Making and responding to objections to evidence
Lay testimony evidence

Part I

Introduction

1. This paper aims to provide a ready reference to the accepted bases for objecting to lay testimony evidence, together with some practical steps on how to make and respond to such objections.
2. It is in the nature of evidence at hearings, particularly oral evidence at trials, that the objection must be taken immediately or the opportunity to do so is lost. Consequently, it is imperative for the first instance advocate to have a sound knowledge of the essential bases for objecting to the reception of evidence, or responding to an objection made, and to be able to articulate it on the spot.
3. The paper deliberately does not canvass at length the rationale behind particular bases of objection, but rather seeks to identify each, together with references to where that in depth analysis might be found.
4. The paper does not deal with specialised rules relating to the reception of evidence, e.g. the evidence of children in alleged sex offence criminal cases, or the admission of evidence on a substantive basis in its own right, e.g. similar fact evidence.
5. Finally, the paper does not deal with objections either to documentary evidence or to expert testimony evidence.

Part II

Recognised categories of objection and the response

(a) Lack of relevance

6. Definition – relevant means:

> "Any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in conjunction with other facts proves or renders probable the past, present or future existence or non-existence of the other."[1]

[1] *Cross* at [1490], adopting the definition in *Stephen*; *Phipson* at [7-08]; and [28-02] – [28-07]; *Forbes* at [A.17] – [A.20]; [A.80]; Eggleston J, in *Glass*, at 55-62.

7. *The Commonwealth Act* contains a statutory definition in sub-s 55(1) in like, and more accessible, terms[2]:

> "*The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."*

8. The statutory definition refers to the conception of "a fact in issue", which is implicit in the definition in *Cross*.
9. Ultimately the touchstone of relevance is the identification of how the proposed evidence bears upon some factual matter that is in controversy between the parties in the proceedings.
10. *Phipson* usefully dissects into categories relevant evidence as follows:

> "The facts which may be proved in a judicial enquiry are *facts in issue* and *facts relevant to the issue*, and any facts, whether relevant to the issue or not, which affect the legal reception or weight of the evidence tended."[3] (emphasis in the text)

11. It may thus be seen that, unlike the other species of objection discussed below, an objection to lack of relevance is not to assert a recognised basis for excluding evidence, but rather to identify that the recognised basis for including evidence is absent.
12. The determination of relevance will depend on the particular forum. In a civil trial the pleadings will properly be the manner by which the facts in issue in the proceedings are identified. In applications in civil proceedings or originating applications the facts in issue will fall to be determined by reference to what emerges from the relief sought, the evidence adduced by each side and the challenges made by an opposing party to such evidence. In criminal proceedings questions of relevance will fall to be determined by reference to the charges and particulars that have been provided.
13. Undoubtedly in both civil and criminal trials there may come a point where the evidence is developed sufficiently that matters that were previously in issue by reference to the pleadings, charges or particulars, as the case may be, no longer are, or issues have emerged that do not find expression in such documents. It remains a matter

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[2] See generally *Odgers* at [1.3.602] [1.3.80]
[3] At [7-01].

of good practice that in the latter case the party seeking to expand its case be compelled to amend so there is a statement against which relevance can be tested.

14. Both the taking and the responding to an objection on the grounds of relevance requires a proper understanding of the issues in the case that remain in dispute, what matters rationally bear upon them in light of the evidence and any admissions, and an ability to be able to communicate with the Judge succinctly, by reference to a pleading, charge or a particular, or in the case of an application some other evidence, how the evidence sought to be adduced is relevant to a matter in controversy.
15. Thus, matters are not generally relevant, or relevant in the abstract,[4] rather they are relevant to an identifiable issue or issues in the case.
16. However, evidence need not be directly relevant but may rather be indirectly relevant[5] and still be admissible.
17. It follows from this that it is permissible to give evidence that does not rationally make more or less likely the ultimate matter in issue but without which might leave gaps in the story that the party is presenting to the fact finder.[6] As the matter of dispute did not arise in a vacuum, within reason, the tribunal should not be required to determine it in such a vacuum.
18. Evidence may be admissible on multiple bases. Alternatively evidence may be admissible on one basis and inadmissible on another. In such a case it is receivable, but if necessary limited by the identifiable basis of its relevance.[7]
19. Evidence may be admitted conditionally, in an appropriate case, on the undertaking of counsel to demonstrate its relevance at a later stage.[8] However, that is a matter for the discretion of the Judge.

