APPELLATE ADVOCACY IN CRIME

Paper presented to the 2019 NQLA Conference Townsville by
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INTRODUCTION

[1] The advocate's legal task on appeal is different than at trial. It requires a different advocacy technique, which has long been regarded as deserving discrete consideration in the study of advocacy.

[2] That is not to say that what is important in trial advocacy is unimportant in appellate advocacy or vice versa. As will become apparent from our consideration of appellate advocacy there are some constants in the advocacy skills applicable to both fields. Some constants, such as clarity of expression, barely require elaboration. However two deserve emphasis from the outset: effective preparation and effective issue identification.

[3] Firstly, effective preparation: The importance of preparation to any form of effective advocacy cannot be over-stated. In his book *Advocacy in Practice* J L Glissan QC, having dealt at length with trial advocacy, eventually turned his focus to appeals and the preparation they require. He wrote:

> "Proportionately more preparation time is necessary for an appeal than for a hearing at first instance. Although we have emphasised earlier that there is never a situation in which too much preparation can be devoted to a case, on appeal preparation is even more critical."[1]

[4] Secondly, effective issue identification: As important as effective issue identification is in the preparation and conduct of a trial, it too is even more critical in the preparation and conduct of an appeal. Identifying the determinative issues informs every step of the appeal process, from the decision whether to appeal and drafting of the grounds through to the written outline and the eventual oral argument. In an address on appellate advocacy Sir Harry Gibbs highlighted the importance of effective issue identification in this way:

> "Fundamental to success in appellate advocacy is the ability to perceive the point or points on which the resolution of the appeal will depend and to cut a

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1 J L Glissan QC, *Advocacy in Practice* (LexisNexis Butterworths, 4th ed, 2005) 191.

> path directly to those points, without meandering to explore side issues, however interesting, or worse still, entangling the court in a thicket of irrelevancies of fact or law. The skill lies in discerning what are the critical issues and in distinguishing between what is and what is not necessary to be presented to enable the argument directed to those issues to be properly understood."[2]

[5] Our consideration of appellate advocacy is focussed particularly upon appellate advocacy, both written and oral, in the criminal jurisdiction. The skills to be deployed on appeals in the criminal jurisdiction are not materially different from those to be deployed on appeals in the civil jurisdiction. Nonetheless there are different statutory pathways to appeal in each jurisdiction and the appellate advocate in crime must know those which apply in the criminal jurisdiction. Accordingly, our paper is in three parts:

- Part A: Statutory Pathways to Appeal (by Lynham DCJ)
- Part B: Written Outline of Argument (by Morzone QC DCJ)
- Part C: Oral Argument (by Henry J)

PART A: STATUTORY PATHWAYS TO APPEAL

Introduction

[6] This part of the paper will consider the appeal processes that are available to a defendant following conviction and sentence.

Appeals to the District Court – s 222 Justices Act

[7] Section 222 *Justices Act* 1886 (Qld) provides a right of appeal to a single Judge of the District Court to a convicted person, a complainant or a person who "feels aggrieved" by an order made by a Magistrate on a complainant for an offence or breach of duty.

[8] Section 222(1) *Justices Act* provides:

> "(1) If a person feels aggrieved as complainant, defendant or otherwise by an order made by justices or a justice in a summary way on a complaint for

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2 (1986) 60 ALJR 496.

> an offence or breach of duty, the person may appeal within 1 month after the date of the order to a District Court judge."

[9] It is important to bear in mind however that the right of appeal conferred under section 222 is the subject of three exceptions:

(a) There is no right of appeal against a conviction or order made in a summary way under section 651 *Criminal Code*: section 222(2)(a) *Justices Act*;[3]

(b) A complainant may only appeal against sentence or an order for costs in respect to an indictable offence dealt with summarily in the Magistrates Court: section 222(2)(b) *Justices Act*;[4]

(c) A defendant who pleads guilty or admits the truth of a complainant in the Magistrates Court is only entitled to appeal their sentence: section 222(2)(c) *Justices Act*.

