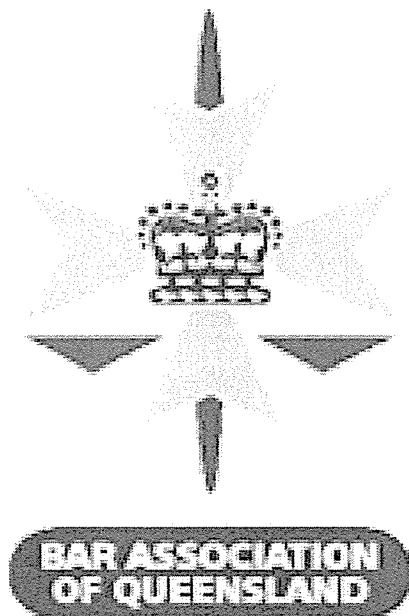
BAR ASSOCIATION OF QUEENSLAND

CPD 4 OF 2006

ASPECTS OF CROSS EXAMINATION ON DOCUMENTS

By Graham Gibson QC and Declan Kelly



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Introduction

1. The topic of cross-examination on documents has been the subject of much consideration, including recent consideration, in textbooks, journals and articles. In the final section of this paper we have attempted to collect some useful references on the topic. Despite much having been written on the topic, a leading commentator observed as recently as in 1988 that the common law rules as to the cross-examination of a witness on documents "are shrouded in obscurity and complication which is exceptional even by the standards of the law of evidence".[1] We think that today the position is somewhat more clear, particularly in the Federal context where litigants now have the benefit of the ameliorative provisions of the *Evidence Act* 1995 (Cth) ("the Commonwealth Act"). It is necessary to be aware that much of what has been written on the topic predates the Commonwealth Act.

2. There are also diverging views as to the practical importance of this topic in the modern, civil context. The differing views are perhaps best illustrated by the extra judicial writings of some superior court judges. One view is that the modern emphasis on the efficient conduct of civil litigation and the discouragement of disputes means that there is not usually any practical

[1] RA Brown, *Documentary Evidence in Australia*, (1988) at p 162

difficulty in tendering relevant documents.[2] The contrary view is that there has been a discernible hardening of the attitude of modern counsel to the enforcement of the rules of evidence which is "nowhere more manifest than in the use of documents".[3]

3. Ultimately, an awareness of the fundamental rules concerning cross-examination on documents is important for the structure and flow of any cross-examination and it is prudent to prepare cross-examination on the presumption that your opponent will take any substantive point which is open to be taken.

4. The three generally recognised uses of documents in cross-examination are to:

   (a) prove a document;

   (b) prove a fact referred to in a document without tendering the document;

   (c) discredit the witness.

5. It is the purpose of this paper to deal with some discrete issues which can arise when pursuing these uses.

Proving documents

6. The position in the Federal sphere has been simplified by reason of Part 2.2, sections 47-51 of the Commonwealth Act.

7. In particular, section 51 abolishes the principles and rules of the common law that relate to the means of proving the contents of documents.

8. Section 48(1) of the Commonwealth Act provides that a party may adduce evidence of the contents of a document either by tendering the document or by pursuing any one or more of six enumerated methods. Essentially, those methods involve:

   (a) adducing evidence of an admission made by another party to the proceeding as to the contents of the document in question;

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[2] The Honourable Mr Justice R N Chesterman, "*Trial Documents – Proving, Tendering and Cross-Examination*", BAQ CPD 31 August 2000 at p 3

[3] The Honourable Mr Justice J H Phillips, "*Cross-Examination on Documents*", (1990) 64 ALJ 591 at 591

(b) tendering a document that purports to be a copy of the document in question and which has been produced or purports to have been produced by a device that reproduces the contents of documents;

(c) where the document is an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound or in which words are recorded in a code, tendering a document that is or purports to be a transcript of the words;

(d) where the document is an article or thing on or in which information is stored in such a way that it cannot be used by the court unless a device is used to retrieve, produce or collate it, tendering a document that was or purports to have been produced by use of the device;

(e) tendering a document that forms part of the records of or kept by a business and which purports to be a copy of or an extract from or a summary of the document in question or purports to be a copy of such an extract or summary;

(f) where the document is a public document, tendering a document that purports to be a copy produced by or on behalf of the government.