(b) Hearsay

20. Definition – the rule against hearsay is:

> "An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible *as evidence of any fact asserted"*[9] (italics in the text).

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[4] *Phipson* at [2-01].
[5] *Phipson* at [7-03].
[6] *Phipson* at [7-10]; Eggleston J, in *Glass*, at 62-63.
[7] *Phipson* at [7-12]; *Cross* at [15.20].
[8] *Phipson* at [7-11].
[9] *Cross* at [1260] and [31001] – [31010].

21. Heydon J makes the point in *Cross*[10] that the italicised words above are of "vital significance".

22. On the one hand evidence by a witness as to what that witness was told by a third party about a particular event will not be admissible as evidence, testimonially at least, of that event as narrated by the third party. On the other hand, however, the fact that the third party said those words may have a relevant aspect in its own right, e.g. state of mind, admission against interests or res gestea. In this latter sense the evidence is original evidence in relation to those words spoken.[11]

23. *The Commonwealth Act* contains a statutory definition of hearsay in s59 and certain exceptions to it in ss60 – 66A.[12] *The Commonwealth Act* then provides a notice regime between parties of an intention to adduce certain categories of hearsay evidence pursuant to s67 and for a response via s68.[13]

24. In civil proceedings in state courts and under the *Commonwealth Act* an express exception to the hearsay rule exists in relation to interlocutory applications.[14] Whilst hearsay on interlocutory applications in state criminal matters plainly occurs, there seems to be no express power for it.

25. The rule in relation to hearsay applies with equal application to evidence-in-chief, cross-examination and re-examination.[15]

26. The principal exceptions to the hearsay rule at common law are:

    (a) statement of deceased persons which were:

        (i) declarations against interest;

        (ii) declarations in the course of duty;

        (iii) declarations as to public or general rights;

        (iv) pedigree declarations;

        (v) dying declarations;

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[10] At [1260].
[11] *Cross* at [31080] – [31110].
[12] See generally the discussion in *Odgers* at [1.3.740] – [1.3.2410].
[13] See generally *Odgers* at [1.3.240] – [1.3.2560].
[14] *UCPR* Rule 430; *Deputy Commissioner of Taxation v Aherm* (No. 2) [1988] 2QdR 158; *Forbes* at [A.146]; *Commonwealth Act* s75, see also *Odgers* at [1.3.3700].
[15] *Cross* at [17430]; *Phipson* at [28-07].

(vi) post-testimentary declarations of testators concerning the contents of their wills;

(vii) extra-testimentary statements of testators and testor's family maintenance;[16]

(b) statements in public documents;[17]

(c) admissions of the parties;[18]

(d) confessions in criminal proceedings;[19]

(e) miscellaneous matters such as:

(i) testimony on former occasions;

(ii) previous statements of witnesses;

(iii) evidence through interpreters;

(iv) evidence of age;

(v) ancient documents;

(vi) reputation.[20]

(c) Non-expert opinion evidence

27. Witnesses generally are not allowed to inform the court of inferences they draw from the facts perceived by them, but rather must confine their evidence to an account of what they actually observed.[21] However, the law is astute to recognise that there are borderline cases where the perception of the fact, e.g. speed, temperature, the identity of persons, things or handwritings, all in fact do involve some matter of inference or opinion and are admissible.[22]

28. Other than these borderline matters where a lay person is in a position to express some non-expert opinion, and indeed typically could not give a meaningful eyewitness account without doing that, witnesses may not give opinions on matters calling for special skill or knowledge unless they possess that expertise.[23]

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[16] See generally for a discussion of each of these grounds *Cross* at [33010] – [33340].
[17] See generally *Cross* at [33345] – [33415].
[18] See generally *Cross* at [33420] – [33590].
[19] See generally *Cross* at [33595] – [33785].
[20] See generally *Cross* at [33790] – [33840].
[21] *Cross* at [1505] and [29010]; *Phipson* at [12-18].
[22] *Cross* at [29015]; *Forbes* at [A.76] – [A.79].
[23] *Cross* at [29005].