[10] However, as to this last exception, s 222(2)(c) may not preclude an appeal to the District Court where the appellant has pleaded guilty in the Magistrates Court if the appellant's plea was equivocal, or upon analysis amounted to a plea of not guilty,[5] or where the appellant had entered a plea of guilty to a charge "that clearly did not exist at law".[6]

[11] There is no right of appeal under s 222 in respect to interlocutory rulings made during the hearing of a complaint.[7] Any such ruling may however be the subject of a ground of appeal in an appeal against conviction.

[12] It is important to remember that an appeal under s 222 *Justices Act* is by way of rehearing on the original evidence: s 223(1) *Justices Act*. This simply means that the appeal is a rehearing on the record and not a rehearing *de novo*.[8] However, s 223(2) *Justices Act* does enable a party to seek leave to adduce "fresh, additional or substituted evidence (new evidence)" and, if leave is granted, the appeal will be by way of rehearing both on the original evidence given in the proceedings, as well as the new evidence adduced.

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3 Section 651 allows a person who is charged on indictment before the District or Supreme Court to plead guilty to summary offences and have them dealt with in that Court together with the indictable offences.

4 Any appeal by such a complainant is limited to an appeal against sentence or an order for costs; the complainant cannot appeal from a not guilty finding.

5 *Shaw v Yule* [1995] QCA 611; *Ajax v Bird* [2010] QCA 2.

6 See for example *Hall v Bobbermen* [2009] QDC 188.

7 *Schneider v Curtis* [1967] Qd R 300; *Paulger v Hall* [2003] 2 Qd R 294.

8 *Teelow v Commissioner of Police* [2009] 2 Qd R 489.

Leave to adduce new evidence will only be granted where the court is satisfied there are "special grounds" for giving leave: s 223(2) *Justices Act*.[9]

[13] As an appeal by way of rehearing, the well-known principles explained in *House v The King*[10] will have application both in respect to appeals against conviction and appeals against sentence. Accordingly, "the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error".

[14] An appeal against sentence is permitted on the sole ground that the sentence imposed was excessive: s 222(2)(c) *Justices Act*. A sentence is excessive "only if it is beyond the acceptable scope of judicial discretion" or "so outside the appropriate range as to demonstrate inconsistency and unfairness": see *R v Morse* [1979] 23 SASR 98. Thus to succeed on an appeal against sentence it will be necessary for an appellate to demonstrate that the sentence imposed "was beyond the permissible range, not that it was severe, or that a lesser punishment would have been appropriate, or even more appropriate than the one in fact imposed".[11]

[15] As to the practical requirements of an appeal to the District Court under s 222 *Justices Act*. An appeal under s 222 is commenced by filing a Notice of Appeal within 1 month of the date of the order appealed. There is power conferred on the court to extend the time for the filing of a notice of appeal outside the appeal period.[12] That is a separate application that will need to be made.

[16] Section 222 appeals are governed by District Court Practice Direction Number 5 of 2016. Whilst (unlike other jurisdictions) there is no page limit prescribed either under the Act of the practice direction in respect to outlines, the practice direction does specify that outlines of argument must contain a "concise, logical statement of any factual

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9 A "useful guide" for the purposes of identifying the kind of "special grounds" which might be said to justify the grant of leave under s 223(2) are the three considerations identified in *Gallagher v The Queen* (1986) 160 CLR 392.

10 (1936) 55 CLR 499 at 504-505.

11 *R v Jackson* [2011] QCA 103, per Chesterman J at [25].

12 Section 2224 (1) *Justices Act* allows for an appellant to apply for time to be extended to file a notice of appeal.

conclusions upon which it is contended that the District Court Judge should proceed" and a "concise logical summary of submissions" emphasising that precision is still an important requirement in drafting an outline. An appellant's outline must be filed within 28 days from the date of filing the notice of appeal. The respondent must file an outline in response within 28 days of the service of the appellant's outline.

