inessential. They include:

(1) Juries no longer need to be constituted exclusively by men[46];

(2) Jurors no longer have to qualify for service by having minimum property holdings[47];

(3) Jurors no longer need to be segregated in every case during the trial or from the moment when they are charged to consider their verdict[48];

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43 cf *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

44 But cf *Cheng* (2000) 203 CLR 248 at 268-269 [53]-[54], 293-294 [133]-[137]. See 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 at 107-111.

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

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

47 *Jurors and Juries Consolidation Act* 1847 (NSW), s 1; see *Cheatle* (1993) 177 CLR 541 at 560.

48 *Brownlee* (2001) 207 CLR 278 at 290-291 [27]-[30], 301-302 [64]-[67], 331-333 [150]-[157], 342-343 [187]-[191].

(4) When a juror dies or is discharged the trial need no longer be abandoned[49];

(5) A juror in waiting may be removed from the jury upon a prosecution challenge based upon the supply to the prosecution alone of information concerning a non-disqualifying criminal conviction[50];

(6) It is not every serious offence against federal law resulting in imprisonment that attracts s 80[51]; and

(7) A preliminary determination, at first instance and on appeal, of questions of law or issues governing the admissibility of evidence before the jury are empanelled is not incompatible with trial by jury complying with the Constitution[52].

37 *Essential characteristics*: Certain features of jury trial have been held to be essential. Where s 80 applies, such features must be observed if the trial is to conform to the Constitution:

(1) The jury must deliver a unanimous verdict[53]. The verdict of guilty must be reached by the agreement of all persons constituting the jury at the time the verdict is pronounced[54]. (The requirement of unanimity may also extend to a jury verdict of not guilty[55]);

(2) Where jury numbers have been reduced before the verdict is given, the trial can still be accepted as a trial by jury. The jury must still be of a

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49 *Brownlee* (2001) 207 CLR 278 at 288 [20], 303-304 [71]-[72], 331 [149], 341 [183]-[184].

50 *Katsuno v The Queen* (1999) 199 CLR 40 at 65 [52]; cf at 97 [137].

51 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 396-397 [24]-[25], 405 [50]; cf at 427 [105]; see also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556.

52 *R v Gee* [2003] HCA 12 at [140]-[142].

53 *Cheatle* (1993) 177 CLR 541 at 548, 550, 552, 562; *Brownlee* (2001) 207 CLR 278 at 284 [5], 297 [52].

54 *Cheatle* (1993) 177 CLR 541 at 548.

55 *R v Glynn* (2002) 82 SASR 426 at 444-445 [95]-[105]; cf at 433-434 [45]-[51].

sufficient number to be representative of the community and capable of performing the group deliberation inherent in jury trial[56];

(3) The jury must be randomly and impartially selected, not chosen by the prosecution or the state[57]; and

(4) The jury must be comprised of lay decision-makers who are impartial as to the issues in contest[58].

38 *The norm of twelve*: This Court has not held that twelve jurors ("neither more nor less"[59]) is an inherent requirement of trial by jury that conforms to s 80. On the contrary, it has decided that, although the jury number may fall below twelve, at least to ten, the trial can still answer to the constitutional description.

39 However, until this case, this Court has not had to consider the validity of an expansion of juror numbers to allow for supplementary jurors in trials to which s 80 applies. That issue did not arise in *Brownlee v The Queen*[60]. True, three members of the Court made it clear in *Brownlee* that they were not calling into question the use of reserve jurors applicable in that case[61]. In support of that comment they cited the decision in *Ah Poh Wai v The Queen* where, as they pointed out, the reserve juror system, applicable in Western Australian trials, had been considered and upheld as constitutionally valid by the Court of Criminal Appeal of that State[62]. Special leave to appeal to this Court from that decision was refused by a majority[63]. The present application re-submitted some of the questions raised in *Ah Poh Wai*.

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56 *Brownlee* (2001) 207 CLR 278 at 288-289 [20]-[21], 303-304 [71]-[72], 331 [149], 341 [183]-[184].

57 *Cheatle* (1993) 177 CLR 541 at 560-561; *Katsuno* (1999) 199 CLR 40 at 64-65 [50]-[51], 69 [67].

58 *Cheatle* (1993) 177 CLR 541 at 549, 560; *Brownlee* (2001) 207 CLR 278 at 289 [22], 299 [57].

59 *Patton v United States* 281 US 276 at 288 (1930).

