

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, GLEESON, JAGOT AND BEECH-JONES JJ

THE KING

APPELLANT

AND

SEBASTIEN BECHAUD

RESPONDENT

The King v Bechaud
[2026] HCA 36
Date of Hearing: 5 August 2026
Date of Judgment: 7 October 2026
M40/2026

ORDER

1. *Appeal allowed.*
2. *Set aside orders 2 to 6 of the orders made by the Court of Appeal of the Supreme Court of Victoria on 4 December 2025 and, in their place, order that the appeal to the Court of Appeal be dismissed.*

On appeal from the Supreme Court of Victoria

Representation

B F Kissane KC with L C A McAuliffe for the appellant (instructed by Office of Public Prosecutions (Vic))

O P Holdenson KC with J P O'Connor for the respondent (instructed by Condello Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

The King v Bechaud

Criminal practice – Jury trial – Separation of jury after retirement and before verdict given or jury discharged – *Juries Act 2000* (Vic) – Where jurors took separation oath on first day of trial – Where trial judge twice permitted jury to separate after retirement and before verdict or discharge – Where jury not reminded of separation oath – Where respondent's appeal against conviction successful – Where Court of Appeal held discretion to allow jury to separate conditional on jurors having taken separation oath shortly before power to allow separation exercised – Whether *Juries Act*, s 50 requires jurors to take separation oath shortly before power to allow separation exercised.

Words and phrases – "administration of jury trials", "deliberations", "discretion", "enduring efficacy of an oath taken by jurors", "error or irregularity", "integrity of the trial process", "jurors", "jury", "legislative history", "protecting the integrity of a jury's verdict", "reminder", "safeguard", "separation during deliberations", "separation oath", "sequestration", "text and statutory context".

Juries Act 2000 (Vic), s 50, Sch 5.

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Introduction

1 This Crown appeal concerns the correct interpretation of s 50 of the *Juries Act 2000* (Vic) ("the Act"), which empowers a judge in a jury trial to allow the jury to separate after retiring to consider its verdict, provided that each juror first takes the oath or makes the affirmation provided for by that section ("the separation oath"). Section 50 provides:

"Court may allow jury to separate after retiring to consider verdict

(1) Subject to subsection (2) but despite any rule of law or practice to the contrary, the court may –

(a) allow the jury to separate; or

(b) allow an individual juror to separate from the jury if, in the opinion of the court, there is good reason to do so –

after the jury has retired to consider its verdict and before the verdict is given or the jurors are discharged.

(2) A court may allow a jury or juror to separate in accordance with subsection (1) only if each separating juror has taken an oath or made an affirmation in the form of Schedule 5."

2 The prescribed form of the separation oath in Sch 5 to the Act is, relevantly, "that you will not discuss with any person other than another member of this jury any matter relating directly or indirectly to the evidence in this trial or the deliberations."

3 The Crown's single ground of appeal is that the Court of Appeal of the Supreme Court of Victoria (Priest and Kaye JJA, Taylor JA dissenting) erred in concluding that there was a "fatal and fundamental irregularity" resulting in a substantial miscarriage of justice in the respondent's trial because the trial judge did not administer and therefore the jurors did not take the separation oath at a time "both temporally proximate, and necessarily connected, with the first occasion

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upon which [the] jury [was] permitted to separate while in the course of deliberations of verdict".¹

- 4 For the following reasons, there was no relevant error or irregularity in the trial and, consequently, there was no substantial miscarriage of justice.² In short, the majority in the Court of Appeal misconstrued s 50. The appeal must be allowed, orders 2 to 6 of the orders made by the Court of Appeal on 4 December 2025 set aside and, in their place, it must be ordered that the respondent's appeal against conviction be dismissed.

Background facts

- 5 On the afternoon of Wednesday, 24 July 2024, the respondent was arraigned in the presence of a jury panel and pleaded not guilty to two charges of rape. The jury was empanelled at 3.10 pm that same day. On empanelment, in accordance with s 42 of the Act, the jurors swore an oath or made an affirmation in the form prescribed in Sch 3 to the Act, by which they promised to "faithfully and impartially try the issues between the Crown and [the respondent] in relation to all charges brought against [the respondent] in this trial and give a true verdict according to the evidence" ("the empanelment oath").

