BAR ASSOCIATION OF QUEENSLAND CONFERENCE – 27 MARCH 2022
THE ART OF WRITTEN SUBMISSIONS – SPEAKING NOTES

The use and abuse of written submissions has been the subject of dozens of articles and presentations at conferences like this for decades. Is there anything new left to be said? Probably not. Then why have a session at all on this topic? Because counsel are still wasting the opportunity to have their arguments put, without interruption, to the court. In oral submissions you might be the subject of cross-examination from the bench and, sometimes, feel that you're not able to get your point across. That ability is manifestly available in a written submission.

I'm going to approach this topic under four headings:

- Why is the written submission overtaking the oral submission at an increasing rate? Because it often helps when considering how you will frame a submission to consider why it's being put in writing.

- When are written submissions the superior means of persuasion?

- What are the basics of a persuasive written submission?

- How can you blend the written and the oral so that the whole is greater than the sum of its parts?

Why is the written submission overtaking the oral submission at an increasing rate?

1. There are many practice directions or rules of court or conventions which mandate or strongly encourage the use of written submissions. I'm going to be talking to you today about the use of submissions at the trial level. There are differences of focus and detail which separate trial submissions from appeal submissions and from those which are provided on applications. But, if they are done well, then they will all contain a core of exposition and analysis.

2. Sometimes it assists when drafting submissions to bear in mind how we have reached this state. While the provision of written material was well advanced in the United States and, to a lesser extent, in Canada from the beginning of the 20th century, the provision of submissions was almost un-known only 40 years ago.

3. There are, I suggest, seven reasons for the requirement most courts impose or request for the provision of written submissions. I'll deal with them very briefly.

4. The first is the time pressure on judges. I am not aware of any jurisdiction in which governments are delighted to increase the number of judges available to hear trials. They require the courts, like many other parts of society, to do more with less. The courts also impose time limits on the delivery of judgements. Around Australia the usual protocol is that a judgement should be delivered within three months of the last day of the hearing. That is not unusual. And written submissions are seen, correctly in most cases, as assisting the judge in writing the decision.

5. The second is that technology has made it so much easier to do this. In 1982, there were no word processors. Barristers did not rely on an Apple or a Windows computer but on an IBM or Olivetti typewriter. Easier, though, does not always mean "better".

6. Thirdly, at least in the superior courts, reliable transcript is readily available. This has led to both counsel and solicitors taking fewer notes during a hearing and waiting for the transcript to be available. It is also led to a much greater insistence on accuracy so far as references to exchanges in examination or cross examination are concerned.

7. A fourth issue is the inexorable move from common law principles to principles embedded in statutes. It was once possible to argue a contract or a tort case without referring to a statute. The broad principles were known and reference would be made to leading authority. The reluctance of legislators to leave anything alone has meant that many of those principles now find themselves being expressed in excruciating detail in statutes. Reference must be made to

sections with many subsections and sub subsections and that can be almost impossible to do in an oral presentation. Judges are much more likely to understand a submission where the relevant section is inserted into the written submission.

8. Fifthly, the diet of trials fed to judges used to be leavened with some simpler cases. They might only last a day or two and could be dealt with adequately in the final oral address of counsel. Those cases are rare birds now. Mediation and other means of alternative dispute resolution has meant that the cases which are listed are the most difficult or most complex cases which remain intransigently incapable of resolution. The more complex the matter, the more helpful a written submission is.

9. The sixth point is that a generation of counsel and judges have grown in the profession while these changes have been being made. The expectation that a barrister will give a final oral address at the conclusion of, say, a three-day trial is greeted by some with an onset of nervous perspiration and a general desire to be somewhere else.

10. Finally, the appointment of judges from outside the traditional pool of the senior bar has resulted in some judges who are more comfortable with receiving arguments in written form.

I have discussed with a number of the judges on my court the fact that I was going to be speaking to you today on this topic. One response, apart from the universal expression of pity for me, was this: counsel should not expect that they will be allowed to provide written submissions in a trial which is relatively simple and short. There are, of course, not many of those in the Supreme Court but where the evidence concludes in two or three days then you should not expect to have an adjournment for some time in order to prepare written submissions. Most judges will expect you to commence your submission immediately. Wise counsel will enquire at the beginning of the trial as to the judge's expectation with respect to presentation of addresses.

When are written submissions superior?

1. Lengthy trial
2. detailed examination of complex facts / expert evidence
3. detailed examination of complex legislation
4. when a reserved decision is inevitable.

What are the basics of a persuasive written submission?

There are hundreds of papers and articles published in this country and elsewhere which deal with the construction of a written submission. There are dozens of books – mostly from America – which do the same thing.

I am not going to attempt, in the time available, to cover the entire field. I want to deal with a few matters – some more important than others – which may assist you in the difficult task of composing a compelling submission.