60 (2001) 207 CLR 278.

61 (2001) 207 CLR 278 at 304 [73] per Gaudron, Gummow and Hayne JJ. Their Honours referred to "reserved" jurors.

62 (1995) 15 WAR 404 at 415-423, 423-428.

63 *Ah Poh Wai v The Queen* (1996) 14 LegRep C24. The Court was constituted by Dawson and McHugh JJ and myself.

40 As it seems to me, it is one thing to accept twelve jurors as the norm and to provide, exceptionally, for the validity of their verdict where their number is *reduced* by death, illness or other excuse. It is another to *enlarge* jury numbers from the outset of a trial against the risk that the trial might otherwise miscarry for a later want of an adequate number of jurors. Accordingly, the issue raised by this application was not determined by the decision of the Court in *Brownlee* either as a matter of authority or as a matter of legal principle. Different considerations are involved. They need to be considered and decided.

41 It is not true to say that juries have always been constituted by twelve persons (until quite recently twelve men). Grand juries, special juries and civil juries were commonly constituted by different numbers. In Scotland juries are now, and have for a long time been, comprised of fifteen persons. Exceptional circumstances have summoned forth exceptional arrangements. Thus, Charles I was tried in a "High Court of Justice" that comprised 62 Commissioners as a kind of national jury[64].

42 Nevertheless, before the Australian colonies were founded, the ordinary jury for the trial of indictable offences according to the common law of England was undoubtedly a jury of twelve. Indeed, until legislation altered that requirement in England there was ordinarily no jurisdiction to try such a case otherwise than with a jury of that number[65].

43 Initially in the Australian colonies jury trial was conducted before seven commissioned naval or army officers[66]. The colonists insistently demanded jury trial in accordance with the common law[67]. By the *Jury Trials Act* 1832 (NSW) provision was made for trial by "twelve persons" and civilian jurors replaced military juries completely. That Act was consolidated in later legislation and

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64 Nalson, *Trial of Charles I* (1684) reported (1649) 4 St Tr 1045; Wedgwood, *The Trial of Charles I*, (1964) at 107; Kirby, "Trial of King Charles I: Defining Moment for our Constitutional Liberties", (1999) 73 *Australian Law Journal* 577 at 580-581.

65 *R v Hambery* [1977] QB 924 at 928.

66 *Wu v The Queen* (1999) 199 CLR 99 at 112 [42].

67 *Kingswell* (1985) 159 CLR 264 at 298-299.

copied elsewhere in the Australian colonies[68]. Under such legislation "all crimes and misdemeanors" were to be "tried by a jury consisting of twelve men"[69].

44 Historically, therefore, both for the common law of England and in early Australian legislation, a jury of twelve was undoubtedly the norm. In a sense, the legislation under consideration in this application accepts that norm. Provision is made for the removal from the ultimate jury of any supplementary jurors in excess of that number.

45 *The applicant's case*: So can it be said that, like unanimity, representativity, random and impartial selection and a lay character, the maximum number of twelve jurors should be taken as an "essential" or "inherent" characteristic of "trial … by jury" within s 80 of the Constitution[70]? The applicant did not so submit. He was content to accept as constitutionally valid a jury of more than twelve. Obviously, the larger the jury, the greater the chance that one or more jurors might be persuaded to hold out for a not guilty verdict.

46 This Court is not bound by concessions or arguments of the parties where it concludes that they are legally erroneous[71]. Even without much knowledge of the history of the jury at common law or the adoption of a 1900 criterion for the meaning of jury trial in s 80, a respectable argument exists that the "jury" contemplated by s 80, is one of no more than twelve persons. On this view, a jury might validly fall *below* that number, as in *Brownlee*. But to the extent that a jury goes *above*, does it amount to a "jury" at all? Or is it some new hybrid tribunal, different from that for which the Constitution provides?

47 Although it has some support in older cases in the Supreme Court of the United States, the view that twelve jurors is the maximum should not be adopted. Once a functional approach to jury trial is embraced, as it has been by this Court, the argument that twelve is the *maximum* number of jurors for a trial conforming to s 80 of the Constitution is undermined. If *fewer* than twelve jurors is acknowledged as conformable to the constitutional "jury", the validity of a provision allowing for *more* than twelve, so as to ensure that the function of the jury is fulfilled, becomes difficult to resist. Once a criterion is adopted by

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68 *Jurors and Juries Consolidation Act* 1847 (NSW). See Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900*, (2002).