9. The effect of section 48(1) of the Commonwealth Act is that no particular proof of authenticity or identification is required and the court receives the document for what it appears to be.

10. Sections 166 to 169 of the Commonwealth Act then identify some circumstances in which the court may examine or test documents or require persons involved in their production to be called as witnesses. It is not the purpose of this paper to consider those sections in any detail.

11. In the State sphere, the common law rules continue to apply as modified by the *Uniform Civil Procedure Rules*.

12. Rule 227(1) UCPR requires that documents which have been disclosed by a party must be produced at trial if a notice to produce the documents is given and, at the trial, the other party requests their production.

13. Rule 227(2) then materially provides that a document "disclosed under this division that is tendered at the trial is admissible in evidence against the

disclosing party as relevant and as being what it purports to be". This rule is similar to, but much more limited than, s 48 of the Commonwealth Act. The documents to which rule 227(2) refers are documents which have been disclosed by the other party to the proceeding and which, hence, are directly relevant. The rule is not however concerned with issues of admissibility.

14. In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2002] QCA 380 at [101]-[104], Williams JA said of rule 227(2):

> "[101] That is an adaptation of a rule found in the disclosure rules inserted into the rules of the Supreme Court on 1 May 1994, consequent upon a recommendation from the Litigation Reform Commission. Order 35 rule 18 was in terms:
>
> 'If a document disclosed under this Order is tendered at the trial, it is admissible in evidence against the disclosing party as relevant and as being what it purports to be.'
>
> [102] It is only the introductory words which are changed, but it would appear that in either form the rule has the same effect. Put in simple terms, the submission of counsel for the plaintiff is that a document disclosed pursuant to the Rules may be tendered as evidence against the party making disclosure without the need to otherwise establish its admissibility. The submission from the other side is that the document in question must be shown to be admissible before it can be tendered; once its admissibility is established then it goes into evidence 'as being what it purports to be'. The rule does away with the necessity for further proof of authenticity as a pre-requisite to admission.
>
> [103] For present purposes it is sufficient to have regard to one of the documents which counsel for the plaintiff sought to tender which the learned trial judge ruled was inadmissible unless supported by other evidence. There was a meeting between Prendergast and officers of the ATO at which an accountant from Arthur Andersen was present. That accountant made notes of what was said during that meeting and that document was kept in the Arthur Andersen file. It was disclosed consequent upon the orders for further discovery and inspection made in the course of the trial. There was no suggestion the maker of the document was not available to give evidence. Counsel for the plaintiff sought to tender the document as evidence of admissions by Prendergast. The document was clearly hearsay and there was nothing in the *Evidence Act* 1977 which afforded a basis for admissibility. The contention was that rule 227(2) effectively altered the law of evidence so that the document was admissible. The learned trial judge refused to hold that the rule in question has effected such a substantial change to the law of evidence.

> [104] Since *Wilson v Thornbury* [1875] LR 10 Ch App 239 it has generally been recognised that (absent of any special rule) disclosure in an affidavit of documents only admits that the pieces of paper are in the possession of the party, it does not amount to an admission of the genuineness of the document. That is overcome by the rule in question saying that a document, if admitted, is evidence 'as being what it purports to be'. Further, rule 211 requires a party to disclose documents 'directly relevant' to an allegation in issue; it says nothing about admissibility. In order to get a document into evidence it may in many instances be necessary to call a particular witness; the rule in question does not obviate the necessity of so doing."

15. This means that, when conducting your case, you may still be confronted with a situation in which you wish to put into evidence a document disclosed by the other side in circumstances where you are not able to prove, in your own case, that the document was signed or otherwise made by the opposing party. In this situation, it is open to you as the cross-examiner to put the document to a witness to prove that it was signed or otherwise made by the opposite party. If you receive favourable answers, the document can be tendered. If you receive unhelpful answers, the document will have to be proved through some other witness.

Refreshing memory

16. Particular considerations arise in relation to the proper use of a document as a result of a witness having refreshed his or her memory from part of that document.

17. As a general statement, if a witness refreshes his or her memory from part of a document, the cross-examiner can cross-examine on that part without fear however, if the cross-examination strays to other parts of the document, the cross-examiner may be required to tender the document.

18. There are some more specific propositions inherent in this statement.

19. The first specific proposition is that, where a document has been used to refresh a witness' memory, the cross-examiner may call for the document to inspect it without thereby being obliged to tender the document if demand is made for such tender.

