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THE ART OF PERSUASION THROUGH THE WRITTEN WORD IN APPELLATE ADVOCACY

I INTRODUCTION

When addressing the subject of written submissions in *The Gentle Art of Persuasion*, Chester Porter QC somewhat wryly observed:

> But was the written submission read at all? Often you never know. When written submissions became mandatory in the New South Wales Court of Appeal, we all took some pains in writing them, envisaging learned judges of appeal poring carefully over what we wrote. For myself, I was somewhat surprised to find quite often that my cherished work had not even been read. I was comforted by the amusement raised for me by judges pretending they had read my submissions when they obviously had not, and who were now rapidly scanning them so as to be able to claim some knowledge of what I had written.[1]

No doubt, there are many at the bar who could sympathise with these observations. However, such occasions now appear to be rare, at least in the higher courts. Nor should it be forgotten that the traditional focus in the Australian legal system was upon oral advocacy, and that the move to written advocacy is a recent one. Indeed, it was only in 1982 that the High Court first required advocates to provide a written outline of their principal arguments and even then, the outline was not to exceed three pages and was handed up only at the start of oral address.[2] It is not difficult to imagine the protest which counsel would make today if opposing counsel were to engage in such a practice, not to mention the cool reception which could be anticipated from the bench. Yet, Sir Harry Gibbs, speaking in 1985, was at pains to stress that:

> There is a good reason why the outline is not required before the argument commences. It will be useless if it does not set out a summary of the argument which counsel who appears actually intends to put. The system is intended to

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1 Chester Porter QC, *The Gentle Art of Persuasion* (2005), 230.

2 Justice Kirby, 'The future of appellate advocacy' (2006) 27 *Australian Bar Review* 141, 144. See also Sir Harry Gibbs, 'Appellate Procedures in the High Court' (1985) 2 *Australian Bar Review* 1, 7.

> avoid the situation in which a junior counsel has prepared an outline of one argument and on the day in court the senior presents a different argument.[3]

It is, perhaps, not surprising then that Sir Anthony Mason should have expressed the view a year earlier that his enthusiasm for the written case was 'a minority enthusiasm'.[4]

In this context, the procedural amendments made in 1987 requiring parties in the High Court to file detailed written submissions constituted a very significant step.[5] Some measure can be taken of the impact of this change from the recent observation by Justice Kirby that '[a] good advocate ordinarily uses oral argument to complement and strengthen written submissions'.[6]

A major object of this development in the Court's practice, and an object which would appear to have met with some success, has been a substantial reduction in the number of hearing days for appeals. For example, a comparison of the number of hearing days in the first 50 reported cases in the High Court raising constitutional issues, and those in the last 50, revealed that the number of hearing days had almost halved – from 257 days to 136; from an average of 5.14 days to an average of 2.72 days.

In conducting appeals in Australia today, there is no longer room to doubt the importance of written advocacy. The purpose of this article is to suggest some ways in which the persuasiveness and impact of written submissions at appellate level might be improved by reference to three themes:

(a) reason and structure;

(b) language and reading; and

(c) the symbiotic relationship between oral and written advocacy.

Nonetheless, while the focus in this paper is upon written submissions, it is important to emphasise that written advocacy is not limited to written submissions and outlines of argument. Pleadings and grounds of appeal equally offer opportunities for persuasion, and, even in preparing correspondence in the course of litigation, it should always be borne in mind that letters may end up before the court.

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3 Ibid 8.

4 Sir Anthony Mason, 'The Role of Counsel and Appellate Advocacy' (1984) 58 *Australian Law Journal* 537, 540.

5 Kirby, above n 2, 144.

6 Ibid 145.

II REASON AND STRUCTURE

Reason and structure are the foundation of any submission. There may be many good points which can be made, but unless they are presented in a logical and structured way, they may fail to persuade. Ultimately the objective in a "perfect world" is so to structure the submission as to the lead the reader inevitably to accept the author's conclusions.

Courts also lay down certain requirements for the preparation and presentation of written submissions which vary according to the jurisdiction. These can include prescribing the matters which are to be addressed in the submission and the order in which they are to be addressed, as well as the minutiae of font size and line spacing. Nonetheless, even within such rules, there can be room for innovation, and, in my experience, courts have not stifled or criticised innovation by undue adherence to the rules where the innovation is well thought out and adapted to the needs of the particular case.

Subject to the particular requirements of the jurisdiction concerned, it can be helpful to start a written submission with a summary of principal contentions set out in bullet form. This may usefully follow a couple of short preliminary paragraphs which introduce the appeal. Irrespective of the complexity of the issues involved, a case should always capable of being reduced to a succinct statement of propositions which identify the issues and the manner in which they are answered. Providing the court at the outset with a snapshot of the submissions of this kind makes it easier for the court to understand the relevance of the detail which follows, and to appreciate the relationship between the different steps of the argument. It is also a useful discipline generally in preparing a case and testing the logic of your arguments.

