

# Advocacy and the written word:



## appealing written submissions

By Gerard Mullins

**M**ost appellate jurisdictions – whether the appeal is to an industrial magistrate, a district court judge, Court of Appeal or the High Court – require the delivery of a written outline of argument before oral submissions are made. Appellate courts across Australia are continuing to move towards written submissions as a cost-effective and practical method of disposing of appellate case lists.

The President of the Queensland Court of Appeal, Justice Margaret McMurdo, has seen many good (and some bad) outlines of argument since her appointment. At a conference for the Bar Association of Queensland earlier this year, she shared her views on the content of 'appealing written submissions'. The following extracts are reproduced with Her Honour's permission.

In Queensland, written outlines of argument must be filed not only in appeals but in all appellate applications. Court of Appeal matters may be heard solely on the written outlines of argument, although only by order of the court or a judge of appeal and ordinarily only when all parties consent. It has been popular with

some unrepresented regular North Queensland litigants who see the Court of Appeal as but a whistlestop to Justice Callinan in Canberra, not worth the trip to Brisbane or even the cost of the video or telephone link. The practice has its place in minor applications, but the Court is presently able to manage its workload in a timely fashion so there is certainly no current justification for written outlines to routinely replace, rather than supplement, oral submissions.

The written outlines present a great advocacy opportunity. The style and content will vary with the facts and issues in each case, but there are some constants.

The beginner appellate advocate will find helpful the information sheets originally prepared to assist unrepresented litigants, which are available from the Court of Appeal registry either in hard copy form or on the website at <http://www.courts.qld.gov.au>. The information sheets emphasise the importance of meeting the time-frames contained in the Practice Direction which can be extended or abridged for good reason by the registrar or the Court. They stress, as does the Practice Direction, that the outline should be concise

and ordinarily not more than 10 pages.

I am sure many practitioners think the 10-page rule is unreasonable, especially in complex cases. It is all too often ignored. The Federal Court has a similar requirement. Other jurisdictions require even more concise outlines of argument: in South Australia the outline is ordinarily not to exceed three pages. It is important to focus on being concise and relevant to the grounds of appeal. Do not think the 10-page rule will be met by providing outlines in tiny font: it would be extremely poor advocacy to provide illegible outlines of argument for ageing judges with fading eyesight! The foreshadowed amendments to the Practice Direction will forbid it, anyway!

Before commencing your concise outline of argument, be sure you understand how you get before the Court of Appeal. Is there a right of appeal or do you need leave? If you need leave, you should address in the first paragraph of your outline why leave should be given. This will generally require a consideration of the strengths of the grounds of appeal sought to be argued. In case leave is granted, the parties will often prefer the Court to deal with any appeal at the >>



same time as the leave application. So you should address the merits of the appeal grounds in the written outline or supply a separate outline of argument for the appeal. The appeal will only be heard together with the leave application when the Court and the parties agree that this is appropriate.

Is an extension of time needed? If so, you should in the first paragraph of your outline explain why there was a delay and why the extension of time should be given by referring to your proposed grounds of appeal, for if the grounds are unmeritorious, there will be no point granting an extension of time.

Are the grounds of appeal limited, for example, to error of law or lack of jurisdiction? If so, explain at the commencement of the outline how the grounds of appeal come within those set limits.

Next, deal with the grounds of appeal contained in the notice of appeal. If, as appellant, you realise those grounds are no longer apposite, then apply to amend the grounds in an early paragraph of your outline before addressing the amended grounds.

Keane JA, recently Queensland's leading appellate advocate, with whom I briefly discussed this paper, suggested I emphasise that in preparing the written outlines you remember the constraints on appellate courts.

If you are appealing from an exercise of discretion, explain the basis on which you say the Court can interfere within the principles set out in *House v R* 91936 55 CLR 499. If you are seeking to overturn findings of fact, address why that is justified in terms of the principles discussed in *Fox v Percy* (2003) 214 CLR 118.

Remembering the 10-page rule, focus on the heart of the case and what the appeal is really about. Limit the issues, if more than one, to your best points and deal with each issue separately and sequentially using headings.

Keane JA recommends commencing the outline of argument with a statement of the issue and how it affects the orders sought and to conclude the outline of argument with a statement of the orders sought. If the order you now seek differs from that

requested in the notice of appeal, explain why at the beginning of the outline.

Make sure your legal and factual submissions are accurate: if judges find you unreliable in one case, you will probably lose it and certainly be on the back foot in future cases.

Construct your sentences grammatically: you do not want judges distracted from the merits of your arguments by poor grammar or spelling, unnecessarily complicated sentence structure or big words that require a dictionary to comprehend. It is not good advocacy to discuss the facts of cited cases at length nor to quote long passages: state the principle and how it is relevant to your argument.

For non-crucial propositions or to reinforce a point made in the text, use footnotes giving page and paragraph references. All references to the evidence should have footnotes giving the transcript references.

A clever advocate understands that the parties have given the appeal judges a problem and will use the written outline to provide the answer. Make your submissions so appealing that the judges will want to incorporate them into their reasons giving judgment for your client. What greater praise for an advocate than to not only win the appeal but also to find his or her written words incorporated in and adopted by the judges in their reasons; even better, when the adoption is acknowledged rather than plagiarised!

When you have completed your outline you should ERR: edit, revise and refine. The more you revise and refine your written outline, the better you will understand your case and the better your ability to present it orally. ■

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**Gerard Mullins** is the Australian Lawyers Alliance's Queensland President and a barrister at Ronan Chambers, Brisbane.

PHONE (07) 3236 1882. EMAIL [gerrymullins@ozemail.com.au](mailto:gerrymullins@ozemail.com.au)

## POINTS TO REMEMBER FOR A WINNING SUBMISSION

- Put sufficient time aside in your diary to fully prepare written submissions, just as you diarise court appearances.
- Written submissions are a great opportunity to get the judges interested in your client's cause so that when your case is called on for oral argument the judges are looking forward to hearing from you. Don't waste the opportunity.
- There is no substitute for thorough preparation. Know whether you have a right of appeal or need leave to appeal, and whether you are within time limits. Focus on what you need to persuade the court: why leave should be given, why time should be extended, or the issue or issues in the grounds of appeal.
- Do not raise too many issues. If more than one, concentrate on your best. Deal with each separately using headings.
- Relate the issue or issues to the order you are seeking.
- Set out the critical parts of the reasons under attack – explain why they are wrong and what should have been done, or why they are defended.
- Ensure submissions are accurate, concise, comprehensible, grammatical and logically ordered; remember that the judges will not be as familiar as you are with either the relevant facts or law.
- You and your opponent have given the judges a problem: use your written submissions to solve it for them.
- Order your submissions by 'issue, rule, application to the issue, conclusion'.
- State the order you want the judges to make.
- Finally, do what the appellant says the primary judge did: ERR. Edit, refine and revise your written argument until it is as clear and succinct as you can make it.