20. The second specific proposition is that, once having examined the document in this manner, the cross-examiner may cross-examine the witness on those parts

of the document used to refresh the witness' memory. The cross-examiner cannot be compelled to tender the document in these circumstances. The rationale for this rule is that the cross-examination in this instance goes only to the credit of the witness' memory as refreshed and does not make any part of the document itself admissible: *Gregory v Tavernor* (1833) 6 C&P 280 [172 ER 1241]; *Alexander v Manley* (2004) 29 WAR 194 at [24].

21. The third specific proposition is that, where a document used to refresh memory is cross-examined upon and the cross-examination extends beyond the areas used for refreshing memory or the document is used in a way which goes beyond challenging the reliability of the refreshed memory, the cross-examiner may be compelled to tender the whole document, in which case the whole contents become admissible for all purposes: *Wharam v Routledge* (1805) 5 Esp 235 [170 ER 797]; *Senat v Senat* [1969] P 172 at 177; *Alexander v Manley* (2004) 29 WAR 194 at [24].

22. As to this last point, there are differing views as to precisely when opposing counsel should request the tender of the document.

23. In Victoria, the position is that opposing counsel can require the tender of a document only during the cross-examination of the particular witness: *Hatziparadissis v GFC Manufacturing Co* [1978] VR 181 at 183; *R v Trotter* (1982) A Crim R 8 at 19. The rationale behind the rule appears to be that there is a potential risk of unfairness or inconvenience if the rule is not enforced. Some doubt has been cast upon this decision, it having been suggested that the authorities relied upon by *Hatziparadissis* do not clearly support the rule: P R MacMillan, *Cross-Examination on Documents* (2005) 26 Aust Bar Rev 287 at 299; *Alexander v Manley* (2004) 29 WAR 194 at [11]. It has also been suggested that the rule is inconsistent with *Holland v Reeves* (1835) 173 ER 16 at 18; see McHugh, *Cross-Examination on Documents* (1983) 1 Aust Bar Rev 51 at 68.

24. The Victorian rule has not been accepted in Queensland, where the application for tender does not have to be made at any particular time, although fairness will require that the application be made promptly: *R v Foggo; ex parte Attorney-*

General [1989] 2 Qd R 49 at 51; *Alexander v Manley* (2004) 29 WAR 194 at [12], [21] and [67].

Tender under compulsion

25. There are a variety of circumstances in which a cross-examiner may be compelled to tender a document. It is not the intention of this paper to identify and address every conceivable circumstance. There are, however, some particular rules and propositions which we consider useful to identify and address.

26. The first is the so called rule in *R v Jack* (1894) 15 LR (NSW) 196. In *Cross Examination on Documents* (1983) 1 Aust Bar Rev 51, M H McHugh QC (as his Honour then was) stated a proposition in these terms:

> "If *R v Jack* (1894) 15 LR (NSW) 196 represents the law, even a party cannot have an identified document put in his hand and then be asked whether he adheres to his testimony, unless the cross-examiner undertakes to put the document in evidence."

27. McHugh QC noted (at 53) that *R v Jack* had "troubled the New South Wales Bar for almost 90 years".

28. In *R v Jack*, counsel for the accused had placed in the hands of a crown witness, the witness' deposition and said to him "Look at your own deposition...do you adhere to what you have said?...Is not the word 'stab' in your deposition?"

29. At page 200, Windeyer J said:

> "When Counsel did this he was clearly making use of the depositions in a way which was calculated to create the impression in the minds of the jury that the witness, in giving his evidence at the Police Court, had made use of the word 'stab'. His Honour was therefore, entirely correct in the course he took, and acted on the law laid down in *R v Ridout SMH* 3 May 1854, and in cases in England decided before that case. The law laid down and established in that case was, that if cross-examining Counsel makes use of a deposition in this way by putting into the witness' hands, he must put it in evidence, even though he ostensibly makes use of the deposition for the purpose of refreshing the witness' memory. The reason of the rule is that if the putting in of the deposition were not insisted upon, a false impression might be conveyed to the jury that the witness had sworn something different at the Police Court from the evidence that he was then giving in Court, whereas the deposition in evidence might be exactly the same."