(e) Character and Propensity evidence

29. This basis of objection covers a range of different instances where evidence that might otherwise be thought to be relevant is excluded.

30. Evidence is not admissible solely to bolster the credit of a party's witness.[24] *The Commonwealth Act* provides in like terms at s102.

31. A corollary of this first prohibition on certain character evidence is that a party may not impeach the credibility of a witness called by that party. There is however an exception where the witness can be demonstrated to be a hostile witness and such a challenge is permissible.[25] Section 17 of the *Queensland Act* embodies in statutory form this common law formulation.[26] A similar formulation is to be found in s38 of *The Commonwealth Act*.[27]

32. Whilst the cross-examination of an opponent's witness as to credit is permissible, there is a statutory discretion both by s20 or the *Queensland Act* and by the combined operation of ss 102 and 103 of *The Commonwealth Act* to prevent such cross-examination. The distinction between the statutory provisions is under the Queensland provision prima facie cross-examination as to credit is permissible unless the Judge forms the view that it is not material, whereas under *The Commonwealth Act* prima facie there is no entitlement to such cross-examination, save where it can be demonstrated to be of "substantial probative value".[28]

33. In relation to cross-examination on matters that go only to credit, and are thus collateral to the facts in issue, the finality rule comes into operation, such that generally the cross-examiner must take the answer to such a question as final.[29]

34. The consequence of this rule is that it is not proper for a cross-examiner to put to a witness expressly or by implication the substance of evidence which he or she is not in the position to lead because of this rule.[30]

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[24] *Cross* at [19005]; *Palmer* v R (1998) 193 CLR 1 at [49] per McHugh J.
[25] *Cross* at [19019]; *Forbes* at [A.82].
[26] *Forbes* at [17.1] – [17.17].
[27] See generally *Odgers* at [1.2.3260] – [1.2.3400].
[28] See also *Cross* at [17505] and [19030].
[29] *Cross* at [17500], [17580]; *Forbes* at [A.96]; *Odgers* at [1.3.8120].
[30] *Cross* at [19015].

35. In a criminal trial an accused's bad character can only be the subject of evidence where the accused has put his or her character in issue. In this regard merely an attack on the character of a witness for the prosecution will not suffice.[31] However in civil proceedings, save in cases where character is itself an issue in the proceedings, such as defamation cases, evidence of good character of a party cannot be adduced and is objectionable.[32]
36. Generally evidence may not be lead of a party's misconduct on other occasions if its sole purpose is to show that the party is a person likely to have behaved in the manner alleged on the occasion subject to the trial. Such propensity evidence is objectionable.[33]
37. Propensity evidence, termed tendency evidence, is objectionable pursuant to s97 of *The Commonwealth Act*.[34]

(f) Improper, offensive or repetitive questions

38. There is a statutory protection against such questioning. By s21 of the *Queensland Act* a court may disallow a question in cross-examination, or not require it be answered, if it is "an improper question". A more expansive statutory formulation is found in s41 of *The Commonwealth Act*.[35]
39. An improper question is one that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive.[36]
40. Cross-examination that hectors, insults, abuses or bullies a witness is impermissible, as is cross-examination which causes needless embarrassment, shame, anger or harassment.[37] Cross-examination is "indefensible when it is conducted… without restraint and without the courtesy and consideration which a witness is entitle to expect in a court of law."[38] It is also conduct falling short of the professional conduct expected of a barrister.[39]

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[31] *Cross* at [19140].
[32] *Cross* at [19160].
[33] *Cross* at [15105].
[34] See *Odgers* at [1.3.6660] – [1.3.6830].
[35] See *Odgers* at [1.2.3790] – [1.2.3820]; see also generally *Cross* at [17505].
[36] See generally *Forbes* at [21.1] – [21.4], see also [A.89].
[37] *Cross* at [17510].
[38] *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346 at 360; *Phipson* at 12-30.
[39] *Harrison* pp 51-53, 81-83; *Clyne v New South Wales Bar Association*(1960) 104 CLR 186.