Appeals to the Court of Appeal

Appeals from indictable offences dealt with in the District and Supreme Courts

[17] Section 668D *Criminal Code* is the source of the right to appeal conviction and/or sentence in relation to indictable offences dealt with in the District or Supreme Courts. A person convicted of an indictable offence may appeal their conviction to the Court of Appeal as of right on any ground which involves a question of law: s 668D(1)(a). If a ground of appeal involves a question of fact alone or a question of mixed fact and law, then it can only be pursued with leave of the Court of Appeal or with a certificate from the trial Judge: s 668D(1)(b).

[18] An appeal against sentence is not as of right. Instead a person may appeal against the severity of their sentence only with leave of the Court on the basis that the sentence imposed was manifestly excessive, or on the basis of an error made by the sentencing Judge in the exercise of the sentencing discretion: s 668 D(1)(c).

[19] Both an appeal against conviction and an application for leave to appeal sentence are commenced by filing a notice of appeal or application for leave to appeal within 1 calendar month of conviction or sentence.[13] Rule 73 *Criminal Practice Rules* requires a lawyer acting for the convicted person to file a notice that they are acting on behalf of the convicted person and to serve that notice on the respondent to the application or appeal.

[20] In accordance with rule 65 *Criminal Practice Rules*, an application for leave to appeal must "state, briefly and precisely, the grounds of appeal". If leave is not required, then

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[13] Section 671 *Criminal Code*; Rules 65 and 66 *Criminal Practice Rules*.

in accordance with rule 66 *Criminal Practice Rules* a notice of appeal must also "state, briefly and precisely, the grounds of appeal".

[21] As with appeals to the District Court, an application can be made to adduce fresh evidence on an appeal: s 671B *Criminal Code*. A party wishing to do so must file an application for leave to adduce fresh evidence as well as supporting affidavit material identifying the new or further evidence and why it was not placed before the Court at first instance.[14]

[22] With respect to applications for leave to appeal sentence, the current practice of the Court of Appeal is to hear the application for leave to appeal and the substantive appeal at the same time without a separate leave hearing. As an appeal against sentence involves an appeal against the exercise of the sentencing discretion, the principles in *House v King* will also apply. Again, to succeed on appeal the applicant will need to demonstrate that the sentence imposed was beyond the permissible range, not that it was severe, or that a lesser punishment would have been appropriate, or even more appropriate than the one in fact imposed.[15]

[23] An appeal to the Court of Appeal obliges the Registrar to prepare an "Appeal Record Book" which is intended to contain all material relevant for the hearing and determination of the appeal or application. Supreme Court Practice Direction 3 of 2013 governs appeals to the Court of Appeal. Unless otherwise directed by the Court, a Judge of Appeal or Registrar, the appellant must file and serve 28 days prior to the hearing date the appellant's outline of argument. The respondent's outline of argument must be filed and served 14 days prior to the hearing date. The parties are also obliged to file lists and copies of relevant authorities and legislation no less than 2 clear days prior to the hearing.

[24] Practice Direction 3 of 2013 directs that a written outline of argument is not to exceed 10 pages in length. An appellant's outline is to concisely state the grounds of appeal being argued, identify the errors said to have been made by the Court whose order is the subject of the appeal, set out the basis for any contention that a finding of fact should or should not have been made and precisely identify any errors of law alleged to have been made

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14 Practice Direction paragraph 11.

15 *R v Jackson* [2011] QCA 103; *Kentwell v The Queen* (2014) 252 CLR 601 at [38]-[43].

by the Court. The respondent's outline must summarise the answers to the appellant's arguments, referring to the authorities relied upon and the evidence for any factual assertions made.

Appeals from the District Court in its appellate jurisdiction

[25] An appeal from the District Court in its appellate jurisdiction under s 222 *Justices Act* is governed by ss 118 and 119 *District Court Act* 1967 and lies only with leave of the Court of Appeal: s 118(3) *District Court Act*.

