Written Advocacy

A CPD Presentation to the members of the NSW Bar

By the Hon T F Bathurst AC, Chief Justice of NSW (Chair) the Hon Justice A S Bell, President of the Court of Appeal of NSW and Mr Justin Gleeson SC, Banco Chambers

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Photo by Gillianne Tedder

Bathurst CJ: Written submissions are a relatively recent phenomenon. They were introduced, I think it is fair to say, in the early 1980s by Justice Rogers who adopted the Woolf reforms which advocated for written submissions with a great deal of enthusiasm. It must be said that some members of the bar did not share Justice Rogers' enthusiasm

That all changed through the 1980s and into the 1990s but even up to the turn-of-the-century, written submissions were seen very much as subordinate to oral advocacy. They were not recognised as an advocacy tool. Rather, they were somewhere to park the boring bits which could not be avoided. They were given to the judge and, from then on, almost universally ignored. Indeed, some people were accused of doing that into the early part of this century. I will not mention names because that would be embarrassing but that has changed.

There is no doubt that written advocacy plays, and will continue to play, a vital role in the disposition of litigation. Not only have its benefits been seen in practice, but it also becomes increasingly important when cases are decided as they often are in the commercial sphere not just on a word against word basis but in the context of detailed documentary material which is becoming larger and larger. Increasing scientific material of various types and the complexities, for example, of DNA evidence which is reviewed on appeal in criminal appeals, is an example which is entirely outside the commercial setting. Indeed, in standard personal injury cases, for example, there is a greater emphasis on scientific evidence as well as on medical evidence.

In that context can I congratulate the Bar on convening this seminar on advanced legal writing and having two very distinguished panellists, the President of the Court of Appeal, Andrew Bell and Justin Gleeson SC.

Justice Bell is going to give his five key points about written submissions and Justin Gleeson is going to do the same. There will then be a focus by the two panellists on written submissions at different levels and the relationship between written and oral submissions, and then I am going to say something about written submissions in the Court of Criminal Appeal.

Written submissions – Five key points

Bell P: The first key point that I would emphasise is to remember that written submissions are an exercise in advocacy — they are not something which simply accompany oral advocacy, they are a key part of contemporary advocacy.

Depending on the context, written submissions may be your only opportunity for advocacy. Let me give some examples. Special leave applications these days are increasingly decided solely on the papers. The High Court has not indicated what its criteria are for whether or not it decides a special leave application solely on the papers, but the point is that written submissions may be the only opportunity for advocacy on a special leave application.

In the Court of Appeal it is a little bit different, but there is one important area where the advocacy is all in writing and that is on the question of whether a leave application should be heard concurrently or separately. Now that can be quite an important decision for parties and advocates because on it turns whether you receive a truncated leave hearing — 20 minutes each — or whether there is a concurrent hearing, in other words, the application is heard as though on a full appeal, and you will have, in those circumstances, the full day or the appropriate amount of time fully to develop the argument. But the decision of whether or not to list a matter in the Court of Appeal as leave only or concurrently is done on the basis of the written submissions addressing that topic in the Summary of Argument.

So also, during these COVID times, many interlocutory motions have been decided solely on the papers. It remains to be seen whether that will continue, at least in part, post-COVID, but it is another area where the advocacy may be conducted solely in writing. Finally, costs issues are frequently, if not invariably, decided on the papers. In a complicated case, much may turn on that determination for the parties.

So, sometimes, the written submissions are the only form of advocacy but, even when that is not so, they remain extremely important. They will often be the first document read by judges, for example, on an appeal. Where there is a very lengthy judgment, for example, I will often read the submissions first to get an idea of whether the full judgment is being attacked or only aspects of it.

The second key point is to know and comply with the applicable rules. Now by the applicable rules I do not simply mean technical rules of court such as in relation to page length, font size, margins or matters to be addressed, all of which are important and which are there for a reason. Instead, I am talking about the more substantive rules. One particularly important rule for appeals relates to the need to identify as an adjunct to your written submissions findings of fact which are challenged and those which it is contended should have been made: see Uniform Civil Procedure Rules r 51.36(2). The Court of Appeal has recently addressed the significance of that requirement in *Magann v The Trustees of the Roman Catholic Church for the Diocese of Parramatta* [2020] NSWCA 167 at [55]–[56]. As I said there:

> '… that procedure [of identifying the challenged fact] does not represent a procedural option. Adherence to it is important for at least three reasons.
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> First, it serves to focus the mind of the lawyer drafting the submissions on precisely what factual errors are relied upon to underpin the appeal, and whether there is a proper basis in the evidence to challenge that finding or those findings. Secondly, adherence to the rule is important as a means of putting the respondent on fair notice as to the level of detail at which the decision at first instance is to be challenged. Thirdly, adherence to the procedure is vitally important in delineating this court's task on an appeal and assisting the court with all the relevant evidentiary references. The high volume of appellate work conscientiously undertaken by this court demands that practitioners who should have the closest familiarity with the evidentiary record in a given matter, frequently running to thousands of pages of documentary evidence and transcript, assist the court with precise and accurate references to that record, as required by the rules, in respect of those findings of primary fact which are sought to be challenged.'

Having a complicated fact-intensive judgment thrown at you without real specificity as to the key factual findings challenged, what the relevant evidentiary references are, and what different findings should have been made is unsatisfactory.