Allow me to remind you that a written submission is just as much advocacy as oral argument or cross examination. It is all about persuasion.

You will be more likely to be successful, assuming you have a case which allows you to be successful, if you always bear that in mind.

Do not fall into the trap of putting every last indefinite article, punctuation mark and rhetorical device into the written document. It is not a script. It is not a journal article. It is not a doctoral thesis. It is an implement. It is a tool to be used by the judge when he or she is working on the judgment. It was put this way by one eminent English: you should aim for the middle ground – somewhere between a text message from a teenager and a brief for the US Supreme Court.

It is a document which you wish to have the judge pick up and use it with confidence. It is not a document which will have the judge flipping backwards and forwards in order to find where particular important matters are dealt with.

Always remember:

You are trying to persuade the judge.

- Not your client.
- Not your solicitor.
- Not your opponent.

The judge.

Let me start at the very beginning.

It is not unusual to receive, after a trial has concluded, a written submission which commences with the full title of the matter and then has the heading: "written submission". This is obviously to assist those judges who cannot tell the difference between an oral and written submission. It also has an air of mystery – whose submissions are these? It often seems to happen where there are more than two parties involved. Please identify the origin of the submissions. The plaintiff's, the second defendant's, the first third-party and so on.

During trial conventions often arise as to the manner in which particular parties are referred. It is always better to refer to parties by their actual names rather than their position on the court heading. Any reader is more likely to comprehend an argument better if the reader is provided with a consistent description of the relevant party. And keep it consistent – if a party has been referred to away during the trial, don't change the description when you come to write about it.

So, you've told the reader on whose behalf the submission is made. You want to make the reader continue to read it and to comprehend.

A shorter document is easier to comprehend than a longer document. There is no prize for the heaviest submission.

One of the best expositions of the elements of clear writing was set out by George Orwell in "Politics and the English Language" published in 1945.

In discussing clarity of language he provided the following rules which, he said, would cover most cases:

1. Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.

2. Never use a long word where a short one will do.

3. If it is possible to cut a word out, always cut it out.

4. Never use the passive where you can use the active.

5. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.

6. Break any of these rules sooner than say anything outright barbarous.

You will always be assisted if you bear those in mind.

The admonition that: if it is possible to cut a word out then you should cut it out carries across to the citation of authority. You should always remember:

> "…if it is *not necessary* to refer to a previous decision of the court, it is *necessary* not to refer to it. Similarly, if it is *not necessary* to include a previous decision in the bundle of authorities, it is *necessary* to exclude it."
> *R v Erskine* [2009] 2 Cr App R 29, *per* Judge LCJ at [75]

May I take this opportunity to remind you that there is no need to demonstrate a principle by reference to decisions commencing in the 18th century and listing those cases which have dealt with that principle. The rule of thumb is that when referring to a

principle or exposition of law you should only refer to the authority which is the most recent and from the highest court. If the High Court has pronounced upon a subject, then there is no need to refer to decisions of intermediate courts of appeal which have followed it. If the High Court has not dealt with a particular matter then, of course, you would refer to an intermediate appellate decision. There is no need to clutter a submission with a recitation of a long list of authorities all dealing with the same point. And it will be a rare day when you cannot find an appellate decision on the topic you're discussing.

A submission not only needs to read well, but it also needs to look good. There should be some white space on the pages. There should be headings which are consistent with the issues to be determined. The paragraphs should be numbered and never in the decimal style. Use the same conventions as are used in legislation, i.e., number, letter, roman numeral etc.

Do not be afraid to incorporate diagrams or plans or maps. It will not be necessary in many cases. But in cases involving, for example, complex corporate relationships a diagram demonstrating the hierarchy can be very helpful. In a case for family provision where there are numerous relevant family members then a family tree can explain the relationships much more quickly and much more efficiently.

I come now to the one thing that I want you to remember about this subject – the importance of context.

Whether your submission is for an application, a trial, or an appeal, the judge may not come back to it for some months. In the trial division the judge may have heard other civil or criminal trials after your trial concludes mint-writing can commence.

So, remind the judge of what it's about. Don't just leap into an analysis of the law or the facts.

Put yourself in the position of the reader, i.e., the judge. The judge hasn't been able to turn his or her mind to it for some time. Set out what some call an "overview statement"

which tells the reader what the case is about, who did what to whom, the major issues and your position on them. This should take up no more than one page. And this process represents a fundamental principle of persuasive submission writing: put context before details.

The overview statement is important because it provides a roadmap for the rest of the submissions. It provides the context for those submissions and allows the judge to better absorb and understand the details which follow.

In that introduction you begin by persuading the court of the rightness of your client's case. Tell the story in human terms. You are wanting to grasp the judge's attention and that is best done by capturing the essence of what the case is about and why your client should succeed.

In your introduction you will state the key issue or issues on which the trial turns. This is a task which requires careful attention. You do not want to descend into complex particularity , nor do you want to state the issue too broadly.

