Chapter 8

Written Submissions

The Hon Margaret McMurdo AC
President, Queensland Court of Appeal

Written submissions in Australian intermediate appellate courts were not the norm, at least in the less complex cases, until the close of the 20th century. Australian courts followed the British common law emphasis on oral argument, with the barrister as heroic orator, even at appellate level. But by the first decade of the 21st century, the High Court of Australia and all Australian State and federal intermediate courts of appeal allowed for or required written outlines of submissions or summaries of argument. By contrast, US and Canadian courts have a long established tradition of the primary appellate submissions being contained in a comprehensive written appellate brief (USA) or factum (Canada), supplemented only by the opportunity for short oral submissions at the public hearing, subject to strict time limitations.[1]

Perhaps Australia's move away from the British to the North American tradition is another indicator of our gradual shift from closely adopting, with necessary adaptations, the British legal system and the dutiful following of British legal precedent towards a more global jurisprudential perspective. Justice Michael Kirby, for example, considers that international law is now a legitimate influence on Australian domestic and constitutional law and that it will increasingly influence the future development of Australian law. He wisely reminds advocates, however, that not all Australian judges share this view.[2] Australia's untying of the British jurisprudential apron strings first noticeably commenced with the abolition of appeals from Australian jurisdictions to the Privy

1 For an interesting historical comparison of the development of oral legal argument in British courts and written legal argument in US courts, see Ehrenberg S, 'Enhancing the Writing Centred Legal Process' (2004) 89 *Iowa Law Review* 1159.

2 Kirby AC CMG, The Hon Justice Michael, 'The Dame Ann Ebsworth Memorial Lecture', London, 21 February 2006, pp 35-36.