But beyond compliance with the technical rules, you must have thought about and tailored your written submissions to the nature of the appeal. For example, where factual findings are challenged, were they affected by considerations of credit and/or demeanour or were they simply based on inferences drawn from documents? That is an important matter to consider and address in writing because, as you know from *Robinson Helicopter Co Inc v McDermott* (2016) 331 ALR 550; [2016] HCA 22 and *Lee v Lee* (2019) 266 CLR 129; [2019] HCA 28 the standard of appellate review of factual findings will be influenced by that consideration. It is a matter which is often overlooked, so you really have to have your attacks nuanced by reference to those substantive principles of law, and the recent decision in *White Constructions Pty Ltd v PBS Holdings Pty Ltd* [2020] NSWCA 277 is an example of that.

Similarly, in written submissions where the appeal involves a challenge to an exercise of discretion, you need to remember what the plurality of the High Court said in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42 at [120], namely that when a court is invited to make a discretionary decision to which many factors may be relevant, it is incumbent on the party contending that attention was not given to particular matters to demonstrate that the primary judge's attention was drawn to those matters, at least unless they are fundamental and obvious.

So these are all rules, some very technical, some more substantive, that you have to be aware of when you are preparing the written submissions, because it means that you are not on the back foot immediately with the court asking you questions such as: 'is this in truth a discretionary decision or an evaluative one?', or 'was demeanour an issue?'

The third point is that structure is all important. Use headings, subheadings, cross-references and signposts. Enumerate reasons for the conclusions you argue towards. The Chief Justice always used to say that there were seven reasons in support of an argument. He did not always get past three but enumerating your reasons for arguing towards a particular conclusion has a number of benefits. First, it acts as a discipline for the author of submissions to break down and refine the argument. Secondly, it assists the logical presentation of an argument, because it forces you to isolate the steps in an argument and also to prioritise which are the stronger arguments. Doing that means that the most persuasive arguments can usually be presented first, which generates a certain rhetorical momentum as the weight of reasoning grows as the argument progresses.

If you are the respondent, structure is also important in written submissions. If the appellant's submissions lack structure, use your submissions to impose structure on them, and then to dismiss them. It is a great old debating technique — summarise your opponent's argument and then knock it down. Having the ability to summarise or to impose structure on the arguments allows you, in a sense, to control the debate. If there is no structure there to start with, you will assist the court by putting structure to it or you will have a chance to persuade the court to adopt your structural framework for its analysis. If the appellant does have a good structure, make sure you engage and respond to it, otherwise there will be ships passing in the night.

The fourth key point is a short one — that is, length is not synonymous with quality. Page limits operate as a very useful tool to focus the argument, to separate the wheat from the chaff, and to cut to the essence of the issues.

Fifthly, ensure factual and legal accuracy, grammatical correctness and basic matters such as spelling. I know it sounds obvious and we tell it to our children when they are doing their essays, but there is nothing less impressive than a shoddily presented written argument; you immediately lose the confidence of the court. Related to that, references to evidence and authorities must be given and they must be precise as well as accurate. Submissions which simply assert that 'there was evidence to support proposition x' or that 'a particular finding was contrary to the evidence' without identifying that evidence, are next to useless and it will only irritate the court.

Bathurst CJ: Additionally, where you are dealing with an appeal from something which might involve a discretionary decision, involving what is now called judicial restraint, or an evaluative decision, if that is controversial make it clear at the outset what the appropriate line is in your submission and why that is so. We spend a lot of time these days arguing about whether decisions are discretionary in the *House v The King*


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(1936) 55 CLR 499; [1936] HCA 40 sense, or evaluative, and it is important that you address that in your written submissions.

Gleeson SC: My first point would start with a question of perspective or prism. One of the things we are good at as barristers is advocacy and traditionally that might be three to five days a week in court. Some of us might feel that writing our advocacy is not as good as presenting it in person. The reality is, as the Chief Justice has said, the world has moved in that direction and it will only move further, so written advocacy is going to be central to our craft.

One of the strengths we have at the Bar over solicitors is that we are in fact practising advocacy, whether written or oral, at least five days a week. Every day of the week I would think almost everyone at the Bar, across almost every field, is doing some writing and all of the writing is for judges or arbitral tribunals or like bodies. What that leads me to it is the first point, namely that we need to try and put ourselves in the position of the judge or the tribunal. If you are on that side of the Bar table, what would you find easy to read, helpful when you are preparing for the oral hearing, attractive in style and persuasive? I think the biggest challenge for us is to make that mental leap: what is it that the judge is looking for? And just as we are spending more time in written advocacy, it is worth sparing a moment of sympathy for the judges. They are spending a lot more time reading. It is how we can help them to get most quickly to the strength of our case which is our basic challenge.

The second point is stating the issues in the case simply, fairly and with balance. Now that ought to be straightforward; in many submissions I see it is not. The parties cannot even agree upon the issues and they cannot state them fairly and adequately and, I imagine, from the judge's perspective, that it must be just a fraction annoying that the parties cannot even identify clearly what the issues are that the judge is being asked to decide. Once we look at it through the prism of the judge or perhaps the arbitral panel, those people have to, in most cases, sit down and write a judgment and they know they must properly identify the issues they are being asked to decide as that will be an appealable error, or potentially in an arbitration, that will be a due process ground of appeal. We as barristers have to help them to make sure that at least that part of the process can be done easily and accurately.

My third point is that once you have done all the preparation for the case, have you then put the entire submission aside, sat down and asked 'what are the ultimate propositions of fact or law that I am contending for in summary form and in propositional form which, if the court accepts, will win the case?'