30. The view of McHugh QC was that this reasoning completely denied the effect of the New South Wales equivalent of section 19 of the *Evidence Act* 1977 (Qld) ("the State Act"). McHugh QC argued that the decision was clearly wrong and that its reasoning was "predicated on the law which had been laid down in the *Queen's Case* and in a series of cases which were decided in England between 1820 and 1852.

31. In *Maddison v Goldrick* [1976] 1 NSWLR 651 at 660, Samuels JA expressed the view that *R v Jack* was an authority which "was to be doubted".

32. The commentators have tended to agree with the observations of McHugh QC and of Samuels JA in *Maddison.*

33. In *Cross-Examination on Documents* (1986) 2 Aust Bar Rev 267 at 271, D K Malcolm QC (as his Honour then was) said of McHugh QC's comments:

> "With respect I agree. What could counsel in *R v Jack* have done? It is submitted that he could have said 'I would like to show you a document. I would like you to read it and then I will ask you a question'. After the witness has read the document counsel should then ask 'Having looked at the document, do you still adhere to your previous statement?'. In this way neither the document nor its contents have been identified...No doubt the jury or the trial judge who is to decide an issue of fact will be intrigued to know what it was in the document which caused the witness to change his mind. In some cases they may be able to find out. The position differs depending on whether the witness is the author of the document."

34. MacMillan, in *Cross-Examination on Documents* (2005) 26 Aust Bar Rev 287 has described *R v Jack* as "anomalous and contrary to the legislation".

35. The second instance is provided by the ruling in *Walker v Walker* (1937) 57 CLR 630. That rule may be stated as follows: If a party calls for and inspects a document held by his or her adversary, he or she is bound to put it into evidence if required to do so unless the document has been used to refresh the memory of one of the adversary's witnesses.

36. This is a common law rule which predates discovery. It promotes caution when exercising the decision to call for and inspect any document as to do so may result in the cross-examiner being required to tender a document as part of his or her case or make admissible a document which, in the hands of his or her adversary, is inadmissible.

37. The first point to note is that the rule applies only to calls made formally in the course of a trial or subsequent to the service of a notice to produce during the course of a trial and in relation to a document which the party making the call is otherwise not entitled to see: *Alexander v Manley* (2004) 29 WAR 194 at [22].

38. The second point is that the rule can be avoided:

    (a) by issuing a subpoena requiring the production of the document;

    (b) by exercising a right of inspection of documents produced on discovery: *Moore v R* (1995) 77 A Crim R 577 at 583;

    (c) where the document has been used for the purpose of refreshing a witness' memory, in which case the cross-examining counsel can call for the document to inspect it, without, by doing so, being obliged to tender the document in evidence.

39. The third point is that the rule has been abolished by section 35 of the Commonwealth Act which provides:

> "(1) A party is not to be required to tender a document only because the party, whether under this Act or otherwise:
>
> (a) called for the document to be produced to the party, or
>
> (b) inspected it when it was so produced;
>
> (2) The party who produces a document so called for is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it."

Cross-examination of a party on pleadings

40. An opponent's pleading may be of utility to a cross-examiner in at least two situations.

41. First, the pleading may contain an admission adverse to the party's interest, the pleading having been filed in other proceedings. In this situation, the pleading, if admitted by the party when cross-examined, is relevant to an issue in dispute, or a main issue, as distinct from being relevant only to the collateral issue of credit. Second, the pleading may have implications for credit. For example, the pleading may allege a fact which tends to be inconsistent with the witness' present evidence. We have considered each case in turn.

<u>*Pursuing main issues*</u>

42. The purpose of the cross-examination in this context is directed to the admission of a relevant fact.

43. The particular situation we wish to consider is where a pleading has been filed in a separate proceeding and the cross-examiner proposes to make use of an admission in that pleading. Merely because a pleading has been filed in another proceeding does not mean that it has evidentiary value in the instant proceeding as an admission.

44. Whether a pleading can be tendered as an admission has been the subject of some controversy.

45. The traditional principle is that assertions made in pleadings do not amount to admissions: *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 85. In equity, an averment of the existence of an agreement in a bill in equity in another suit between the same parties could not be received as an admission of the agreement by the party pleading the agreement: *Boileau v Rutlin* (1848) 2 Ex 665 [154 ER 657] at 680-681. Some years later, the Court of Exchequer Chamber applied the same principle in the case of common law pleadings: *Buckmaster v Meiklejohn* (1853) 8 Ex 634 [155 ER 1506] at 637.