[26] The Court's discretion to grant or refuse leave to appeal is unfettered but leave will not be granted lightly given that the appellant has already had the benefit of two judicial hearings.[16] The mere fact that there has been error in the judgment appealed against will not ordinarily, by and of itself, be sufficient to justify the granting of leave to appeal. Rather, leave to appeal will usually only be granted where it is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected.[17]

[27] If leave is granted by the Court of Appeal under s 118, the appeal is then conducted as an appeal by way of rehearing: s 118(8).

[28] The time limit for filing an application for leave to appeal under s 118(3) against an order of the District Court in its appellate jurisdiction is 28 days. An appeal under s 118 is governed by Part 4 *Criminal Practice Rules*. Rule 84 *Criminal Practice Rules* prescribes that an applicant for leave to appeal must file a notice of application for leave to appeal with the Registrar. The notice must be signed by the applicant or the applicant's lawyer and it must identify the judgment against which the appeal is brought as well as "state, briefly and precisely – the grounds of the appeal" and why the Court of Appeal should grant a further appeal to the Court from the District Court.

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16 *McDonald v Queensland Police Service* [2018] 2 Qd R 612 at [39].

17 *McDonald v Queensland Police Service* [2018] 2 Qd R 612 at [39]; *Costigan v Marshall [2010]* QCA 344 at [50].

Appeals to the High Court – ss 35 and, 35A *Judiciary Act*

[29] An appeal to the High Court from a judgment of the Queensland Court of Appeal may be brought only by the High Court giving special leave to appeal: s 35 *Judiciary Act* 1903 (Cth). Section 35A *Judiciary Act* sets out matters to which the High Court may have regard when considering whether to grant an application for special leave to appeal:

- whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law that is of public importance, whether because of its general application or otherwise or in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and

- whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

[30] Before filing an application for special leave to appeal a prospective applicant would need to ensure they can meet one or more of the special leave criteria. This requires substantially more than proof of prima facie error. The guidelines which can be extracted from the High Court's jurisprudence in respect to grants of special leave establish the following principles the Court will apply:

(a) The High Court will be extremely reluctant to grant special leave where the appellant is seeking to challenge the correctness of a unanimous decision of the High Court which was applied by the Court below and where the appellant cannot point to any subsequent decision of development in the law which has undermined the authority of that decision;[18]

(b) Even if the question of law raised in the appeal otherwise involves matters of great public interest or is an important question of law, the Court will refuse special leave if the decision appealed from is plainly correct or is not attended by sufficient doubt to justify a grant of special leave;

(c) Special leave will generally be refused where the case only involves a question of fact;[19]

(d) Special leave will be denied where the question involved relates only to the construction of particular documents.

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18 *Computermate Products (Aust) Pty Ltd v Ozi-Soft Pty Ltd* (1989) 63 ALJR 517.

19 *Blackhouse v Moderna* (1904) 1 CLR 675.

[31] Given the restricted appellate jurisdiction of the High Court and the narrow grounds and guidelines for special leave applied by the Court, the grounds of appeal set out in the notice of appeal will generally relate only to questions of law.

[32] Chapter 4 Parts 41 to 44 of the High Court Rules 2004 set out in comprehensive terms the procedures for applying for a grant of special leave to appeal and, if successful, the procedures for the appeal itself. An application for special leave is commenced by filing a Form 23 Application for Special Leave. The application must be filed within 28 days of the judgment under appeal being pronounced.[20] The application for special leave must not exceed 12 pages[21] and, in a criminal case, the application must also be accompanied by a number of documents including the indictment, a transcript of the summing up, the sentencing remarks and the notice of appeal or application for leave to appeal filed in the Court of Appeal. In support of the application for special leave, an appellant is required to set out in their application:[22]

- The proposed grounds of appeal and the orders that will be sought if special leave is granted;
- A concise statement of the special leave questions said to arise;
- A brief statement of the applicant's argument in support of the grant of special leave;
- Any reasons why an order for costs should not be made in favour of the respondent in the event that the application is refused;
- A list of the authorities on which the applicant relies, identifying the paragraphs at which the relevant passages appear;
- The particular constitutional provisions, statutes and statutory instruments applicable the subject of the application set out verbatim.