Now if one takes for example the style used by the Commonwealth Solicitor-General from time to time (I am not particularly referring to myself), while some might regard it as overly formalistic, what happens is the statement of the case will say 'these are the issues' and then it will say 'we contend for the following four or five ultimate propositions.'

Taking up the President's point about structure, the balance of the written document will then simply follow those four or five propositions and it will say to the court 'this is how you get from the primary facts or from the legal authorities to the ultimate proposition'. Now a huge amount of work is required in producing what in the end will be only half a page of the written submissions, but I imagine for judges of any court to get that sort of material where you know that is what this person is ultimately contending for in order to produce victory would be very helpful in preparing for the hearing and in ultimately deciding the case.

The fourth matter, and I think this has been taken up by the Chief Justice and the President, is that most often we write submissions and we just get straight into our version of the facts or the law. We do not think enough about the 'meta-tools' which the judges have to use in order to write a good judgment that might itself survive appeal. If we are in an area of discretion, the meta-tools, some of which have been mentioned, include: what sort of discretion is it? What sort of review is available to the court? Is it a *House v The King* review? Is it an evaluative judgment? What are the factors relevant to the discretion?

Another one mentioned by the President is the degree of deference that needs to be shown to the fact-finding below but there are others. In ordinary fact appeals, there are some principles of law which the court must comply with, such as, where appropriate, those contained in *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8 or *Blatch v Archer* (1774) 1 Cowper 63; [1774] 98 ER 969. I think it is helpful in the submissions to address those matters explicitly, and not simply to leave it to the court to work out which level you are asking the court to decide.

The same is true with legal principles. I remember Justice McColl once said to me that one of the biggest changes she found when she became a judge was that, as a barrister, you make arguments of law but, as a judge, you have to decide whether the matter is bound by ratio? Is the matter completely open? Can you reason by analogy? Do you have a duty pursuant to *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; [1993] HCA 15 to follow another court unless it is plainly wrong? Those matters should be addressed in written submissions.

My final point is personality. The best written submissions I have seen are where you can actually see the personality of the advocate on the page in the way they have constructed an attractive submission, and you can almost hear them delivering it orally. When they do come to deliver it orally, that can be very effective.

Bathurst CJ: One of the difficulties I suppose with personalities is often that written submissions are written by someone who does not deliver the oral submissions, but that does show the importance of all parties who are responsible for presenting the case having input and expressing their views.

Written advocacy at different levels: interlocutory, trials and appeal

Bathurst CJ: The next matter which the two panellists are going to speak about is written advocacy at different levels. It is self-evident that oral techniques are different depending on whether you are conducting a trial or arguing an appeal, but so are written techniques, and it is an important issue.

Bell P: Let me start with interlocutory matters. Occasionally interlocutory matters are set down as special fixtures, but more commonly they are heard on designated motions days or in lists where there will be multiple interlocutory matters facing the judge who will have to deal with those matters, often on the spot. It is tactically shrewd in my view to prepare a very short, generally no more than three or four-page, written outline in support of your argument. It should identify very clearly in a very structured way the relief sought; the relevant rule(s) of court engaged; the evidence relied on; a short outline of the relevant principles; and a short outline of your argument. That form of submission gives a busy judge, in a busy list court who will be keen to deal with the matter on the spot if he or she can, a very handy and accessible framework in which to deliver reasons. That is a reason for relative brevity rather than length. A written submission of 10 pages or more on an interlocutory motion will generally be excessive and counterproductive, particularly when one is dealing with matters of practice and procedure, security for costs, amendment, discovery etc, the principles of which will be very well known to the judge. Unless someone is taking some novel or arcane point, there is no occasion or need to recite at length the relevant principles.

Let me come to trials. I want to make a distinction between opening outlines and closing submissions. I think opening outlines are very valuable. In some areas they are mandatory; in others, they are optional. It is not the occasion to put your final submissions. It is the occasion to capture the judge's attention and interest and that dictates an identification of the key issues that will arise in the case, how the case is formulated, whether it is a case that is going to turn on factual contests and, if so, whether those are the subject of oral conversations or whether it is essentially a documentary case. The opening is a very good way, particularly if you are the moving party, to get into the judge's mind, even in advance of your oral opening. A judge will appreciate having such an overview, especially if faced with a large court book or tender bundle and lots of affidavits.

But of course, a written opening has to have very much in mind where you want to end up in the case. I used to think of submissions at first instance as an organic document. I would often draft a longer written opening anticipating where I wanted to end up in the case. In addition, I would often write the legal argument in advance, to make sure I knew what I needed to establish as I went along.

Setting out the relevant legal principles is a very good discipline for fashioning what you seek to prove by way of evidence and what propositions you seek to establish in a cross-examination. Now, generally, you would not have that in the opening outline, but I would often have written that at the outset for my own purposes as a framework, knowing that I would use it in final submissions at the end of the case.

My advice in terms of closing submissions is to write them as you go, and indeed to start them before the case commences. That may involve repurposing an opening submission, but it is helpful to think of the process as organic and, as you cross-examine, for example, you can populate that organic document with key witnesses' evidence on particular issues. This technique also has the benefit of ensuring consistency — you know where you want to go, you build your case, you feed the evidence into your case. If you are a silk, you work with your juniors for them to feed the evidence into a clear structure. Obviously you can chop and change the structure as the case develops — we all know what litigation can be like with unforeseen twists and turns — but it is something which one should develop organically.