41. Repeating questions will only be appropriate where a witness is prevaricating, beyond that it becomes oppressive.
42. Questioning should not needlessly implicate third parties nor invite the assertion of discreditable inferences.[40]
43. Other instances of improper questions are:
    (a) compound questions;
    (b) questions resting on controversial assumptions;
    (c) argumentative questions;
    (d) comments;
    (e) cutting off answers before they are completed.[41]

(g) Privileged matters

44. A valid claim of privilege will be a legitimate basis for objecting to the admission of evidence concerning those privileged communications or that conduct.[42]
45. This topic requires a consideration of the substantive bases of privilege.[43] The claims of privilege that will relevantly arise are:
    (a) legal professional privilege;
    (b) privilege against self-incrimination;
    (c) without prejudice privilege;
    (d) public interest immunity.
46. There are exceptions in respect of each of those privileges, but they are matters that turn on a substantive understanding of the privilege itself.

(h) Unduly prejudicial evidence/Lack of weight

47. The power in criminal proceedings of a court to exclude unduly prejudicial evidence is well settled, and is the topic of substantive law. Section 130 of the *Queensland Act* simply provides that nothing in that act derogates from that substantive body of law.

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[40] *Cross* at [17510].
[41] See generally *Libke v the Queen* (2007) 230 CLR 559 at [121] – [131] per Heydon J; Gleeson CJ agreeing at [1] and Kirby and Callinan JJ agreeing at [38] (although in dissent as to the result).
[42] See generally *Cross* chapter 13; *Forbes* [A.16].
[43] See generally *McNicol, Law of Privilege*, the Law Book Company, 1992.

48. In civil proceedings the better view appears to be that the court has a power to disallow evidence that, whilst strictly relevant, is insufficiently relevant to bear upon the matter in a probative way.[44]

49. Under the *Commonwealth Act* there is a single provision, s135, which confers on the court a power to exclude evidence, in either civil or criminal proceedings, on either of these bases.[45]

Part III

Some particular matters

(a) Cross-examination on the contents of a document of another

50. It is generally impermissible to cross-examine a witness by reference to a statement, already in evidence, of another witness, or of a document prepared by another witness; *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd*[46] at [1] and [17] per Chesterman J, as his Honour then was.

51. This area concerning the permissible use that may be made of documents, particularly of another witness, in cross-examination, and where that intersects with the knowledge of the witness being cross-examined of that document is a difficult area. Mr Gibson QC and Mr Declan Kelly delivered a very helpful paper that expands on these issues entitled "Aspects of cross-examination on documents", which was CPD 4 of 2006, on 22 March 2006.

(b) Cross-examination on the contents of a pleading

52. The position in Australia is that, at least where the pleading has not been verified on oath, the allegations contained in it do not constitute admissions by that party.[47]

53. The practical effect of this is that notwithstanding the times that it is seen done, this rule, together with the legal professional privilege involved in the giving of the instructions, means that cross-examination on pleadings can be effectively blunted. The only practical way around it is, whilst not offending any privileged communications, to first have the witness confirm that the allegation in question was

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[44] *Cross* at [1525] – [1545]; c.f. *Phipson* at 7-05, 7-07, 11-04.
[45] See generally *Odgers* at [1.3.14540] – [1.3.14630].
[46] (2006) 2 Qd R 145.
[47] *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 84 – 86 per Mason CJ and Brennan J, as his Honour then was, Gaudron and McHugh JJ agreeing at 98.

one made on his instructions and he was aware that that was the allegation in the proceedings, and from there try and have the witness adopt it so as to make it an inconsistent statement.