- 6 Before the prosecution had opened its case,³ or the defence had responded,⁴ and before any evidence was called, the trial judge (Gaynor J) gave preliminary directions to the jury. The preliminary directions included the following:

"Now when you go home tonight it may well be the case that family and friends are thrilled and excited to discover that you are on a jury in a criminal trial and they'll want to know all about it. By all means you can talk about the barristers, the courtroom, the judges, all those sorts of things. But you must not, and it would be a betrayal of your oath, if you were to

1 *Bechaud v The King* (2025) 79 VR 95 at 100 [22].

2 See *Criminal Procedure Act 2009* (Vic), s 276(1)(b). See also *Brawn v The King* (2025) 99 ALJR 872; 423 ALR 69; *MDP v The King* (2025) 99 ALJR 969; 423 ALR 204.

3 *Criminal Procedure Act*, s 224(1).

4 *Criminal Procedure Act*, s 225(1).

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discuss any of the evidence led for your benefit with anyone other than another member of this jury.

Now we do not want the opinions of friends and neighbours who are not here to hear the evidence, to see the evidence, to be directed by the rules of law that you will be directed by.

...

Now before you go I'm going to ask you to take an oath of separation. What that means is that you undertake either by way of a religious oath or an affirmation that you will not discuss the evidence with anyone other than another member of the jury, and then I will let you go."

7 At the end of those directions and before the jury left court for the day, each juror took the separation oath. The trial judge gave no reasons for having the jurors take the separation oath at that time.⁵

8 On Thursday, 25 July 2024, after the prosecution opening address and the defence response, evidence in the trial commenced. The prosecution case closed on Thursday, 1 August 2024. After the parties' closing addresses, the trial judge gave final directions to the jury on 1 and 2 August 2024. On the afternoon of Friday, 2 August 2024, jurykeepers were sworn in⁶ and, at 2.34 pm that day, the jury retired to consider its verdicts. By then, nine days had passed since the jurors had taken the separation oath. Later that Friday afternoon, after further directions were given in response to two questions from the jury, and without objection, the trial judge allowed the jury to separate.⁷ Before the jury separated, the trial judge did not remind the jurors of the content of the separation oath they had taken or that the jurors continued to be bound by the oath or, more generally, that they should not discuss with any person other than another member of this jury any matter relating directly or indirectly to the evidence in the trial or the jury's deliberations.

5 *Bechaud* (2025) 79 VR 95 at 97 [3].

6 In accordance with s 49 of the *Juries Act 2000* (Vic) and in the form prescribed by Sch 4 to the *Juries Act*.

7 *Bechaud* (2025) 79 VR 95 at 97-98 [8].

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9 The jury reconvened to deliberate on Monday, 5 August 2024. That afternoon, the trial judge gave a perseverance direction to the jury to persevere to reach a unanimous verdict.⁸ Later that afternoon, the trial judge again allowed the jury to separate until the following day without objection and without the jurors being reminded that they continued to be bound by their separation oath. Following further deliberations of the jury on Tuesday, 6 August 2024, at approximately 4.00 pm the jury returned a verdict of not guilty on the first charge and a verdict of guilty on the second charge.⁹

10 After the jurors took the separation oath on 24 July 2024, the trial judge did not remind the jurors of their separation oath or that it continued to bind them. At no point during the trial did either the prosecution or defence counsel submit to the trial judge that the jury should receive such a reminder.

Court of Appeal's decision

11 The respondent appealed against his conviction, including on the ground that the trial judge erred in allowing the jury to separate after retiring to consider its verdict without each juror having taken the separation oath shortly before separation. The majority of the Court of Appeal allowed the appeal on this ground, set aside the respondent's conviction and ordered a new trial.

12 Noting that the jury's taking of the separation oath is a precondition to allowing the jury to separate after the jury has retired to consider its verdict, the majority concluded that the separation oath is not directed to the conduct of the jury during or after the conclusion of a trial but is specific to the conduct of the jury's deliberations.¹⁰ The majority reasoned that it was of "particular importance" that the separation oath "be administered at a time which necessarily connects, in the minds and understanding of the jury, the obligation contained in [the separation oath] with the required conduct of the jury during separation in the course of the jury's deliberations".¹¹

13 In dissent, Taylor JA found that, on a "plain reading", s 50 did not mean that the separation oath must be given only after a judge has determined to exercise

8 *Bechaud* (2025) 79 VR 95 at 98 [10].