In large, complex cases, I would also often, as part of the written submissions, have in a separate section what Justice Santow used to call 'the findings of fact contended for'. These can appear in a separate section of the submissions, rather than just a discursive chronological account of the evidence. Isolating the key findings contended for is useful because the judge has to make findings of fact, as opposed simply to regurgitating the narrative, and the key findings of fact are the ones which will lead to your success or failure in the case. So if you prepare that with the evidentiary references, it can be very useful indeed. The judge will be hugely assisted by having a document that clearly sets out the findings of fact and he or she can then ask the other side what they take issue with and, where there is no issue taken, the judge can readily adopt the uncontested or uncontroversial findings of fact in the judgment. It is a perfectly legitimate way to proceed and it is very effective. If you are doing the writing, if you have presented the facts, whether you are the moving party or the responding party, you say 'here are the facts' and if the references are valid, they are the findings which the court should adopt.

In preparing final submissions at first instance, I had a preference for producing as self-contained a document as possible.

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By that, I mean that where there were key passages of transcript or key passages from cases, I would tend to set them out in the submissions so the judge could read the submissions as a standalone document, rather than having to turn up volume three of the transcript or pull out law reports as he or she read through the submissions. Now the only danger to that is the word processor and its cut-and-paste function. One has to exhibit real discipline in that respect. Quoting huge slab after huge slab in written submissions may be counterproductive. There is a balance to be struck. I do think, however, that the idea of self-contained submissions for a trial judge is valuable.

Turning to written submissions at the appellate level, again I differentiate between submissions for leave or special leave to appeal and final submissions on the appeal. In leave and special leave submissions, you are not seeking to win the case; you are seeking to get your foot in the door; you are seeking to get to the next hearing or to get to a concurrent hearing and so there is a different forensic aim from final appeal submissions. Obviously, the submissions will be underpinned by the ultimate strength of your case, but the forensic aim is to satisfy the criteria for the grant of leave or special leave. That does not mean just reciting the criteria and asserting that the case involves matters of importance or key points of principle. You have to spell out what the principle is, or what the particular significance of the case is. The argument should be able to be put quite pithily. You have to draw to attention that your case stands out from all of the others that are competing for a grant of leave or special leave.

With respect to final appeal submissions, again structure is all important. Good appellate submissions, like good judgments, will often start with a clear statement of the central issue or issues that the appeal raises.

Finally, it is worth remembering, especially for younger practitioners, that the High Court publishes written submissions in relation to upcoming cases on its website. Look for the written submissions by the leading advocates, assisted by the leading juniors. You will see a variety of styles and I agree with Justin Gleeson's point about 'personality'. I am against a 'cookie cutter' approach to written submissions just as I am against a 'cookie cutter' approach to judgments. People have different techniques and different styles, and you should play to your style and your strengths. You will see on the High Court website a variety of styles and a variety of quality, but it is generally a very high quality, as you would expect, and much can be gained and learned from observing how the best advocates formulate written arguments.

Gleeson SC: What Justice Bell has given us is a fantastic tour through what will be the work for much of the Bar, but not all of the Bar. If we are appearing in superior courts and perhaps some inferior courts, we can readily think of this progression from interlocutory, through to the first instance trial, through to leave and to the substantive appeal, and so I agree with everything he has said.

One thing we also need to keep in mind is of course that many members of the Bar are not always appearing in those courts. Many of our members are appearing in a range of administrative tribunals, many are doing jury trials. So that raises two challenges: first, not all cases can be run as if the big end of town is behind them, and, secondly the written element will vary depending on the tribunal in which you are appearing. What the President has given us is a fantastic goal to aim towards, particularly when we are in the superior courts. To the extent that we have a broader set of work, we should be modifying those principles of necessity to meet the case. With that in mind, the only comment I would add to the interlocutory one is that I agree entirely with the notion of the short form document.

I have heard from a number of barristers that they fear that, with COVID-19 and with new court practice notes, it is now the end for the Bar in terms of interlocutory work because it will simply be done in writing by the solicitors. My feeling is that this is not necessarily the case, as we still have a skill in writing for judges and tribunals five days a week which can allow us to write that two- or three-page document better than those who are spending a lot of their time writing to their opponents in correspondence, so I would not give up on that being work for the Bar.

As for the trial, what you have been given is a fantastic way of doing the written work for a hearing in a superior court if you have the resources behind you. I do want to throw in that I think first instance work across the various jurisdictions we are appearing in — courts and tribunals — is where you find the greatest variation in the style and the practice of submissions. While, in some courts, the short outline of opening followed by the final grand written submission that pulls everything together is the 'A grade' to be aiming for, I am not sure that is the case, for instance, in arbitration, and it is certainly not the case in international arbitration with which I am familiar. In both the Rules and Practice notes of this court and of the Federal Court, you will see there is the ability to adopt other forms of written advocacy if the parties want to.

Now for those who have practised in arbitration in Europe or North America there is a creature called 'the memorial'. I did not know what a memorial was until a few years ago, but it is a lengthy document written in advance of the oral hearing which pulls together the entire case; includes reference to all the witness statements and all the legal authorities; and ultimately tells the entire story. At first I thought it was a really bad document because it is contrary to our system of using the pleadings to define the issues, then allowing the evidence to unfold, and then you put your final story, but the memorial is the form that is being used in many comparable jurisdictions around the world. I can see the possibility, not necessarily today or tomorrow, but the possibility that it will come into practice in our superior courts over, say, the next decade. Done well, it is an incredibly powerful document because the judge or tribunal looks at it and says, before you get to the oral hearing, that is your entire case.