So, start with a sufficient but simple picture of the facts which provides a context to the issues and a preview what is to come in the balance of the document.

There are four principles the observation of which will lead to a more effective document.

Principle 1

Readers will absorb information better if they understand its significance as soon as they see it. Before providing detail, provide a context or framework that allows them to grasp the relevance of the detail in the organisation that binds them together.

You do this by:

A providing a focus

B making the structure of the information explicit

C beginning with familiar information before moving to new information.

Principle 2

A reader will absorb information better if its form (its structure and sequence) mirrors its substance (the logic of the analysis or the theme of an argument).

Submissions should be issues-based because judgments should be issues-based. Judges have to decide issues. They are, in the first place, determined by the pleadings but, as we all know, those issues can change and become more or less important as a trial proceeds. It may be, for instance, that one of the issues is the credibility of a major witness. If the case for one side is dependent upon the judge accepting that witness's evidence, then you will deal with that as early as possible.

Principle 3

A reader absorbs information better if they can absorb it in pieces. Don't be afraid to have paragraphs with only one or two sentences

You will have all noted the change in the way judgments are written. Even the great Sir Owen Dixon committed what is now a cardinal sin of writing sentences and paragraphs which are too long.

Look at the way the High Court, in particular the decisions of the Chief Justice and Keane J are set out. The paragraphs are, generally, short. They use headings and break up their decisions into digestible pieces. You should do the same. Break up larger blocks of text by using headings, shorter paragraphs, and white space. If you are dealing with, for example, a test which has a number of factors then set them out in bullet point form rather than within a paragraph separated only by commas.

Principle 4

A judge will pay more attention if you approach your material from their perspective, not yours. Understand what a judge has to do. Findings of fact have to be made. Upon those findings, issues are determined. Upon those issues, orders are made.

With that in mind, your written submission will set out the issues which need to be determined and the facts which needed to be found before that determination can be made.

When you do that you will not be hiding the point you wish to make in the middle of the paragraph. Consistent with the imperative to provide context, you will make your point first and then provide the cogent reasoning to support it.

Remember this, a submission should not be written as if it is a mystery novel. The conclusions should be obvious and made early in the document.

If you want to adopt a template for dealing with issues, then one means of doing it is to:

A set up the issue
B say how the issue should be decided
C set out the relevant law
D set out the relevant facts
E apply the law to those facts which demonstrate that the issue should be decided in the way you have already provided.

How can you blend the written and the oral so that the whole is greater than the sum of its parts?
The final thing I wanted to say concerns the difficulty some people have with speaking to written submissions. There are few things more deflating than for counsel to hand-up the written submissions and say I have nothing further.

This is meant to be an exercise in persuasion not abandonment. If you do this you are forgoing one of the most effective ways of persuading someone, that is, through discussion and argument.

In any event, as I've already said, the written document should, unless otherwise ordered, be an outline.

So, what can you do to engage with the written document? Take the judge to those parts of it which are at the heart of your case. Don't read out what is written but have

something ready which will allow you to expand upon that which is on the piece of paper.

One area in which this type of interaction can be very helpful is when you are dealing with issues of credit or particular findings of fact. It is much easier to impress upon the judge the value of certain pieces of evidence or parts of certain documents in oral argument. You should not, for instance, place large slabs of transcript into a submission. You should, though, provided the relevant transcript references. That will allow you to ask the judge to take up the transcript and go to the particular page or pages and ask him or her to read the relevant parts. That allows the judge to remember that evidence and to mark it up. It allows you to compare the evidence given by other people in the same way. It allows you to draw the judges attention to consistency or inconsistency with exhibits. This is much more effective being done when you're standing up than expecting and hoping that the judge will, with the file spread out on the desk, find all these things and absorb what you say are the important aspects.

Similarly, while you will provide the correct references to authorities in your submission, it can be more effective to take the judge to particular parts of an authority, direct attention to them, comment upon them, and then analyse evidence in the light of the principles set out in those authorities.

I will deal briefly with the manner in which you should conclude the preparation of your written submission. When you have finished it, close the document and do something else. If it is possible leave it for a few days and reread it. Edit it, cut out the unnecessary adjectives, adverbs and modifiers and shorten it. You will, because we all do, miss some typos or infelicities of grammar because you will read what you expect to read. One method of doing this kind of editing is to have the submission read back to you by the computer. I find that a particularly unappetising task. Another method, which I have found useful when editing judgments, is to print it out using an entirely different typeface. It is remarkable how that can let you see what you have not seen before.

Finally, do not overlook the editing and correction process. There are few things more infuriating than to find that a reference to transcript or to a particular authority is

incorrect and that you are required to then trawl through the transcript or try to find the authority yourself. This does not encourage confidence in the balance of the document.

Justice Glenn Martin