9 *Bechaud* (2025) 79 VR 95 at 98 [11].

10 *Bechaud* (2025) 79 VR 95 at 99 [15]-[16], 100 [22].

11 *Bechaud* (2025) 79 VR 95 at 100 [22].

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the discretion to allow the jury to separate after the jury has retired to consider its verdict but immediately before the discretion is exercised.¹² In particular, her Honour reasoned that the words "in accordance with sub-s (1)" in s 50(2) "do no more than make the conditional link between the exercise of the discretion and the prior giving of the separation oath."

- 14 Taylor JA considered that s 50 is premised on the fact that the separation oath is sufficient to guard against the risk and fact of outside influence upon the jury.¹³ Such an oath, once made, endures with respect to the trial in which it was taken. Accordingly, in her Honour's view, that the trial judge did not remind the jurors that they remained bound by the terms of the separation oath each time that they separated did not constitute "a serious departure from the prescribed processes of a criminal trial", particularly given that "there was no basis for any suspicion that any juror in the [respondent's] trial failed to comply with the terms of the separation oath".¹⁴ Nevertheless, Taylor JA also said that it is "unwise to administer the separation oath shortly after a jury is empanelled" and that the observations of the Victorian Court of Appeal in *Youssef (a pseudonym) v The Queen* "as to the best practice as to the administration of the separation oath and later reminders of it remain desirable", so that "jurors have the significance of the deliberation process and the integrity of their verdict reinforced".¹⁵

Interpretation of s 50

Text and statutory context of s 50

- 15 Section 50(1)(a) of the Act confers upon the trial judge a discretion to allow the jury to separate "after the jury has retired to consider its verdict and before the verdict is given or the jurors are discharged". By the words "[a] court may allow a jury or juror to separate in accordance with subsection (1) only if", s 50(2) of the Act makes taking the separation oath by each juror a precondition to the exercise of the trial judge's discretion to allow separation of the jury after the jury has retired and before or during the jury's deliberations. Thus, the trial judge's

12 *Bechaud* (2025) 79 VR 95 at 114 [87].

13 *Bechaud* (2025) 79 VR 95 at 117 [100].

14 *Bechaud* (2025) 79 VR 95 at 119 [104]-[105].

15 *Bechaud* (2025) 79 VR 95 at 119-120 [105]-[108], referring to *Youssef (a pseudonym) v The Queen* [2019] VSCA 240 at [64].

discretion to allow the jury to separate may be exercised only after each separating juror has taken the separation oath. Otherwise, s 50 is silent about the manner of both exercise of the discretion to allow jury separation and compliance with the precondition to the exercise of that power. Accordingly, s 50 is not to be construed as subject to other limitations not apparent from the text, context or purpose of s 50. Except for s 50(2) functioning as a precondition to the exercise of the discretion to allow jury separation, nothing in the text of s 50 supports a conclusion that the separation oath must be taken at any particular time or stage of the trial process.

16 Section 50 must also be read with the prescribed form of the separation oath which refers to both the evidence in the trial and the jury's deliberations. If jurors are required to take the separation oath early in the trial, the separation oath binds the jury from that time. In this way, requiring the jury to take the separation oath early in the trial (particularly, before evidence commences) could be said to support the preliminary directions trial judges routinely give to juries about the need to avoid discussing the evidence with anyone outside the jury.¹⁶ What is clear, however, is that the text of s 50 and the terms of the separation oath provide no support for the conclusion of the majority of the Court of Appeal that the trial miscarried or for Taylor JA's view to the effect that it is "unwise to administer the separation oath shortly after a jury is empanelled". Taylor JA's point which remains good is that the separation oath is to be taken once only by each juror and jurors should be reminded that they continue to be bound by the oaths they have taken throughout the trial process and by such directions given by the trial judge as may be called for by any particular circumstance (such as a question by a juror suggesting any relevant lack of understanding).

