**07/86**

## FEDERAL COURT OF AUSTRALIA — INDUSTRIAL DIVISION

# *BIRRELL v AUSTRALIAN NATIONAL AIRLINES COMMISSION*

**Gray J**

**7 December 1984 — (1984) 5 FCR 447; (1984) 9 IR 101**

**EVIDENCE – DOCUMENT USED OUT OF COURT TO REFRESH MEMORY – DOCUMENT CALLED FOR BY CROSS-EXAMINER – WHETHER WITNESS COMPELLED TO PRODUCE DOCUMENT FOR INSPECTION.**

**Where a witness's memory has been refreshed by a document out of court, cross-examining counsel should be permitted to inspect such document notwithstanding that the document may not be a contemporaneous account of the events concerned nor a document in the production of which the witness has played no part.**

**GRAY J:** *[After dealing with matters not relevant to this Report, His Honour continued].* … **[105]** A problem arose in the course of evidence given by Captain Davidson. In cross examination of Captain Davidson by Dr Jessup, who appeared for the applicant, the following exchange occurred:

> Q. "In some of the matters you have been giving evidence about, Mr Davidson you have had a fairly good recollection of who said what and what happened at various times?" A. "Yes."
> Q. "And on some of the other matters you have been unable to recall things or a bit uncertain about your recollection?" A. "Yes."
> Q. "Have you spoken to anyone other than TAA's legal advisers about the evidence you are to give in this case?" A. "No. I think I can explain why I am more accurate or more sure of what I am saying in some areas. In order to prepare for a grievance board hearing on the same subject in July of last year I was asked to make out a statement covering the events to **[106]** Mr O'Rourke's office on the Tuesday afternoon, or on 10th. Consequently I have been able to refer back to that statement and therefore my mind is refreshed on those matters, but not on other matters that have been raised on other days."
> Q. "Do you have a copy of that with you?"
> A. "I have got a copy in my brief case."
> Q. "Could I have a look at it, please?"

Mr Young, appearing for TAA, objected to the witness being required to produce his statement. I heard argument on the objection, and ruled that the document should be produced to Dr Jessup It was so produced. I announced that I would give my reasons for the ruling at a later date.

The document concerned was document No. 30 in the list of documents filed on behalf of the respondent on 3 July 1984, and verified by the affidavit of John Denis O'Rourke, sworn on 2 July 1984. In the list of documents and affidavit, a claim was made for privilege against production of various documents, including document No. 30, on the ground "that the disclosure may incriminate the respondent". No claim was made for privilege from production of any document on the ground that such document may tend to subject the respondent to the penalty claimed in the proceedings. The distinction between this privilege and the privilege against self-incrimination was referred to in an interlocutory judgment given in this proceeding on 26 June 1984.

The question before me was whether a witness who had used a document to refresh his memory, before entering the witness box, could be compelled to produce the document for the purpose of inspection by cross-examining counsel. It is well established that a witness whose memory is refreshed by means of a document while a witness is giving evidence can be required to produce the document, without the party requiring its production being compelled to tender the document. Refreshment of memory in the witness box is subject to certain restrictions, notably that the document must be reasonably contemporaneous with the events as to which evidence is given, and must have been made or checked by the witness. See generally *Cross on Evidence*, 2nd Aust. ed, at 220-222. Refreshment of memory outside court, before giving evidence, is not subject

to the same restrictions; it is in the nature of things that a witness may look at any document for the purpose of refreshing memory, whether such document be the witness's own or some other person's, and whatever its date may be. Perhaps for this reason, there has been some controversy as to whether, and in what circumstances, a document used to refresh the memory of a witness outside the court needs to be produced. This was one of the questions dealt with by the Full Court of the Supreme Court of Tasmania in *Mather v Morgan* [1971] Tas SR 192. In their joint judgment, at 196-207, Burbury CJ and Neasey J (with whom Chambers J expressed agreement on this point) dealt at some length with the authorities. Their Honours' conclusion was expressed at 206-207:

> "In our view the decisions which clearly establish the right of cross-examining counsel to inspect a document used in the witness box by a witness to refresh his memory justify the conclusion that he should be given the opportunity to exercise the same right in relation to a document used by the witness to refresh his memory before he comes into court. The rationale of the decisions is that in the interests of justice cross-examining counsel should be able to check the source of the witness's memory stimulus, and test the reliability of the witness's oral testimony by reference to it.
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> In our opinion it is not possible to lay down a hard and fast rule that the document must always be produced. For example, the document may not be in the control of the witness (as it is when he uses it in the witness box). It may have been destroyed or become unavailable since it was used to refresh **[107]** memory. Upon the assumption, which we make for present purposes, that a document used to refresh memory out of court may be any document (not being confined to a contemporaneous record made by the witness) it may contain matter which it would not be fair to let cross-examining counsel see. It may for instance be part of the brief of the opposing side.
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> However, we are satisfied that this court should affirm the general rule to be that in the absence of any good reason to the contrary the document should be produced on the cross-examiner's demand. This is a procedural rule and not one going to admissibility, because the evidence is admissible whether the document is produced or not, in contrast to the situation where the witness has no independent recollection apart from the document. If there is a legitimate reason for its non-production, therefore, that fact can only according to circumstances affect the weight of the testimony. If the court hearing the matter takes the view that the document should be produced, we are of opinion that it is within the court's inherent jurisdiction to direct that cross-examining counsel be permitted to inspect it, since this is a direction to a witness for the purpose of enforcing a rule of practice."

A similar approach was taken by Lee J in *R v Pachonick* [1973] 2 NSWLR 86, at 88, where His Honour said:

> " ... there is no basis which can be urged as to why there should be a distinction between the practice which applies when the witness refreshes his memory in the witness box as compared with the case where he does it outside the court before coming into court."

In my view, I should follow these decisions. The interests of justice clearly dictate that every possible safeguard should apply when a witness gives evidence after having refreshed his or her memory from a document. The reasons which lie behind the rule requiring production of a document used by a witness to refresh his or her memory in the witness box apply with even greater force when the refreshment of memory has taken place outside the court.

It is even more important that cross-examining counsel be permitted to inspect the document used to refresh memory if that document may not be a contemporaneous account of the events concerned, and may not be a document in the production of which the witness has played any part.

Mr Young did not seek to argue that the privilege against self incrimination was applicable. In my view, the failure to claim any other privilege from the production of Captain Davidson's statement at the time when discovery of documents was given constituted a waiver of any such other privilege which might have existed. No question therefore arises whether privilege would override the requirement to produce a document for inspection by cross-examining counsel in the circumstances.

In argument before me, the reference was also made to *Collaton v Correll* [1926] SASR 87; *King v Bryant (No.2)* [1956] QSR 570, and *R v Alexander* [1975] VicRp 74; [1975] VR 741. Each of those cases was concerned with a question different from that which arose in the present

case. Those cases dealt with questions such as whether the evidence of a witness who has refreshed his or her memory outside court is admissible at all in the absence of production of the document, whether or not production is requested by cross-examining counsel. For this reason, it is unnecessary to engage in further discussion of those authorities. *[His Honour then dealt with other matters]*

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