Now, as practitioners in the common law tradition, we would say that that cannot be right, because everything is going to depend upon the oral evidence and the cross-examination and so, until you get to the hearing, you cannot know what is going to unfold. Well, in the civilian tradition, which does not like cross-examination as much as our President Michael McHugh SC (who is present this evening) and I like it (or I used to like it), the belief is that through the documents, through the inherent probabilities of the case, you can resolve most factual disputes without ever seeing a witness. Now that is heresy within our tradition, but my impression is that over the last 30 years we are inching towards that approach, and we are probably likely to move further in the period ahead. So in terms of a 'stump speech' for the Bar, if we are to keep ahead of the game with our skills, I think we have to be open to different styles of written advocacy which take us even further in the direction to which I am pointing.

In terms of the work at leave and special leave hearings and substantive appeals, I would agree with what the President has said.

Bathurst CJ: I want to endorse what Justin Gleeson said about memorials. It will happen to some extent if only because more and more cases are not decided on cross-examination and the demeanour of witnesses. They are decided on what witnesses say, evaluated in respect of documentary material or other evidence, so I do think that is another reason that written submissions will become more and more important, whether they take the memorialisation form used in arbitration or some hybrid form of that model.

The relationship between written and oral submissions

Bathurst CJ: There is nothing worse than having written submissions that have a total disconnect from oral submissions. It is sufficiently important that I have asked each of the panellists to spend a few minutes on it.

Bell P: One should not think of written submissions as an alternative to oral submissions, although sometimes that is imposed on us by particular rules of court for certain types of hearing. Ideally they will be an adjunct to oral advocacy and one cannot really succeed as a barrister these days without being able to do both written and oral advocacy.

One has to be a fluent, capable oralist, on the one hand, but one also needs to be a very good writer or, perhaps for the more senior barrister, a very good editor of written submissions as well.

It is important that there be coherence between the written submissions and the oral submissions. Now that can sometimes be difficult in practice. In some jurisdictions, the written submissions need to be on well in advance of, say, an appeal. That is certainly the case in the Court of Appeal, where written submissions have to be filed reasonably promptly after the notice of appeal, although we do try to get the hearings on very quickly as well. On the other hand, in some jurisdictions, the written submissions come on much closer to the hearing of the appeal. That is still the case in the High Court. In such circumstances, where there is a gap in time between the filing of submissions and the hearing of an appeal, if there is a silk involved, he or she will not always be as engaged in the case or may not even have been briefed at the time submissions are put in or may not be the silk or the senior barrister who makes the oral argument. That can be a problem because, after all, both the written submissions and the oral submissions represent the argument put to the court. They should complement each other and they have to be coherent.

So I would say to the senior barristers that if you are briefed on an appeal, do not think that your job is limited to presenting the argument orally. Your job, if not to write the submissions, is to settle them in a detailed way, not in a 'once over lightly' way. You should aim to make sure that the written submissions capture the argument you want to put. You have to do the intensive thinking at the time the written submissions go on, not in the weeks or days before the appeal. Otherwise, you will have lost an important opportunity as your written submissions will already have been filed and read by the court and initial impressions will have been formed. And so I would urge the senior barristers not to treat written submissions as just an add-on or something which can be 'fixed up' with oral submissions.

A skilful oral address on appeal will incorporate reference to the written submissions. The best advocates will, when making a point orally, tend to introduce it without distracting the bench by going to the written submissions, but then identify where the argument is to be found in the written submissions. That way, the issue having been opened, the court or tribunal can have confidence as the argument is developed that the pinpoint references to the evidence and authorities are there in the body of the document. This will allow the judges to focus on the argument, rather than laboriously trying to copy down references to evidence, citations and the like. They should all be in your written document. I remember watching Bret Walker's appearance in the High Court in *Pell v The Queen* (2020) 268 CLR 123; [2020] HCA 12 and it is a very good illustration, as one would expect, of the interaction between oral submissions and written submissions. That, as you know, was a very evidence-rich appeal, with a lot of detailed references. Walker's technique was to say 'you will find these references in [13] or in footnote 29' and there all the references would have been collected. He was not allowing the necessary detail to obscure the clarity, flow and force of his oral argument but, at the same time, he was assuring the court that what he was saying was supported by the evidence and that the references would be found in the written submissions.

Now sometimes, of course, as you prepare or re-focus immediately before an oral hearing, there will be references you want to add. My technique used to be to say — 'can I take the court to [13] and could I ask your Honours to add the following references'. That way the reference is not just being written down in the judge's notebook, but is being written down in the submissions, next to the points for which it stands and supplementing the references you have already given.

When hearing an appeal, it is useful for the barrister, when moving on to a particular issue, to identify where the issue is dealt with in the primary judgment, in the appellant's written submissions, in the respondent's submissions and in the reply so that when the court comes to write a judgment dealing with the issue, it has a useful collection of all of the relevant material.

The final point I would make is this: if you believe, as I do, in the power of oral advocacy, do not leave critical documents buried in written submissions. The oral submissions are the occasion to take the court to striking pieces of evidence. We have all had the experience where the gist of a particular document or a letter or an invoice might be referred to in written submissions, but there is great benefit in taking the court to the actual document, depending on its significance.