69 *Jurors and Juries Consolidation Act* 1847 (NSW), s 17.

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

71 *Roberts v Bass* (2002) 77 ALJR 292 at 320 [142]-[143]; 194 ALR 161 at 199; cf *Banbury v Bank of Montreal* [1918] AC 626 at 661-662; *Burchett v Kane* [1980] 2 NSWLR 266 at 269.

reference to considerations of community representativity and effective deliberations, legislative measures aimed at ensuring the retention of those qualities become constitutionally permissible. This is especially so today, as jury trials typically last longer than was the case in 1900 or, indeed, until the latter part of the twentieth century. In *Brownlee*[72] I observed that:

> "contemporary trials, particularly of federal offences, can be extremely complex and lengthy[73], 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[74]".

48 If it is acceptable to treat a jury of *fewer* than twelve as constitutionally valid in order to sustain the *system* of jury trial and the continued "involvement of the public" and "societal trust"[75] implied in the mode of trial referred to in s 80, it is also acceptable, exceptionally, for *supplementary* jurors to be introduced to the jury to guard against a failure of the trial caused by the death, illness or absence of jurors.

49 These conclusions leave to be determined the validity and applicability of the Victorian legislative provisions that were invoked in the trial of the applicant. However, the logical extension of the principle adopted in *Brownlee* (including in my own opinion in that case) results in the conclusion that the reference in s 80 to a "jury", and to the procedure of trial by a jury, does not forbid the enlargement of jury numbers. At least this is so in relation to the time before the retirement of the jury to consider their verdict and where the membership of the jury is supplemented by the small numbers involved in the present case.

50 These general conclusions bring me to the question of whether any feature of the State law invoked in this application is such as to indicate direct inconsistency with an essential characteristic of trial by jury conforming to s 80 and thus to prevent the application of the State law in such a trial by virtue of the provisions of the *Judiciary Act*[76].

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72 (2001) 207 CLR 278 at 330 [147]. See also *Gee* [2003] HCA 12 at [142].

73 Australian Institute of Judicial Administration, *Report on Criminal Trials*, Report No 48 (1985) at 5-8.

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

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

76 s 68(2)(c).

The legislation

51 *The Victorian Juries Act*: By s 14A of the *Juries Act* 1967 (Vic) it is provided:

> "A court before which a criminal inquest is to be heard may order the impanelment of up to 3 additional jurors in that inquest before the jury is impanelled for any reason that appears to the court to be good and sufficient."

52 By s 48A of the same Act it is provided, relevantly:

> "(1) Where more than 12 jurors have been impanelled and remain at any time at which the jury is required to retire to consider its verdict a ballot must be held in accordance with sub-section (2) to reduce the number to 12 before the jury retires to consider its verdict.
>
> (2) A ballot referred to in sub-section (1), must be conducted by drawing at random the number of cards necessary to reduce the number of jurors to 12 from those cards kept apart in accordance with section 48(1).
>
> (3) Subject to sub-section (4) and unless the juror or jurors are, in accordance with sub-section (3A), to return to the jury, and continue as part of it, for the continuation of the trial, the juror or jurors whose cards are drawn must be excused and their cards returned to the box for further use unless the court otherwise orders.
>
> …
>
> (4) If the card of the foreperson is drawn, that card is to be kept apart and another card drawn.
>
> (5) The cards of the 12 jurors including the card of the foreperson must be kept apart until a verdict has been given or until the jurors are discharged."

53 The foregoing law contemplates a jury that may initially comprise more than twelve jurors but not more than fifteen. Indeed, such a jury may operate with up to "three additional jurors" until virtually the end of the trial: to the point immediately before the jury are required to retire to consider their verdict. At that stage a ballot is conducted of all of the jurors. But whatever the outcome of that ballot, the foreperson must remain a juror until the jury deliver their verdict.

54 *Overseas legislation*: Legislation providing for supplementary jurors has been enacted in various overseas countries where jury trial exists. Thus in Canada, provision is made both for the continuation of a trial with ten or more jurors where a juror originally empanelled dies or is discharged[77] and for the selection of up to two "alternate" jurors[78]. In Canada, the alternative jurors participate as jurors until the commencement of the trial when any "alternate" jurors who have not been substituted by that time are excused[79].