(c) Swearing to the issue

54. Under the *Commonwealth Act*, by s80, the common law prohibition on swearing to the issue has been abolished.[48]

(d) Leading question in evidence –in-chief and re-examination

55. A leading question is one which either suggests the answer desired, or assumes the existence of disputed facts.[49]

56. *The Commonwealth Act*, by s37, has enshrined the matter in statute.[50]

57. Leading questions are equally impermissible in re-examination as they are in evidence-in-chief.[51]

(e) Evidence of direct speech

58. Whilst it is preferable to give evidence of conversations in direct speech, there is no inflexible rule that requires that, and thus a witness who can only give evidence of a conversation by reference to its effect rather than the direct speech is nonetheless permitted to give such evidence.[52]

Part IV

Practical considerations regarding how and when to take objections

59. As with any other aspect of the advocate's interaction with the tribunal, when taking or responding to objections both immediate and overall persuasiveness must be borne steadily in mind. That said, the taking of objections in particular raises the prospect that in the circumstances which immediately present themselves the advocate may ultimately see that the real utility in the objection will be, if necessary, on any review of the decision. Balancing those considerations will always turn upon matters of judgement.

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[48] See generally *Odgers* at [1.3.4460].
[49] *Cross* at [17150]; *Phipson* at 12-20.
[50] See generally *Odgers* at [1.2.3140] – [1.2.3150].
[51] *Cross* at [17605]; *Phipson* at 12-20.
[52] *Forbes* at [A.66]; *Odgers* at [1.2.2200]; *LMI Austral Asia Pty Ltd v Baulderstone Hornibrook Pty Ltd* (2001) 53 NSWLR 31 at [7] – [9] per Barrett J.

60. The objection should be taken promptly and firmly, yet courteously. The customary fashion is at the point at which it is clear that the question is objectionable, or very occasionally the part of the answer fits that description, the barrister wishing to take the objection should rise (and her or his opponent obviously resume her or his seat) and state that the question, or answer, is objected to. The customary form of words is "Your Honour, I object to that question". The Judge will then typically invite an explanation of on what on what basis the objection is taken. The response should be brief and direct at the outset. For example;

    (a) "The matter is not relevant to anything in issue in the proceedings, which your Honour will see from paragraph 5 of the statement of claim and paragraph 10 of the defence.";

    (b) "The evidence would be hearsay";

    (c) "The question invites the witness to speculate" or "The question invites the witness to offer an opinion on a matter that is for the court."

61. It is important that the basis of the objection can be identified succinctly and, certainly if relevance is in issue, some brief reference to how the issues in the case have become defined in a way so that the evidence is not relevant.

62. The Judge will then typically invite the questioner to respond. Again, the response should be succinct and direct. For example:

    (a) **"**By reason of the denial in paragraph 7 of the defence and the allegation in paragraph 5 of the reply it remains in issue that… and the question is relevant to that issue in this way…";

    (b) "The evidence is relied on not as the truth of what was said but as direct evidence of the fact of what was said" or "The evidence of what was said, given it occurred in circumstances where…, is part of the res gestae and thus what was said is admissible testimonially" or "What was said would constitute an admission against interest because…";

    (c) "The witness is being asked to recount his observation and it is permissible for a lay person to express an opinion as to at what speed he thought the vehicle was travelling immediately prior to the accident".

63. Many times the above exchange (or even less) will be sufficient for the Judge to rule on the objection. On other occasions the Judge will then invite a more detailed analysis if the matter is more finely balanced.
64. Special care needs to be taken in making an objection in a jury trial, especially a criminal one.
65. On some occasions disputes as to the admissibility of a body of evidence will require a detailed argument that constitutes a substantive hearing in its own right. In criminal matters s 590 AA of the *Criminal Code of Queensland* contemplates, and indeed encourages, the determination of those matters in advance of the trial. There will always be special considerations about dealing with evidence of contentious admissibility where the tribunal in fact is a jury.
66. In a trial on affidavit objections are often dealt with in advance, either when the witness is sworn and the affidavit formally read, or sometimes at the beginning of the trial. As to dealing with objections to all affidavit material at the beginning of the trial, reasonable minds differ on the topic, however it is respectfully submitted there is much to be said for avoiding this practice as it tends to be time consuming, considered it imperfect circumstances (usually the case has not even been opened and certainly the moving party's principal witness not called) and many of the objections may ultimately turn out to be unnecessary because of the course that the proceeding takes.
67. Where it can be reasonably expected that either oral evidence-in-chief is likely to be contentious, or a line of cross-examination may be anticipated which may be expected to be contentious, then the barrister should arrive ready to argue the point with references to those authorities necessary. Typically, an authority in the form of an evidence text, in particular *Cross*, will be sufficient to dispose of all but the most finely balanced of points. However, if such a point arises or is expected to arise, then the Judge should be provided with the benefit of direct authority on the point.
68. What has just been discussed are the mechanical steps necessary to effectually take or respond to the objection. Just as important in many cases will be the tactical decision as to whether to make the objection or to press the evidence or question. That will usually involve a question of judgement for which there will be no right or wrong answer. It is important, as stated at the outset of this part, to at all times remain