17 It is also relevant that s 50 sits within Pt 6 of the Act, entitled "Jury trials". In contrast to s 50, other provisions in Pt 6 specify precise temporal requirements for certain actions in a jury trial.¹⁷ For instance, s 50 may be contrasted with s 42 of the Act, which requires the empanelment oath to be administered to the jury "[o]n being empanelled".

16 Judicial College of Victoria, *Criminal Proceedings Manual* (July 2026) at [11.6.1], citing *R v Skaf* (2004) 60 NSWLR 86 at 104-105 [279]-[281]. See also *Platt v The Queen* (2018) 58 VR 593 at 595 [4]; *Warne v The Queen* (2020) 135 SASR 431 at 439 [43].

17 *Juries Act*, ss 42, 44(1), 48(1).

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18 Thus, nothing in the text or statutory context of s 50 supports construing the provision so that it requires jurors to take the separation oath at a time "both temporally proximate, and necessarily connected, with the first occasion upon which a jury is permitted to separate while in the course of deliberations of verdict".¹⁸ To the contrary, the presence of temporal requirements in other provisions in Pt 6 of the Act is a statutory contextual indicator that the legislature did not intend to impose such a requirement.

The purpose of s 50

19 The purpose of s 50 also does not support the conclusion of the majority of the Court of Appeal that the discretion in s 50(1)(a) to allow the jury to separate is conditional on the jurors having each taken the separation oath shortly before the power to allow separation is first exercised.

20 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.¹⁹ Historically, jurors were segregated together throughout the trial and until they had delivered their verdict.²⁰ The purpose of sequestering juries was to ensure the integrity of the jury's verdict.²¹ The common law in Australia evolved away from absolute jury sequestration and towards permitting jury members to separate from one another while the trial was proceeding and before the jury retired to start their deliberations. As Gaudron, Gummow and Hayne JJ observed in *Brownlee v The Queen*, "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."²² Thus, it came to be accepted that this essential feature of the jury

18 cf *Bechaud* (2025) 79 VR 95 at 100 [22].

19 *Brownlee v The Queen* (2001) 207 CLR 278 at 302 [67].

20 *Brownlee* (2001) 207 CLR 278 at 289 [25].

21 *Brownlee* (2001) 207 CLR 278 at 289 [25].

22 *Brownlee* (2001) 207 CLR 278 at 302 [66]. See also *R v Glennon* (1992) 173 CLR 592 at 614.

trial, that a jury's deliberations should be unaffected by outside influence, could be achieved while permitting jury separation during deliberations.

21 As Gleeson CJ and McHugh J also observed in *Brownlee*, the effectiveness of jury sequestration "has never been absolute" and "[t]he ultimate protection [of jurors from external influence] in every case must lie in the sense of responsibility of jurors themselves".²³ Gleeson CJ and McHugh J observed that the discretion reposed in a trial judge by the then s 54(b) of the *Jury Act 1977* (NSW) to permit jury separation "at any time after [the jury] retire to consider their verdict" enabled 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".²⁴ Consistently with this observation, in the case of s 50 of the Act, the trial judge must consider the exercise of the discretion to allow the jury to separate by reference to the facts and circumstances as they exist immediately before allowing the jury to separate. That does not mean, however, that s 50 requires the jurors to have taken the separation oath shortly before the power to allow separation is exercised.

22 This flexibility accords with the purposes of the Act, which include to provide for the operation and administration of a system of trial by jury that "equitably spreads the obligation of jury service amongst the community"²⁵ and "makes juries more representative of the community".²⁶ More specifically, Pt 6 seeks to facilitate the administration of jury trials and ensure a fair trial for the accused by conferring discretionary powers upon the trial judge to protect the integrity of the trial process and the jury's eventual verdict. These purposes are advanced by jurors being able to return home to attend to other duties during deliberations which may extend over days rather than mere hours.²⁷

23 Providing a trial judge with the discretion to allow a jury to separate during deliberations "was clearly designed to modify the strictness of the common law

23 *Brownlee* (2001) 207 CLR 278 at 289-290 [26]-[27].