The structure of the argument will also be shaped by whether the submissions are put on behalf of the appellant or the respondent. An appellant's written submissions in chief must focus upon identifying and demonstrating the errors below, and explaining their consequences for the appeal. On the other hand, a respondent must identify, and directly rebut, the key aspects of the appellant's case. The court ought not to be left to guess how the respondent's submissions answer those of the appellant. The same observations apply with equal force to an appellant's submissions in reply.

Headings and sub-headings are also useful signposts which assist in maintaining the flow of an argument, and can provide a thumbnail sketch of the structure of the submission if generated into an index in longer submissions. I found this technique to be very helpful recently when preparing submissions in five appeals that had been listed to be heard and determined together. They raised a number of common legal issues, but they also raised legal and factual issues which were peculiar to each appeal. In order to make the submissions more 'user friendly' for the court (and also to provide counsel with a 'ready reckoner' for each case), an abbreviated

index was inserted on the title page of each set of written submissions. That index, in turn, had been structured so as to provide an immediate picture of the issues in each case, how they had been answered, and where to find the submissions on each point.

III LANGUAGE AND READING

It is trite to say that words are the advocate's tools of trade. The most effective oral advocates are those who have a wide vocabulary, and a mastery of the meaning of words. So too in the case of written advocacy where the opportunity exists carefully to weigh up and assess each word written upon those precious ten or twenty pages. Indeed, it can be said that is through the careful use of language that a well crafted submission becomes a form of art.

On the other hand, the written word has a permanence about it that can be most inconvenient if ill-chosen. In this regard, it is well to bear in mind, as Chester Porter QC reminds us in his work on persuasion, those words of warning in *The Rubaiyat of Omar Khayyam*:

> The Moving Finger writes; and, having writ,
> Moves on; nor all thy Piety nor Wit
> Shall lure it back to cancel half a Line;
> Nor all thy Tears wash out a Word of it.[7]

How then to acquire this mastery of words? It is difficult to improve upon Lord Denning's succinct answer, by practice in writing and by word of mouth, and through reading the literary classics[8] – in fact through reading as widely as possible.

IV THE SYMBIOTIC RELATIONSHIP BETWEEN ORAL AND WRITTEN SUBMISSIONS

While written submissions are no longer merely a tool to assist oral argument, written and oral submissions should perform complementary functions. The precise manner in which they complement each other will depend upon many different

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7 Porter, above n 1, 232 (quoting *The Rubaiyat of Omar Khayyam* (trans Edward Fitzgerald)).

8 Lord Denning, *The Discipline of Law* (1st ed, 1979) 6-7.

factors. However, there are a couple of general points which might usefully be made.

First, the goal to strive for in writing submissions is to persuade the court before counsel rise to address, albeit that this is an object not easily achieved.

Secondly, the quick road to a bored bench is to repeat written submissions orally. Nonetheless, there should be consistency between a party's oral and written submissions. This points, among other things, to the need to allow for a degree of flexibility in oral address when settling written submissions. As Sir Anthony Mason wrote extrajudicially in 1984 (albeit in the context of oral advocacy):

> The able appellate counsel, alive to the possibility that he may need to adjust his case in light of the Court's reaction to his argument, preserves some degree of flexibility in the expression of his submissions, knowing that what attracts one judge may repel another.[9]

In the third place, there is an opportunity in written submissions to develop an argument in a carefully structured way. That is a luxury which is rare in oral address and, indeed, it is preferable for counsel to be responsive and flexible in oral address.

Written submissions also afford the opportunity to include a relatively high degree of detail on matters of fact and law – a consideration which is particularly important where there are complex concepts and issues involved. Chronologies can also form a valuable annexure to submissions, and in some jurisdictions, are required. In addition, it can be useful to summarise evidence in an annexure, provided that care is taken to ensure that the relevance of that evidence is apparent. Dealing with detailed matters of this kind in writing has the advantage that it gives counsel the freedom to focus on the major issues in oral address, and upon responding to particular concerns raised by the bench. As Sir Anthony Mason has also written:

> Because the object of advocacy is to persuade, there is much to be said for getting there as quickly as possible. As the Americans say: 'Go straight for the jugular.'[10]

As Sir Anthony Mason then went on to observe, that advice is easier to take 'in a forensic world whose Pole Star is the written brief.'[11]

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9 Mason, above n 4, 541.
10 Ibid 542.
11 Ibid.

V CONCLUSION

The relative novelty of written advocacy, as against oral advocacy, means that there is perhaps still less consideration given to this subject than might otherwise have been the case. However, it is now essential for an appellate advocate to develop the skills of written advocacy to a high degree.

From the perspective of courts of appeal, the emergence of the practice of requiring written submissions would appear to have had tangible benefits in handling an increasing appellate workload efficiently. It is difficult to envisage that the *Bank Nationalisation Case*, [12] were it to run today, would take the 37 days which it took in the Privy Council in 1948, in the course of which two judges perished – hopefully not, as Justice Kirby recently hypothesized, 'of Australian advocacy or just sheer boredom'.[13] At least it is hoped that written advocacy does not carry with it the same perils.

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12 *Bank of NSW v Commonwealth* (1948) 76 CLR 1.

13 Kirby, above n 2, 146.