Similarly, with respect to key portions of transcript. Although you might have referred to the key passage in written submissions and even extracted a section of it, it is sometimes more powerful to take the court to the actual transcript, because it allows the judges to roam a little before and after the particular passage you want to emphasise. You might think that there is something very good in the particular passage, but there might be something even better in the context of that cross-examination and what you will find is that often when the court is taken to a piece of evidence, whether it be documentary or a portion of the transcript, even though it is referred to in the written submissions, one judge or another will say, 'I see that this line of cross-examination started with this question' and they will trawl through the document, often in a way that can be very useful and very revealing — a fresh set of eyes is looking at something but in its fuller context. This illustrates the point that one should not be overly reliant on one or other of the elements of advocacy, the written or the oral. They complement each other and, used properly, represent the complete package of contemporary advocacy.

Bathurst CJ: I agree with what Justice Bell has said. Another issue relevant to both written and oral submissions in the Court of Appeal is that you might have 20 or 30 key documents which are buried in 12 volumes of material. Now you can ask a judge to go through all 12 volumes or to look at one here and one there. Another way of doing it, which I often found useful, was to pull the key documents out and put them in a separate folder and hand that to the judge so they have the 12 or 15 best documents. They do not have to wade through the entirety of the material and, human nature being what it is, while I am sure they look at everything else, they really focus on the key documents and it helps. But do not hesitate occasionally to extract your best documents in your written submissions.

Gleeson SC: On this theme of coherence between the written and the oral submissions, it is interesting to think about two aspects. One is what is happening during the presentation of the appeal, and how the interplay between the written and the oral submissions is exerting persuasion on the mind of the judge. We barristers think we have a mysterious power over what happens in that moment of persuasion when a judge's mind actually turns or changes but no judge ever explains it. That is part of what we are trying to do by weaving the written and the oral together and that can, of course, play out in various ways. A very fine barrister like David Jackson QC on receiving a very hard question from the bench would give

his answer to it, but he would know that he could come right back to the next part of his written submissions as if they were his battle jacket, which was almost impossible to penetrate. I have never seen a court land a fatal blow on David Jackson. I have seen courts land fatal blows on me and many other people. But he uses the written submissions in this way. Their structure give him the protection that he could always move back and say 'your Honour I am now looking at [10]', so that is one form of interplay.

Justice Bell mentioned Bret Walker. I think he uses written submissions slightly differently. He weaves between the oral and the written, not always requiring the court to read the part of the written submissions to which he is referring, but using it to identify where the further detail can be found. I saw him on one magnificent occasion in the High Court, in the *Bell Group (in liq) v Western Australia* (2016) 260 CLR 500; [2016] HCA 21, a matter where he had signed his name to a submission and I am sure he had read and approved every word of it. It was the most complicated submission on the transitional provisions of the *Corporations Act 2001* (Cth) that I have ever seen. It went for about five pages and I could see the High Court justices thinking, well how is even the great Bret Walker SC to deal orally with this exceptionally complicated argument? When he came to it, at a point in his argument where he was otherwise ahead, he said, 'well, your Honours, I have advanced that argument in my written submissions and I cannot improve on it'. He just looked at the Justices straight in the face and dared them to ask him to explain and improve his written argument. Not one of the seven High Court justices was game to invite him to do so, and so the case just moved on. So that was part of the 'dance' between the oral and written submissions.

With other fine advocates, for example Neil Young QC from Melbourne, he again will have a different approach because he does not like to lose any battle or leave any prisoner on the field. He will make sure that as he goes through his submissions, he has got the judges reading each paragraph and raising their questions if they have them, but he will really make sure that no part of the written submissions has escaped from or been evaded by a judge.

So there are very different ways of doing it — reflective of different personalities. But what that is aiming towards is, hopefully, this magic moment during the oral argument, as if one was before a jury, where you have actually got the judge or judges persuaded that you are right. Now they still have to do all the further thinking and they have to write a quality judgment, but that is what we are trying to do on the day.

An element we sometimes forget is that, when the judge comes to write the judgment, assuming it is reserved, they have now got the written submissions, they have got their memory of the oral argument and they have got a transcript. I often wonder, if you have departed too far from the written submissions during oral submissions, whether you have in fact created an unnecessary confusion, because the judge who then has to go back and read the transcript will be reading a different presentation of your argument. In a perfect world, what you have created orally will follow reasonably closely what is in writing. Now structure is often hard to keep because judges are difficult creatures, but if there is a structure in the written transcript of your oral submissions, it should then be easy for the court, if it wishes, to go back and re-read how you develop a certain point.

The final thing I want to mention is an ethical point. As we are moving further towards written submissions, it is still inevitably the case that, no matter how much care you have put into them, just before the hearing you may think of a better authority or a better argument or perhaps some aspect of the facts that you have not dealt with in writing but you do propose to deal with orally. Now I am not sure that the Bar has a clear rule or practice on it, but I think best practice would be the very old-fashioned practice which is, if the point is genuinely new or is likely to take your opponent by surprise, you notify them of it as soon as you have thought of it, even if that is only 24 hours before the hearing. 24 hours' notice is better than dumping it on your opponent in the course of the case which can provoke unnecessary aggravation and I think, if the point is sufficiently new, with your opponent's consent, you would seek to give the additional authority to the court beforehand so it is not taken by surprise.