24 *Brownlee* (2001) 207 CLR 278 at 290 [28]; see also at 302 [67], quoting *R v Brownlee* (1997) 41 NSWLR 139 at 145-146.

25 *Juries Act*, s 1(a).

26 *Juries Act*, s 1(b).

27 cf Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 1993 at 1157.

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practice in favour of convenience to jurors, provided that the requirements imposed by the section were complied with".²⁸ By ameliorating the strict common law rule "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",²⁹ s 50 strikes a balance between the need for jurors to perform jury duty compatibly with their other responsibilities (insofar as possible) and the need to ensure the integrity of a jury's verdict against the risk of outside influence during separation. The requirement of the separation oath is evidently a safeguard "specifically designed to promote the integrity of the trial process and to minimise the risk of the jury's communication with third parties",³⁰ "to protect jury deliberations from contamination" and to prevent "the perception that there has been any opportunity for unauthorised communications with the jury".³¹ Undoubtedly, these objects can be achieved within the terms of s 50 including by jurors taking the separation oath immediately after a trial judge has decided to allow the jury to separate for the first time following the jury retiring, whether that decision is made before the start of or during the jury's deliberations (referred to by Taylor JA as "best practice"³²), but the terms of s 50 are sufficiently flexible to conclude that there was no irregularity in the trial judge having taken the different course in this case.

24 Given the terms of s 50, properly construed, the respondent's arguments to the contrary cannot be accepted. It is one thing to accept that to safeguard and protect the integrity of the jury's verdict the trial judge must consider the exercise of the discretion to allow the jury to separate having regard to the circumstances prevailing immediately prior to each occasion of separation. It is another to say that the jury must take the separation oath only when jury separation is "imminent". That argument wrongly conflates the fact of the taking of the separation oath, the

28 *R v Patton* [1998] 1 VR 7 at 11.

29 *R v Chaouk* [1986] VR 707 at 710, 717.

30 *Youssef* [2019] VSCA 240 at [56].

31 *Youssef* [2019] VSCA 240 at [62]. See also *T* (1996) 86 A Crim R 293 at 302; *Birchall v The King* [2026] VSCA 63 at [82].

32 *Bechaud* (2025) 79 VR 95 at 116 [95], 120 [108]. See also *Appleby* (1996) 88 A Crim R 456 at 485; *Patton* [1998] 1 VR 7 at 11; *Youssef* [2019] VSCA 240 at [64].

precondition to the jury being allowed to separate, with the trial judge's discretion to allow the jury to separate after it has retired.

25 Once it is understood (as it must be) that any oath endures in accordance with its terms as described in [29] below, it also cannot be accepted that there is a risk that a separation oath, if taken by jurors early in the trial, may become futile or diluted in its effect on the minds of the jurors with the passage of time or because of the events in the trial since the jurors took the separation oath. The respondent proposed two alternative approaches to address this supposed risk. The first alternative was to read the words "has taken" in s 50(2) as requiring a proximate "temporal or factual connection" between the jurors taking the separation oath and the fact of the jury separating before or during deliberations. By "factual" connection, the respondent contemplated a reminder of a separation oath administered earlier during the trial. The second alternative was that the word "just" should be read into s 50(2) so that it reads "only if each separating juror has [just] taken".

26 Both alternative constructions must be rejected. The purpose of protecting the integrity of a jury's verdict does not require additional words to be read into s 50 to constrain the trial judge's discretion to allow the jury to separate in accordance with the provision.

27 The implausibility of the respondent's first alternative reading of s 50(2) is exposed by the lack of a precise articulation of the asserted temporal or factual connection said to be contained in the words "has taken" in s 50(2) and the disconnection between (on the one hand) construing s 50 as requiring jurors to take the separation oath in temporal proximity to the jury's deliberations and (on the other hand) the capacity of the trial judge to remind jurors of the separation oath and other oaths and directions as and when appropriate in the circumstances of the trial. The second alternative reading is not justified by the identified purpose: why should it be supposed that the integrity of the jury's verdict can be protected only by jurors taking the separation oath "just" prior to separation? Further, this alternative wrongly implies that the separation oath must be taken by the jurors prior to each occasion when the trial judge allows the jury to separate after retiring, whether before or during deliberations, contrary to the assumption correctly stated in *R v Patton* in relation to s 51A of the *Juries Act 1967* (Vic) (the predecessor to s 50) that:³³

33 [1998] 1 VR 7 at 11.