46. This traditional approach came to be criticised but was nonetheless followed. In *Austin v Austin* [1905] VLR 564 at 566-67, Hodges J expressed the view that the traditional principle was too strict and that in some circumstances an assertion contained in a pleading should be received as an admission. Having expressed this view, his Honour ultimately deferred to the authorities. A similar approach was adopted by McGuire J in *Kleeners Pty Ltd v Lee Tim* (1959) 78 WN (NSW) 746 at 747-748.

47. In *Singleton v John Fairfax & Sons Ltd* [1982] 2 NSWLR 38 at 51, Hunt J went further and declined to follow the traditional principle. His Honour (at 51) reasoned that pleadings should be treated "in the same way as any other form of admission" and that the susceptibility of a pleading to be received as an admission should depend upon whether it was intended to be taken as a sincere or absolute assertion.

48. The approach in *Singleton* was immediately controversial. In *Stohl Aviation v Electrum Pty Ltd* (1984) 5 FCR 187 at 202, Jenkinson J declined to follow the

approach in *Singleton*, preferring the traditional rule of exclusion on the ground that a departure from that rule would often lead to unprofitable, collateral inquiries concerning the circumstances in which the assertion was included in the pleading.

49. The most persuasive recent authority on the point is *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 86 where the joint judgment of Mason CJ and Brennan J disapproved of the reasoning in *Singleton* and relevantly said:

> "The suggestion that pleadings should be treated in the same way as any other form of admission fails, in our view, to take account of the function and object of pleadings, when they are not required to be verified, in outlining the parties' case and defining the issues to be tried. Especially is this so in the case of pleading defences. A defendant is entitled to put a plaintiff to proof of his or her cause of action and to raise alternative matters of defence which may possibly answer the plaintiff's claim, without asserting in an absolute sense the truth or correctness of the particular matters pleaded. Accordingly, we do not regard the defences filed by the Tribunal as constituting admissions on the part of the Tribunal or, for that matter, on the part of its individual members."

50. Apart from seeking to tender the pleading as an admission, the cross-examiner may legitimately seek to cross-examine on the pleading with a view to eliciting admissions as to material facts which are within the personal knowledge of the party/witness. In this respect, it has been suggested[4] that it is permissible for a party to be asked to make admissions as to the contents of a document (whether or not made by that party) if the contents are within his or her personal knowledge, irrespective of the admissibility of the document citing *Dent v Moore* (1919) 26 CLR 316 at 326; *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 508-9; *Walton v Denton* (1930) 30 SR 393 at 401. For reasons appearing below however, this suggestion should be treated with caution.

51. A cross-examiner may put questions tending to disclose the content of a party's pleadings in another proceeding if the purpose of those questions is to obtain admissions against interest. However, there is a need for caution. The cross-

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[4] P R MacMillan, *Cross-Examination on Documents*, (2005) 26 Aust Bar Rev 287 at 298

examination should not extend to disclosing the contents of the pleading unless the pleading can otherwise be made admissible and the cross-examiner is content and able to tender the pleading whatever the outcome of the cross-examination. The cross-examiner can avoid the spectre of being compelled to tender the pleading if the cross-examination is conducted in a way which uses the pleading merely to probe the witness' personal knowledge.

Pursuing credit issues

52. In this context, it is necessary to be aware of the rule in the *Queen's Case* (1820) Brod & Bing 284 [129 ER 976] and the modifications achieved to that rule by statute. The *Queen's Case* involved the trial of Queen Caroline for adultery.

53. The rule in the *Queen's Case* is to the effect that, prior to the beginning of a line of questioning tending to disclose the contents of a document, the document must have been shown to or read to the witness and, in addition, either have been tendered in evidence or been the subject of an undertaking that it will be tendered in due course. The rule has been modified by statute.

54. Relevantly, section 19 of the Evidence Act 1977 (Qld) ("the Queensland Act") provides:

> "(1) A witness may be cross-examined as to a previous statement made by the witness in writing or reduced into writing relative to the subject matter of the proceeding without such writing being shown to the witness.
>
> (1A) However, if it is intended to contradict the witness by the writing the attention of the witness must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting the witness.
>
> (2) A court may at any time during the hearing of a proceeding direct that the writing containing a statement referred to in subsection (1) be produced to the court and the court may make such use in the proceeding of the writing as the court thinks fit."