55 In the United States of America provision is made, in the trial of federal offences, for continuance of the trial with fewer than twelve jurors[80] and for the initial empanelment of up to six alternate jurors[81]. Such alternate jurors participate in the trial in the same way as other jurors[82]. Those who do not replace jurors who are unable to perform or who are disqualified from performing their duties may be retained and may replace such jurors, even, where necessary, after the jury's deliberations have commenced[83]. In the event of such replacement, the judge is obliged to direct the jury to begin their deliberations anew[84].

56 Many court decisions have considered the application of the United States Rules[85], including one that reached the Supreme Court[86]. The position is differentiated from that in Australia by the fact that, in the United States, judges typically instruct juries to refrain from discussing a case not only with strangers but also amongst themselves "until the end of the case when you go to the jury

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77 *Criminal Code* 1985 (Can), s 644(2).

78 *Criminal Code* 1985 (Can), s 631(2.1).

79 *Criminal Code* 1985 (Can), ss 642.1(1) and (2).

80 Federal Rules of Criminal Procedure, r 23(b).

81 Federal Rules of Criminal Procedure, r 24(c)(1).

82 Federal Rules of Criminal Procedure, r 24(c)(1) and (2).

83 Federal Rules of Criminal Procedure, r 24(c)(3).

84 Federal Rules of Criminal Procedure, r 24(c)(3).

85 eg *United States v Houlihan* 92 F 3d 1271 (1st Cir 1996).

86 *United States v Olano* 507 US 725 at 737 (1993).

room to decide on your verdict"[87]. Such instruction has been justified as upholding the integrity, secrecy and privacy of jury deliberations[88]. On the assumption that such instructions are obeyed, alternate jurors may usually be permitted to remain with other jurors during the trial. They separate finally when the jury are instructed to consider their verdict.

57 In most other common law countries where jury trials occur, provision is made for the discharge of jurors and the continuance of the trial[89] but without a law for supplementary jurors. In New South Wales, as in the United Kingdom, that remains the position. In England, legislation to permit the participation of supplementary jurors has been recommended but not yet enacted[90].

58 *Australian legislation*: Save for New South Wales, the legislatures of each of the States and self-governing Territories of Australia have enacted a law providing for supplementary jurors. Putting the position generally, the law in Queensland[91], Western Australia[92] and Tasmania[93] follows the "reserve" juror model illustrated by the law of the Northern Territory described in *Fittock v The Queen*[94]. The laws in South Australia[95] and the Australian Capital Territory[96] follow the model of "additional" jurors enacted in Victoria. As in Victoria, the

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87 8th Circuit Jury Instructions, par 1.08; cf *United States v Virginia Erection Corporation* 335 F 2d 868 at 872 (1964).

88 *United States v Beasley* 464 F 2d 468 (1972).

89 *Juries Act* 1974 (UK), s 16(1); *Juries Act* 1976 (Ir), ss 23, 24; *Crimes Act* 1961 (NZ), s 374(3); *Criminal Procedure (Scotland) Act* 1995 (UK), s 90(1); *Jury Ordinance* (HK), s 25.

90 United Kingdom, *A Review of the Criminal Courts of England and Wales*, Lord Justice Auld, (2001), Ch 5 at [20].

91 *Jury Act* 1995 (Q), ss 34(1) and (5), 56(1).

92 *Juries Act* 1957 (WA), ss 18(2) and (7) and *Criminal Code* (WA), s 646.

93 *Jury Act* 1899 (Tas), ss 39(2), (6A) and (7). In Tasmania, "reserve" jurors may replace other jurors after the jury's final deliberations have commenced: s 39(4).

94 [2003] HCA 19.

95 *Juries Act* 1927 (SA), ss 6A, 56.

96 *Juries Act* 1967 (ACT), ss 8(2) and (3), 31A(1), (4) and (5).

foreperson is exempted from exclusion from the final jury in South Australia[97]. In the Australian Capital Territory, the foreperson, like any other juror, may be balloted off.

The "jury" definition was not unchangeable

59 It will now be apparent why the applicant did not argue that it was contrary to s 80 to increase the jury numbers beyond the norm of twelve. Rather, he contended that the enlarged jury represented a redefinition of his "jury" within s 80 and, once empanelled, could not be reduced in number.

60 Some of the applicant's arguments under this head can be disposed of quite easily. A submission that, once empanelled, jurors have a "right" to participate in the verdict is misconceived. The participation of a juror is at all times conditional upon the operation of relevant laws so long as such laws are constitutionally valid[98]. For example, without contradicting the constitutional provision, a juror discharged for misconduct has no "right" of continued participation. Legislation can provide for discharge, and it invariably does.