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"To suggest that the section requires a further undertaking on oath on each and every occasion that the jury, within the period contemplated, separates is, in our view, to give the section an interpretation which the words do not command and which would or could lead to an absurd imposition upon the jurors. Once the jurors have sworn on their oath that they will not discuss matters concerning the inquest with persons other than members of the jury, it should be assumed that they will understand that such oath will continue to bind them if, within the designated period, they are permitted to separate again."

28 As noted, while the course considered to be "best practice" in Victoria of the trial judge requiring jurors to take the separation oath immediately before allowing them to separate after retiring accords with the requirements of s 50, a position reflected in the Criminal Proceedings Manual of the Judicial College of Victoria ("the Victorian Criminal Proceedings Manual"),³⁴ another view is that the purpose of protecting the integrity of a jury's verdict may well be served better by jurors taking the separation oath before the evidence commences, as occurred in this case. Not only would this reflect the terms of the separation oath in respect of "the evidence in this trial", but it may also, for example, reinforce compliance with s 78A(1)(b) of the Act, which prohibits "a juror in a trial" making an enquiry (as defined in s 78A(5)) "for the purpose of obtaining information about a party to the trial or any matter relevant to the trial, except in the proper exercise of his or her functions as a juror". By s 78A(5) of the Act, "making an enquiry" includes consulting with another person. As already noted, early administration of the separation oath may also reinforce the preliminary directions routinely given by trial judges about the need to avoid discussing the evidence with anyone outside the jury. Thus, the majority of the Court of Appeal erred insofar as they proceeded on the premise that the terms of the separation oath concern only the conduct of the jury during deliberations.³⁵

29 Moreover, as the Victorian Court of Appeal held in *Patton*, it should be assumed that jurors understand that the separation oath, once taken, will continue to bind them in accordance with its terms, albeit subject to any circumstance arising that casts doubt on the continuing validity of that assumption.³⁶ The

34 Judicial College of Victoria, *Criminal Proceedings Manual* (July 2026) at [11.7.17]-[11.7.18].

35 *Bechaud* (2025) 79 VR 95 at 99 [15]-[16], 100 [22].

36 cf *Patton* [1998] 1 VR 7 at 11.

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enduring efficacy of an oath taken by jurors should not be doubted merely because of the passage of time since the oath was administered. Even so, the practice of reminding jurors of their separation oath each time the jury separates remains appropriate so that, as Taylor JA put it, jurors "have the significance of the deliberation process and the integrity of their verdict reinforced".³⁷ It follows from this that circumstances may arise in a trial by reason of which it may be an error or irregularity for the trial judge not to remind the jurors that they continue to be bound by the separation oath and of the terms of that oath before the jury is allowed to separate after retiring to consider its verdict.

Other contextual matters

30 Finally, neither the legislative history of laws permitting jury separation nor current practice suggests that the precondition in s 50(2) of the Act requiring jurors to have taken the separation oath before the trial judge allows the jury to separate should be read otherwise than in accordance with its terms. When the ability to allow jury separation after the jury retires and before or during deliberations was introduced in Victoria, by the *Juries (Amendment) Act 1993* (Vic), the Second Reading Speech to the Bill recorded that the experience in New South Wales of a similar change (albeit without any requirement for a separation oath) had led to no instances of attempted interference with a jury, that being a fear that had underpinned the traditional practice of jury segregation.³⁸ The Second Reading Speech also noted the government's expectation that courts would be prepared to allow juries to separate unless there were a real reason not to do so.³⁹ Section 51A was anticipated to yield cost savings and reduce the level of disruption to jurors involved in lengthy deliberations.⁴⁰

37 *Bechaud* (2025) 79 VR 95 at 119-120 [108].

38 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 1993 at 1157.

39 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 1993 at 1157.

40 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 1993 at 1157-1158.