55. By virtue of this statutory provision, a cross-examiner who seeks to elicit answers relevant only to credit is not obliged to tender a document or to read the document to the witness or to show it to the witness as a precondition to putting the effect or tenor of the document to the witness. Further, the witness can no

longer refuse to answer a question directed to credit until such time as he or she is informed of the contents of a particular document.

56. However, the rule in the *Queen's Case* has not been abrogated entirely and it is necessary to be aware of some of the limitations inherent in the statutory provisions.

57. First, section 19(1) provides that a witness may be cross-examined "*as to* a previous statement". The section expressly permits cross-examination "as to" a previous statement made by the witness and does not expressly permit the eliciting of the contents of any such document for credit purposes only in circumstances where the document is not either already in evidence or the subject of an undertaking to be tendered. The trap for the cross-examiner is to proceed to the point of disclosing the contents of the document to the court in which case the cross-examiner can be called upon to tender the document.

58. Second, the subject matter of the document must be "relative to the subject matter of the proceeding". If there is no relation to the subject matter of the proceeding, the cross-examination on the document is technically improper as being irrelevant and the cross-examiner would generally be bound by any denials from the witness as to the existence and contents of the document. Hence, if the document is a pleading in another action which contains no assertion relevant to the instant proceeding, a witness' denials as to knowledge of its contents will generally be binding on the cross-examiner and the pleading will be inadmissible in those circumstances.

59. Third, section 19(1) of the Queensland Act requires that the document be "a previous statement made by the witness in writing or reduced into writing". There is no reported authority from common law jurisdictions on the question whether a pleading drawn and filed by a legal practitioner is a statement made by him in writing or reduced to writing for the purposes of section 19(1) of the *Evidence Act*: McNamara, *Cross-Examination of a Party on Pleadings* (1989) 5 Aust Bar Rev 176 at 184; MacMillan, *Cross-Examination on Documents* (2005) 26 Aust Bar Rev 287 at 300. The only potentially relevant authority appears from Quebec, a civil law jurisdiction. In that jurisdiction, in *Falovitch v Lessard* (1979) 9 Cr App R 197, Boilard J held that a pleading which had been

verified by affidavit was a prior statement of the witness but that a pleading which had not been so verified was not.

60. There is a further issue to consider in this context, namely whether the pleading may properly be seen as the witness' own document. This will not be an issue where the witness has signed, verified or otherwise adopted the truth of the pleading's contents. Where the pleading is not in this form, there will be a question as to whether the document is the witness' or rather should be regarded as a document, the ownership of which is better attributed to the party's lawyers.

Restrictions on freedom to cross-examine on documents

61. We are concerned in this section to deal only with the use of documents in cross-examination for the purpose of discrediting a witness.

62. In *R v Bedington* [1970] Qd R 353, an accused had been cross-examined at trial about his knowledge of events following the robbery in respect of which he had been charged. The accused was shown by the prosecutor two newspaper articles and questioned about their contents. One of those articles was later tendered. At 359, the court said:

> "...The use made of the newspapers...was quite wrong. The limited use which can be made in cross-examination of documents of this kind is or should be well known. A document made by a person other than the witness, and not being a document which can be used to refresh memory, may, even if inadmissible in evidence, be put into a witness' hands and that witness may be asked whether, having looked at the document, he adheres to his previous testimony. But this is the extent to which the cross-examiner may go; he may not suggest anything which might indicate the nature of the contents of the document."

63. This approach in *Bedington* was later confirmed by Wilson and Dawson JJ in *Alister v The Queen* (1984) 154 CLR 404 at 442-445:

> "In so far as the accused was not the author of the document, it was impermissible to ask questions about its contents without observing the rule in *The Queen's Case* [(1820)] 2 Brod & B 284 [129 ER 976]]: see *Darby v Ouseley* [(1856) 1 H & N 1 [156 ER 1093]]. Most, if not all, of the documents of this type upon which the impugned cross-examination was based would appear to have been inadmissible and, in so far as that was so, the proper course under the rule in *The Queen's Case* was to ask the accused to look at the document without identifying it and to ask whether he adhered to his previous evidence: *R v Orton* [[1992] VLR 469, at pp 470-471]: *Birchall v Bullough* [[1896] 1 QB 325, at p 326]; *R v*

> *Seham Yousry* [(1914) 11 Cr App R 13]. If any of the documents of which the witness was not the author were admissible they should have been tendered in evidence under the rule."