Bell P: I would agree with that. When that happens the court will obviously be concerned to ensure that the other side has enough time to deal with the point. Sometimes counsel are invited to deal with it, depending on how far in advance they have received the new point, on the spot if they feel able, or to deal with it partly on the spot but to supplement in writing. But it is important, if it is genuinely a new point on appeal, to commit it to writing so there is no confusion about what it is, and to communicate it as expeditiously as possible to the other side. Practitioners should know

Top left – Bench consisting of Justice F Gleeson, President A Bell and Justice P Brereton; Top right – Mr D Hooke SC with Mr H Chiu; Bottom left: Mr C Barry QC with Mr M Tanevski; and Bottom right: Ms A Horvath

that, if a point is genuinely sought to be raised, and it is arguable, they should consent to it being provided to the court. No silly games about 'no we do not consent to it' in order to hold it back, because it also affects the court's view of the matter.

Just as it is unfair to spring a fresh argument on your opponent, it is also actually unfair to the court. Appellate judges spend a considerable amount of time in advance of the hearing reading the materials and thinking about the issues, so the oral hearing is very important for the judges. It is our opportunity to ask the questions which are concerning us. It is our opportunity to clarify matters which may be obscure either in the primary judgment or in the written submissions, and that is what we think about when we prepare to hear an appeal. So it follows that, if there is to be a fresh argument, we should know about it so we can think about it and whether it is cogent. We also think about whether it is fairly raised, whether it is a pure legal argument, and whether it was put at first instance. These matters can eat up time at the beginning of a hearing if there is an attempt to raise something without notice, and then you run the risk of the need for a second day or of an adjourned hearing which is in no one's interests, particularly from a cost point of view. It is much better to have everything heard at once.

Bathurst CJ: I would just add to that, if new points are dropped on you, do not feel frightened to say you are not in a position to deal with them if you are not. Courts are sympathetic to that.

Court of Criminal Appeal

Bathurst CJ: I want to say a few things about the Court of Criminal Appeal, I will try not to be repetitive but it must be remembered that a lot of what has already been said is equally applicable to advocacy in that court as it is to any other court. First, it is important to remember that the judges are busy. It is common in the Court of Criminal Appeal for judges to sit three days per week on cases in which there is one conviction and possibly three sentencing appeals to be heard on any given day. It is a different structure to the Court of Appeal and it is necessary because of the volume of criminal appeals that are filed. It follows that the judges have relatively limited reading time for written submissions but, conversely, it makes the written submissions all the more important and it means that focussed written submissions are vital for a good criminal appeal. Now in those circumstances, whether dealing with a conviction or a sentence appeal, I think it is most helpful at the outset to summarise the propositions which are sought to be made and submissions should only elaborate on those propositions to the extent necessary.

Now dealing in particular with conviction appeals, it is important that there is an accurate and concise statement of the Crown and defence cases. As more and more conviction appeals are based on the suggestion of an unreasonable verdict, that ground should be supported by a summary of the actual matters which may cause a court to entertain a reasonable doubt as to conviction. It is no good making a whole lot of propositions without focus because it will often only be one or two things that will convince the court that, notwithstanding the advantage a jury had, there is reasonable doubt in respect of the verdict.

Now in a case where a point you want to raise was not taken at the trial, be upfront about it and identify precisely why the point should be available. You all know that some judges mutter more about rule 4 of the Criminal Appeal Rules (NSW) than others. I do not get very excited about rule 4, but other judges do. Ultimately, if there is an arguable miscarriage of justice, the point will be allowed; if there is not, the point is probably not very good anyway.

Now in one sense, insofar as the Crown is concerned, the reverse applies. In a case where the Crown seeks to rely on the proviso, rather than simply referring to it, it should summarise why it should apply. I have been very tempted to cause a ruckus by saying, when the Crown puts in one or two words to the effect that 'if we are wrong on this, the proviso applies', that they have given no reason for it, therefore I would reject it. I would not make myself very popular but it might be salutary.

Now although there are no page limits on submissions in the Court of Criminal Appeal, remember, as the President has said, good submissions do not necessarily mean long ones. Make sure your argument is not buried in a mass of peripherally relevant factual material. Although you may have more than one ground of appeal, concentrate on your best grounds as that will focus the judges' attention on where you really want to go.

So far as citations are concerned if, for example, there is a High Court decision which is unambiguously determinative on the issue, there is no need to cite numerous Court of Criminal Appeal authorities which follow it or predate it. Judges assume cases are cited for a reason other than to demonstrate the breadth or depth of counsel's research. Anxious parades of knowledge are not helpful to the determination of issues.

Finally, as has been said, make the most of your written submissions by speaking to them. If there is a disconnect between your written and oral submissions, you will fail to optimise the value of either of them. It is important to remember that both play a vital role in the advocate's toolkit.

Questions

Does the panel has a view of the appropriateness of footnotes in written submissions as opposed to in-text citations? Is it preferable to put citations in the body of the text, in the footnotes, or at the end of the document?

Bathurst CJ: For my part I do not think it matters very much, but make sure the things you really want a judge to look at are in the written submissions rather than in footnotes.

Bell P: Footnotes, not endnotes. There is a question also about a preferred font. Now I am not going to answer that, I am not going to 'bless' a font or otherwise. But what I would say is that judges and barristers have to do a lot of reading and when you get a document which physically is difficult to read because it is in small font, is not appropriately spaced, or is not broken up with clear sub-headings, it is a much harder document to read. It is not a matter of substance, but just as a matter of the facility of reading it, and you can do yourself a great disservice if you do not actually put some thought into the production of the physical submissions. People who try and cram text because they are trying to cheat a page length by using tiny font or avoiding proper gaps between paragraphs are actually doing themselves a disservice, because it is extremely hard to read and thus difficult to absorb the substance of the written submission.

