Foreword

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This work aims to provide legal practitioners with a useful collection of information, and some valuable guidance, on a number of topics relating to practice in appellate jurisdictions. Since a primary function of practitioners in all forms of litigation, including appeals, is to participate in the administration of justice by assisting the court, judges have a strong interest in the level of competence that lawyers bring to their work. Judges, therefore, welcome and encourage the development of lawyers' practical skills.

Appeals are creatures of statute. It follows that a lawyer who contemplates advising, or prosecuting, or defending, an appeal must have a working familiarity with the statutory provisions and rules of court that give a right to appeal and govern its conduct. Basic questions such as rights of appeal, the nature of the appeal, the time for commencing an appeal, available grounds and potential forms of relief are usually answered by reference to statute or rules of court. Appeals take different forms. They range from, at one extreme, a hearing *de novo* (typified by the old 'Quarter Sessions appeal' from a magistrate to a District Court judge) to, at the other extreme, a 'strict' appeal to a court of error which has no power to receive new evidence and does not undertake a rehearing of issues of fact. Appeals from a single judge in a trial court to an intermediate court of appeal, which are the most common, usually take the form of a rehearing on the evidence received at trial. Depending on statute, an appeal may lie as of right; or it may require leave, or special leave. Sometimes, a statute will specify the criteria to be applied in considering leave. An example is s 35A of the *Judiciary Act 1903* (Cth) which states (in general terms) the considerations according to which the High Court may grant or refuse special leave to appeal. Appeal courts themselves have developed principles according to which appellate review is conducted. A familiar example is the important statement in *House v The King* (1936) 55 CLR 499, as to the correct approach to appeals against discretionary judgments.

The scope for review of findings of fact by a primary decision-maker depends on the nature of the jurisdiction exercised by the appellate tribunal, and the nature of the primary tribunal. Where the court of first

instance was composed of a judge and jury, there will be no reasoned decision on the facts, but, instead, an inscrutable verdict. Where a decision at first instance is that of a judge alone, the judge will be obliged to give reasons that will be subject to general review. In most (but not all) Australian jurisdictions, trial of civil actions by jury has become relatively unusual. In consequence, there has been a loss of the element of finality associated with jury trials, and an increase in the potential for appellate review of decisions of fact. Views differ upon whether this is to the advantage of the administration of civil justice. Inevitably, however, the trend has increased the work of appellate courts, and added to the importance of professional understanding of all aspects of the appeal process.

Depending upon the nature of the appeal, and the level at which it is undertaken, modern advocates have to come to terms with the decreasing orality of the process. The pressure of business has made it necessary for many courts to require written outlines or summaries of argument and, in some cases, to limit, or even eliminate, time made available for oral argument. In the High Court, applications for special leave to appeal are not infrequently dealt with on the papers, and, in cases where oral argument is required, the time allowed for such argument is limited to 20 minutes for each side. This time limit is strictly enforced, and the Court usually lists 12 applications for hearing in one day. To prepare for special leave hearings, the Justices assigned to the cases read in advance the written arguments of the parties, the reasons for judgment of the court whose decision is under challenge and, where necessary, material parts of the trial record. This consideration should influence both the care with which written arguments are prepared, and the selectivity with which oral argument is presented.

The future of appellate procedure is worth contemplating. There is a reference in this book to electronic appeals. With the increasing length and complexity of many trials, and the replacement of judges comfortable only with materials in hard copy by new-generation lawyers who prefer to use electronic facilities, electronic appeals will become more and more common. Perhaps, before long, they will be used for most appeals.

Reference to technological change and to the strong trend towards increased use of written arguments raises an issue of concern to modern appellate judges: information overload. Whether it takes the form of indiscriminate and unnecessary citation of authority, lengthy and diffuse written arguments, or inappropriate proliferation of documentary materials in the record, judges are sometimes swamped with material that is, to say the least, unhelpful. Judges can control oral argument more easily than they can control the supply to them of written material, much of which they may feel obliged to read in order to assess its utility. Forty years ago, the photocopier made its contribution to the problem. The computer has given it a new dimension. One reason why most Australian

judges prefer to retain oral argument as the central part of the appeal process is that it preserves the court's capacity to manage the flow of information and achieve a reasonable definition and elucidation of the issues. Any experienced advocate knows that the easiest way to conceal the problems of an argument is to put it in writing, and that such problems are more likely to be exposed when an oral argument is challenged before, and tested by, a sceptical judge. Written arguments often are like ships that pass in the night. Oral argument may be essential to focus attention on the points that are controversial and decisive.

Styles of advocacy, like styles of judgment writing, differ. Within limits, there is plenty of room for individuality. The declamatory manner of argument is no longer fashionable. Sir Frank Kitto, in his well-known paper 'Why Write judgments?' (66 *ALJ* 787), dealt severely with the written judgment that is a transcription of an oration to a stenographer or a dictaphone. Putting an argument, or preparing reasons for judgment, is an exercise in communication. Effective communication of legal reasoning requires clarity and precision.

This book, which includes the contributions of a number of experienced authors on matters of importance to the appeal process, has a strong practical flavour. So far as I am aware, in the past there has not been a practice book that covered the range of topics it addresses, and I expect that practitioners will find it a timely and welcome addition to their resource materials.

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