persuasive. Repeated, failed objections to a line of evidence is far from persuasive. Similarly, persistence attempts to put into evidence matters that are clearly objectionable will equally fail to impress a court with the merits of your side of the case.

69. Against that, it will be no answer on appeal to say that you thought that continuing to object or pressing the question would have irritated the Judge or delayed the proceedings

70. It is an error not to wait long enough for the question or answer to become truly objectionable and to object at a time when the objection can be met by saying that it is premature. This course will often result in the questioner having a lucky escape from what in all likelihood would have been an impermissible question but he or she has the opportunity to recast in light of the early objection.

71. Finally, it is a legitimate tactical consideration not to object to otherwise objectionable material being elicited from an opponent if, on balance, it is considered that it is advantageous to your client's case. However, two things should be noted. The first is that you would want to be fairly sure that it really is advantageous to your client's case because the fact that your opponent is, presumably, deliberately trying to introduce evidence that has the prospect of provoking a legitimate objection would rather tend to indicate that she or he entertains a very different view. Secondly, it is a course that can irritate judges in that if the Judge forms the view that the evidence is truly going to be a waste of time the displeasure can sometimes be visited on both the person asking the question and the person who failed to object to it.

Part V

Evidence-in-chief and cross-examination in light of an earlier ruling on evidence

72. On occasions a ruling on one piece of evidence or question will identify that other evidence or related lines of questioning will also be ruled to be inadmissible. This raises the difficulty of, on the one hand, not making pointless objections that will necessarily be overruled and indeed disregarding the ruling, but on the other hand not giving the court the opportunity to indicate that the ruling was more limited in nature and than appreciated and that other evidence will not necessarily be ruled inadmissible.

73. Ultimately every instance will turn on its own facts. Typically, however where this issue arises the most expedient approach to the party who's evidence has been refused on one point is when the related point comes up to deal with it along these lines:

    (a) "Your Honour, in light of your ruling in respect of paragraph 7 of Mr Smiths' affidavit whilst I press the matter set out in paragraph 10 of Mrs Smiths' affidavit and paragraph 15 of Mr Jones' affidavit formally, I take it in light of your Honour's ruling that they to will be ruled to be inadmissible?";

    (b) "Your Honour you earlier ruled against me in cross-examining Mr X in relation to the letter of 1 July 2006 which is exhibit 5. I had also intended to cross-examine the witness along similar lines in respect of a later letters from August onwards. I take it in light of your Honours earlier ruling that your Honour would also rule that as inadmissible?"

74. If this is done there can be no argument, should it become relevant at any appeal, that something was not pressed when it could have been, yet without wasting the time of the Court.

75. Typically, rulings on evidence will occur during the course of the hearing and, preferably, be ruled on finally then. In very rare instances the hearing might be adjourned to allow an evidential ruling to be tested in the Court of Appeal, however such occasions are exceptionally rare.

76. Whilst it is a matter that applies with special force to criminal trials[53] counsel is "obliged to give full and respectful effect to a trial Judge's ruling on points of law".

Peter Dunning SC

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[53] *R v Lewis* [1994] 1 Qd R 613 at 626-627 per Macrossan CJ, Byrne J, as his Honour then was, agreeing at 654 and at 642-643 and 647 per Pincus JA; *Harrison* at 81.

Barrister at Law 11 March 2009

End Notes

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