31 The other States and Territories now have similar laws,⁴¹ although only Tasmania also requires the administration of a separation oath. It is now routine in Victoria (and throughout Australia) that juries separate after retiring and before or during deliberations.⁴² The current Victorian Criminal Proceedings Manual provides that the trial judge "should only order the segregation of the jury in exceptional cases, where it is necessary in the interests of justice to protect the jury from outside influences"⁴³ and that "[i]n exceptional cases, the court may keep the jury sequestered in a hotel once they commence their deliberations".⁴⁴ In the light of the contemporary approach to jury separation, as described in the Victorian Criminal Proceedings Manual, a trial judge may generally anticipate that they will allow the jury to separate as provided for in s 50 if the jury's deliberations are not completed in a single day.

32 None of these considerations provide a foundation for a constraint upon the discretion conferred by s 50 on a trial judge of the kind identified by the majority of the Court of Appeal. Section 50 permitted the trial judge to administer the separation oath at an early stage in the trial, in the absence of any indication that this step was otherwise inconsistent with ensuring a fair trial to the accused, and subsequently to make orders allowing the jury to separate during deliberations.

Discretion to allow the jury to separate did not miscarry

33 In this Court, the respondent sought to uphold the orders of the Court of Appeal on the basis that even if the time at which the jurors took the separation oath satisfied s 50(2), the exercise by the trial judge of the discretion conferred by s 50(1) to allow the jury to separate miscarried because the passage of time since the oath was taken meant that "[t]here was ... a real risk that the jury would not have perceived the separation oath to bind them during their deliberations". The respondent did not specify which of the specific errors described in *House v The*

41 See *Jury Act 1977* (NSW), s 54; *Juries Act 1927* (SA), s 55; *Jury Act 1995* (Qld), s 53; *Criminal Procedure Act 2004* (WA), s 111; *Juries Act 2003* (Tas), s 46; *Criminal Code Act 1983* (NT), ss 365-366; *Juries Act 1967* (ACT), s 42A(3).

42 *Bechaud* (2025) 79 VR 95 at 115 [90].

43 Judicial College of Victoria, *Criminal Proceedings Manual* (July 2026) at [11.7.1], citing *R v Voss* [1963] VR 22; *R v Gay* [1976] VR 577; *Chaouk* [1986] VR 707; *Prime* (1973) 57 Cr App R 632.

44 Judicial College of Victoria, *Criminal Proceedings Manual* (July 2026) at [11.7.3].

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*King*⁴⁵ was relied upon but, presumably, this exercise of the discretion is said to have involved a failure to take into account some material consideration, namely the elapse in time between the administration of the separation oath and the jury's separation, and the absence of any reminder about the oath having been given to the jury in the meantime. The respondent also submitted that the exercise of the discretion to allow separation was "unreasonable in the sense described in *House v The King*."

34 Even if that elapse in time and the absence of a reminder was a material consideration required to be taken into account in deciding to allow the jury to separate, there is no factual basis for finding that the trial judge failed to do so. There is no reason to apprehend that, at the time her Honour exercised the discretion to allow the jury to separate, her Honour was not cognisant of the time that had elapsed since the separation oath was administered to the jurors, or the fact that the jury had not been reminded of the oath. Otherwise, the decision to allow the jury to separate was anything but unreasonable. As already noted at [25], it cannot be accepted that there is a risk that a separation oath administered early in a trial becomes futile or diluted in its effect merely because of the passage of time since the taking of the oath. That is especially so with this relatively short trial and even without the jury being reminded of the terms or effect of the oath.

Conclusion

35 There was no error or irregularity in the trial as a result of the jurors taking the separation oath on the trial's first day, and the trial judge subsequently permitting the jury to separate after the jury retired and during the jury's deliberations. The majority in the Court of Appeal erred in their interpretation of s 50 of the Act and their consequent conclusion that there was an error or irregularity that was a substantial miscarriage of justice.⁴⁶

36 The appeal must be allowed, orders 2 to 6 of the orders made by the Court of Appeal on 4 December 2025 set aside and, in their place, it must be ordered that the respondent's appeal to the Court of Appeal against his conviction be dismissed.

45 (1936) 55 CLR 499 at 505.

46 See *Criminal Procedure Act*, s 276(1)(b).