64. The case of *R v Seham Yousry* involved Yousry, an Egyptian woman, who had been charged with criminal liable. She had written in a letter that a man, Collins, was a bigamist. She had lived with him in Cairo and had borne him two children. He had then returned to England and married. Yousry alleged that she had married Collins in Cairo. She gave evidence that she and Collins had gone through a ceremony of marriage in Cairo. During her cross-examination, the prosecutor gave her a document which he described as "a report from the Cairo police as to her origin". After having shown her the document, the prosecutor then asked her "... [D]o you adhere to your answer?".

65. At 18, the court then described what happened in these terms:

> "'The prosecutor' then invited counsel for the defence to look at it, who was sufficiently on his guard not to do so. The effect which it was calculated to produce was, no doubt, that this was a report from the Cairo police so damaging to the appellant that her counsel dare not touch it."

66. Later the court said:

> "Now, that was inadmissible in evidence, and in our judgment that was a wholly wrong method to adopt. Counsel for the prosecution, holding documents in his hands which he cannot put in, has no right to suggest to the jury in any way what they are."

67. In *R v Orton* (1922) VLR 469, Cussen J considered that *Yousry* was authority for the proposition that a witness might be shown an inadmissible document and then be asked, 'having looked at the document, do you still adhere to your previous statement?'

68. In *R v Hawes* (1994) 35 NSWLR 294 at 302-3, Hunt J was critical of *Bedington, Orton* and *Yousry*. His Honour said:

> "There is some authority for the proposition that a witness may be shown a document (even though he is not the author of it, and whether or not the document is itself admissible) and asked whether, having read that document, he still adheres to his testimony, provided that the document is not identified and (if the witness is not the author of it) nothing is suggested as to the nature of the document or as to its contents: *Birchall v Bullough* [1896] 1 QB 325 at 326; *R v Seham Yousry* (1914) 11 Cr App R 13 at 18; *R v Orton* [1922] VLR 469 at 470; *R v Gillespie* (1967) 51 Cr App R 172 at 177; *R v Bedington* [1970] Qd R 353 at 359-360. These decisions are discussed in an illuminating paper, 'Cross-Examination on

> Documents', presented by M H McHugh QC...and reproduced in (1985) 1 Aust Bar Rev 51, the relevant discussion being at 54-56.
>
> 'It certainly used once to be a common practice – at least in jury trials – for such a course to be followed in cross-examination, and without objection. But I have never been satisfied as to its validity and the decision to which reference is made are, as the then Mr McHugh frankly conceded (at 73), of doubtful authority. It seems to me that, by whatever manner the document is produced and shown to the witness, the clearest implication in the question whether, having read it, the witness still adheres to his testimony is that the document asserts to the contrary of that testimony. As such, it is in clear conflict with the basic rule of evidence that...the contents of a document cannot be proved in this way: *R v Jack* (1894) 15 LR (NSW) 196 at 200; *Coniglio v Compressed Yeast Co (NSW) Pty Ltd* (1964) 82 WN (NSW) (Pt 1) 165 at 176).'

69. In the course of the trial of *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* (the judgment of which is [2005] QSC 233), Chesterman J delivered a ruling on evidence which described the rule recognised in *Bedington* as having "only antiquity to commend it". His Honour reasoned that it was "unsatisfactory in principle and unlikely to be of any practical value" and ultimately held that "the use of a statement by another witness in the manner described in *Bedington* is an improper mode of cross-examination. The rule, if it is allowed to survive, must be limited to documents not of that kind."