61 Applying the test of functionality to the Victorian law[99], its purpose is clearly to protect and uphold the jury's function. Its design is intended to prevent the failure of a trial. Such failure can work hardship on the accused, on witnesses, on jurors and on the community[100]. What is involved in a jury trial today is in some ways different from what was involved when the Constitution was written. The word ("jury") remains the same. But the concept adapts to the contemporary features of jury trial[101].

62 The applicant's first point of objection therefore failed.

The jury verdict was unanimous

63 In an extension of the first argument, the applicant complained that the verdict in his case was that of the smaller number of jurors who remained after

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97 *Juries Act* 1927 (SA), s 6A(4).

98 cf *Spratt v Hermes* (1965) 114 CLR 226 at 244; *Cheng* (2000) 203 CLR 248 at 291 [126].

99 *Brownlee* (2001) 207 CLR 278.

100 *Wu* (1999) 199 CLR 99 at 106 [19], 107-108 [27]; *Brownlee* (2001) 207 CLR 278 at 303 [70], 330 [147]; cf *Ah Poh Wai* (1995) 15 WAR 404 at 415-423.

101 *Gee* [2003] HCA 12 at [113].

the "additional" jurors were balloted off and excused. Because this Court has insisted that unanimity is an "essential characteristic" of the "jury" provided in s 80 of the Constitution, it followed, according to this argument, that a kind of "majority" jury verdict had been taken. This was constitutionally impermissible.

64 This argument likewise had no merit. Where a juror is removed from the jury by death (or discharged for incapacity or on any other ground provided by law), this does not mean that the resulting jury returns a non-unanimous verdict. As the Court of Appeal held[102], the time that is critical for observing the requirement of unanimity is the time when the verdict is pronounced. The applicant's jury were unanimous in the verdict that they returned at that time.

65 There is no functional distinction between the discharge of a juror for reasons of incapacity or other like cause and discharge of an "additional" juror whose service is in excess of the ultimate needs of the trial. In each case, discharge happens according to law, for reasons unrelated to any views that the juror may have, or may have expressed to other jurors. The possibility that a juror, excluded from participation in the verdict, might have held out in favour of acquitting the accused is entirely speculative. The procedure for selection of the jurors who take part in deciding the verdict, and those who do not, is governed by ballot at all stages. It ensures that the purpose of jury trial is fulfilled: resting as it does substantially upon selection by chance, not selection upon the basis of any opinions that an excluded juror might hold.

66 The applicant's second point of objection also failed.

The jury were not "contaminated"

67 The applicant thirdly complained that the Constitution contemplated a single "jury", not one of variable numbers. Once he was put in the charge of that "jury" he was, as it was expressed, "entitled" to their verdict. To the extent that persons, at one stage part of the "jury", were later excluded from participating in the essential reason for the jury's existence (namely to return a verdict) the characteristics of secrecy, confidentiality and integrity of the jury's deliberations were undermined. "Strangers" who were not, in the end, participating jurors had taken part in the early stage of the jury's deliberations. Especially in a long trial, the excluded jurors might through discussion have had a significant impact on the verdict although they ultimately did not participate in deciding the verdict. The applicant submitted that this possibility was incompatible with an essential characteristic of jury deliberation hitherto observed, namely, the joint responsibility of all jurors for the verdict pronounced by them.

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102 *R v Ng* [2002] VSCA 108 at [28].

68 This argument likewise fails. The "additional" jurors were not "strangers" to the jury. Their participation in the jury does not violate the principles governing the secrecy and privacy of such deliberations. From a functional point of view, the purpose of those principles is to protect the jury from outside influence or pressure. Nothing in the Victorian law endangers those objectives[103].

69 The possibility that one or more empanelled jurors will be balloted off the jury that retires to consider their verdict is no different from the possibility that one or more jurors might be discharged or excused for cause before the end of the trial. The earlier participation of that person in the jury's deliberations has not hitherto been regarded as impermissibly "contaminating" the jury process or undermining the integrity of the jury's verdict. All persons engaged in the jury function are bound by obligations of secrecy and privacy. Such obligations are accepted by a public undertaking in the form of an oath or affirmation administered as they are empanelled. The joint responsibility of the jury that ultimately decides upon the verdict remains unaffected by the removal of "additional" jurors.