In relation to sentencing submissions in the District Court, the questioner has seen some very thorough and lengthy submissions, reproducing great technical chunks of text from cases and legislation, but has also seen some for matters of a similar substance and complexity which are simple brief dot points which run to no more than a page. What is the preferred approach?

Bathurst CJ: I do not think that question is capable of a 'yes' or 'no' binary answer. It depends on the case and it depends on the issue. The submissions should be short but no shorter than is necessary to get the propositions across. They should be of sufficient length to do that.

In complex matters, in my experience, submissions can easily go over 100 pages without judges complaining or putting page limits — is there a strong preference either way on this front?

Bathurst CJ: I think that that question must relate to the Court of Criminal Appeal where it does sometimes happen; in fairness because the parties, quite properly, are trying to present the factual basis of the Crown and the defence cases. If you must do it, can I emphasise what I said in relation to Court of Criminal Appeal submissions —put your key points somewhere near the front. Focus on the part of that mass which is really relevant to the jury verdict being overturned.

Bell P: Can I just add that in a commercial context, a great deal is invested in the case, the preparation and the development of the arguments and so forth. On the one hand, there is a tendency to set it all out in the written submissions, but it is a really good discipline to try and make the written submissions as concise as possible. Sometimes it is not wholly possible, but it tends to make for a better document. I remember going up in front of Justice Allsop when he was a judge of the Federal Court to get some directions in relation to an appeal and my leader wanted 50 or 60 pages for submissions. Justice Allsop said 'no, 20 pages', and it was actually very salutary, because we were able to confine our argument to that length. It was a bit more work, but they were better submissions than they would have been if they were in a 60 page document, which would have lost the court, or run the risk of losing the court's focus and interest. It is a bit like those High Court three-page outlines which are a relatively recent phenomenon, in the last 10 years or so. They show that you can boil down and refine your argument the more you think about it, and focus on what is really important in a matter. Obviously the position is different as between trials and appeals.

Gleeson SC: I will only add that I think that page limits will eventually take over in every matter. They are not only for discipline, but actually to preserve equality between the parties because if one party provides 70 pages and the other 30 pages, there can be unfairness.

My question concerns reply submissions, particularly in civil appeals. Could the panel address the best way to enhance or refine the arguments without repeating what is said in-chief, and perhaps, at the same time, by not just attacking what I might describe as the low hanging fruit?

Bell P: I think reply submissions are obviously the opportunity to signal if there is something contentious in a factual or procedural sense in the respondent's submissions or if there is something which is just not accepted. I agree with the sentiment of the question that reply submissions should not be repetitive. There is a lot to read anyhow and the key arguments should have been put out in front.

Sometimes if there are notice of contention points, they have to be dealt with. If there are matters which require explanation, for example, if some portion of the evidence at trial has been referred to but has not been put in proper context by your opponent, you would use the reply submissions to contextualise it, but that is certainly not an invitation or avenue for repetition.

Gleeson SC: Reply submissions are one area where the common law is out of step with practice in civil law countries and in international arbitration, where our idea of plaintiff, defendant, plaintiff in reply is just not accepted. In comparable jurisdictions, the principle of equality means you each get a first round and either that is it, or you each get a second round which will be shorter, but of the same length for each party.

I am increasingly coming to the view that there is a potential for unfairness in our system where the plaintiff gets two turns at it with more pages and often gets more time in court because counsel can say, 'I'm exercising my right of reply'. That is not just because we know brilliant advocates like Roger Gyles QC will win cases in reply, and certain other advocates would do likewise. It is not just saving up a good point, but I think there is a potential inequality in giving that further chance to the moving party.

As I recall the original common law position, the defendant would sometimes be called on to go first and then the plaintiff would put on its evidence and make submissions. That is just a question to think about over the next 10 years as to whether we have got the balance right.

Bell P: In some jurisdictions, the reply is confined to points of law. The practice in the Supreme Court of Queensland certainly was when I first appeared there, much to my shock.

Are there some tips that the panel would be able to give us in terms of being a respondent against a self-represented applicant, where you perhaps get large volumes of material which is not particularly focussed?

Bathurst CJ: I think you have to focus on the core issues. Ignore the irrelevant material without disparaging it — it is very important to do that. Bear in mind the judge will have the instinct, to the extent that he or she can, to help the unrepresented litigant and will not thank you if you are putting submissions in highly technical terms. Try and keep it simple so the unrepresented litigant can understand it. You will receive appreciation from the judge and it will make it easier. That is the best advice I can give.

Bell P: It is one of those areas that I have touched on before although I did not have responding to self-represented litigants in mind. It is one area where you, as respondent, can impose some structure on the argument. If you have been in the matter for a while, you will have an understanding as to what the underlying grievances are and it may be that you can organise and impose some structure on the argument. So quite often what happens is that many earlier rounds of related litigation are repeated and the whole history of the matter is thrown up in a fairly undifferentiated way. We had one recently where the barrister said there were five points he wanted to make, and it provided a form of organising the undifferentiated material that had been presented by the self-represented litigant. That can be very helpful to the court. It is also good advocacy because it can give the judge or judges a framework within which to work through the material.

Bathurst CJ: Can I just say this, thank you all for coming and I think that this type of seminar where you get to see a few judges a little more informally than usual is very desirable. I do hope everyone here and those people attending online have found it interesting and stimulating. BN