70. In making this ruling, Chesterman J relied upon the reasoning of Hunt J in *Hawes* but also relied upon what his Honour described as a "second line of authority which is also relevant to the topic". That line of authority could be discerned from *R v Foley* [2000] 1 Qd R 290 at 297, where the Court of Appeal said:

> "The resort by counsel to questions which invite a witness to answer by reference to comment on the truthfulness of other witnesses is to be deprecated. On a level of professional practice, it is regarded as 'not a proper question'. The error, however, goes beyond one of professional practice; such questions are actually inadmissible. The literal object of such a question is to obtain an opinion whether someone else is a liar, and that of course is not an issue in the case or a matter for any other witness to express an opinion, it is a matter for the judge or jury. It is also unfair, because it forces the honest witness into a recrimination and seeks to rely upon the natural reluctance of a person to defame another. It is also a form of bullying, using unfair means to persuade a person to retract his or her evidence. Such evidence is inadmissible and we agree...that they are improper."

71. In *North Australian Territory Co v Goldsborough Mort & Co* [1893] 2 Ch 381, Lord Esher, with whom Lindley and Bowen LLJ agreed, held that a witness could not be shown the depositions of other witnesses and asked to give evidence contradicting them. The prohibition extended to showing the witness those depositions and asking him, by reference to them, to change his own testimony. Lord Esher said (at 385):

> "But in the present case the witness when examined...was also asked questions as to what other people had said in the previous examination...; that is, he was told what they had said, he was asked whether he contradicted their evidence. Such questions ought never to have been put..."

72. In *Ensham*, Chesterman J said:

> "The questions which were disapproved in *North Australian Territory Co* were those which invited a witness to contradict, or comment adversely upon, the evidence of other witnesses. *Foley* also condemned this mode of cross-examination, but went further. The prohibition was extended to questions which invited the witness to criticise or change his own testimony by reference to what others had said. I would understand the reason for the extension to be the same as that which prevents a witness being invited to criticise other testimony. If the cross-examinee is confronted with the opposing testimony of other witnesses and asked to admit that he is wrong he can only refuse by condemning the opposing testimony and that course is not permitted. In any event to show a witness another's testimony and demand that he retract his own is a form of hectoring and is objectionable on that ground.
>
> The judgment in *R v Leak* [1969] SASR 172 at 173-174 supports what was said in *Foley*, though with one inconsistency. The court said:
>
> "...[A] witness ought not to be asked whether another witness is telling lies or has invented something. Any witness, of course, can be asked if what another witness has said is true. ... But if he says that what the other witness has said is not true, he should not be asked to enter into the witness' mind and say whether he thinks the inaccuracy is due to invention, malice, mistake or any other cause...No attempt should be made by the cross-examiner to drive any witness...into saying that any other witness...is a liar."
>
> This passage was approved by McHugh J in his dissenting judgment in *Palmer v The Queen* (1998) 193 CLR 1 at 25. That part of the judgment which approves questions which ask whether what another witness has said is true does conform to the principle expressed in *Foley* which deprecates the use of "questions which invite a witness to answer by reference to a comment on the truthfulness of other witnesses". *Foley*, of course, is binding on trial judges in this State, but I would respectfully think that it is correct. No witness of fact should be asked to comment

upon the evidence of any other witness of fact. That is the province of the court when giving judgment.

This principle is another ground for doubting the validity of the rule recognised in *Bedington, Orton* and *Yousry* in addition to the objection identified by Hunt J. If the document in question is the statement of another witness and is put into the hands of the cross-examinee who is asked whether he adheres to his testimony the witness is invited to change his evidence by reason of what another witness has said. The answer, if it be that the witness does change his testimony, I achieved by saying, in effect, "Isn't the other witness correct and aren't you mistaken or dishonest?". If the answer is negative the question is by implication: "Do you contradict the evidence of the other witness?". Such questions cannot be asked directly. The implication is also, in my opinion, forbidden.

It can make no difference that the documents in question are admissible and have been admitted into evidence. That fact may remove Hunt J's objection to the mode of questioning but it does not overcome the problem identified in *Foley*."

73. His Honour concluded and ruled that witnesses could not be cross-examined on the contents of the statements or documents of other witnesses.

Reference sources

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77. D K Malcolm QC, *Cross-Examination on Documents*, (1986) 2 Aust Bar Rev 267.

78. H H Glass, *Seminars on Evidence*, Law Book Co, 1970.

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80. C J Arnold, *Use of Documents in Courts*, (1990) 20 QLSJ 35.

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86. The Honourable Mr Justice R N Chesterman, *Trial Documents – Proving, Tendering and Cross-Examination*, BAQ CPD 31 August 2000.

87. R A Brown, *Documentary Evidence in Australia*, (1988) Chapter 7.