70 The applicant submitted that the model observed in the United States Rules conformed more closely to the requirements of s 80 of our Constitution. That model involves the possibility of the separation of the additional jurors from the primary panel, instructions to all jurors not to discuss the case with each other before beginning deliberations on a verdict and explicit directions where an additional juror replaces an original juror of the duty of the jury to commence their deliberations anew[104].

71 Care must be taken in considering United States decisions on this point. They are influenced by legal doctrine in that country that is, in turn, enlivened in federal cases by the constitutional requirements of due process. That doctrine has no exact equivalent in Australian constitutional law. The instruction to jurors to refrain from discussing together a case that might last weeks or months, before commencing deliberations on their verdict, appears to Australian eyes somewhat unrealistic and even undesirable having regard to the functions of the jury and the vagaries of human memory and impressions, especially over a long trial.

72 Once a functional approach is adopted, as *Brownlee* requires[105], the Victorian law providing for supplementary jurors may be seen as compatible

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103 cf *R v Pan* [2001] 2 SCR 344; *United States v Houlihan* 92 F 3d 1271 at 1287-1288 (1st Cir 1996).

104 Federal Rules of Criminal Procedure, r 24(c)(3).

105 (2001) 207 CLR 278 at 289 [22], 298 [53]-[54], 329 [145]-[146].

with the functions of the jury as envisaged by s 80 of the Constitution. Accordingly, the third challenge also failed.

Random selection and the jury foreperson

73 The fourth argument was put in various ways. It was said that the special status accorded by Victorian law to the juror elected as foreperson amounted, in effect, to constituting the applicant's jury of the foreperson and eleven other jurors, not of a single jury comprising jurors of exactly equal status as s 80 contemplated. It was also argued that the Victorian law departed from the essential constitutional requirement of random selection. By entrenching the participation of the foreperson in the jury, that law gave a special status to one juror who, at the time of selection, may have impressed other jurors with qualities of assertiveness and leadership that could tend to favour one side in the trial. It was complained that only in South Australia and Victoria was this departure from wholly random selection of the ultimate jury enacted.

74 None of these complaints had merit. From ancient times a jury has been expected to make corporate decisions for which all participating jurors are told they must accept responsibility[106]. To communicate with the judge and, at the end of the deliberation, to announce the verdict, it is necessary to have a chosen foreperson who, otherwise, has no higher status or function different from that of the other jurors[107].

75 Under the Victorian legislation the foreperson may be changed by the jury. They may decide to select a replacement during the course of a trial[108]. The process of selection and change being private to the jury, the reasons behind it are unknown to the judge, the parties and the community. Likewise, they will know nothing of any views that the foreperson might have, or have expressed, concerning the verdict in the matter. It is speculative to assume that a juror, initially chosen as foreperson, would necessarily favour the prosecution or defence. The obvious reason for retaining the foreperson on the jury was that this would obviate the necessity of making a fresh choice at a very late stage in the trial.

76 There is therefore nothing in the Victorian law that is sinister or incompatible with the essential element of randomness in the constitution of the

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106 Turner, "Polling the Jurors", (1979) *New Zealand Law Journal* 155 at 156; cf *R v Cefia* (1979) 21 SASR 171 at 173-175.

107 *R v Fowler* [2000] NSWCCA 352 at [47].

108 *R v Lonsdale* [1915] VLR 269.

jury. The legislative provisions concerning the foreperson, in that State and in South Australia, are by no means essential to a valid scheme for supplementary jurors. But neither are they incompatible with the composition of a jury as contemplated by s 80. Accordingly, there is no reason why the Victorian provisions might not be picked up pursuant to the *Judiciary Act* and applied to a trial on indictment in Victoria of an offence against a law of the Commonwealth. The fourth argument, therefore, likewise failed.

77 There was nothing separate or additional in the submission of the applicant that the composition of his jury involved a departure from the requirement of "fair trial" said to be implied in Ch III of the Constitution. Assuming that such an implication exists[109], nothing in the arrangements for Mr Ng's jury enlivened it.

Orders

78 In this application, as it was confined during the hearing before this Court, the challenge to the jury's verdict based on s 80 of the Constitution failed. It was for these reasons that I joined in the dismissal of the application pronounced on 13 February 2003.

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109 cf *Harris v Caladine* (1991) 172 CLR 84 at 150; *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 703-704; *Nicholas v The Queen* (1998) 193 CLR 173 at 207-208 [70]-[72]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 362 [80], 373 [116].