[33] The application must be served on the respondent following which the respondent has 14 days after date of service of the application to file a notice of appearance. Within 28 days of filing the application for special leave to appeal, an applicant must prepare, file and serve a summary of argument and a draft notice of appeal on the respondent. The purpose of a summary is to define clearly for the Judges who will hear the application the issues

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20 Rule 42.02.2.
21 Rule 41.01.3.
22 Form 23.

which will require determination. The respondent has 21 days from being served with the applicant's summary of argument to file a corresponding summary of argument. That response must not exceed 10 pages.[23] The applicant may file a reply not exceeding 5 pages.[24]

[34] An applicant for special leave will be required to prepare an application book. The application book contains the documents which the rules prescribe are to be included. Upon filing the application book the application will be listed for a special leave application.

[35] Time allocations for special leave applications are strictly limited. Both the applicant and respondent are allocated 20 minutes each with a further 5 minutes allocated to the applicant for submissions in reply to argue the special leave application.[25]

[36] If a grant of special leave to appeal is obtained the successful applicant commences their appeal under the procedures set out in Part 42 of the rules. This will involve within 14 days of the grant of special leave filing a notice of appeal and serving that on the respondent. Within 14 days of filing a notice of appeal the appellant must file a copy of the appeal book which was before the Court of Appeal together with a list of exhibits and a copy of the exhibits which were also before the Court of Appeal. An index for the appeal book is settled between the parties. Once the index has been settled the appellant must prepare and file the appeal book. There are stringent requirements set out in the rules for the preparation of the appeal book in terms of its contents and composition.[26]

[37] There are also stringent requirements contained in Part 44 of the Rules with respect to the preparation and filing of written submissions. The appellant must file written submissions within 49 days after the grant of special leave. The written submissions of both the appellant and respondent must be no more than 20 pages in length.[27] The appellant's written submissions must include:

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23 Rule 41.05.5.
24 Rule 41.06.3.
25 Rule 41.08.3.
26 Rule 42.13.2.
27 Rule 44.02.1 and 44.03.1.

- A narrative statement of the relevant facts found or admitted in the Court from which the proceedings are brought with appropriate reference to the appeal book for the annotated version;

- A succinct argument addressing the error or errors complained of in the Court from which the proceedings are brought, the applicable legislation, principle or rule of law relied upon, with references to authority or legislation signifying their relevance to the appellant's argument and how the legislation, principle or rule applies to the facts or other relevant material in the case.

[38] Within 28 days of service of the appellant's written submissions the respondent must file their written submissions. A respondent's written submissions are required to include:

- A statement of any material facts set out in the appellant's narrative of facts or chronology that are contested with appropriate reference to the appeal book;

- A statement of argument in answer to the argument of the appellant.

[39] An appellant may, within 14 days after the respondent's written submissions have been filed, file submissions in reply which must not exceed 5 pages. The date of the hearing of the appeal will by this time have been set.

PART B: WRITTEN OUTLINE OF ARGUMENT

Introduction

[40] Much is written and said about outlines in a trial context. Here I focus on the peculiarities of written advocacy for appeals.

[41] Some things ought be borne in mind by way of background:

[42] Firstly, appellant hearings have changed over recent decades, particularly in the requirement for written submissions and outlines of argument. They are integral to the appeal process and as essential as oral advocacy. Their practical effect is that half of the case is over well before the advocate stands up for oral submissions. Indeed, before court even commences.

[43] Of course, their length, form and content are subject of practice direction or case management, which collectively reflect the practices of good advocates past.

Written outline of argument

[44] Plainly the content of the outlines of argument is of great importance, which cannot be overstated, as a powerful first written act of persuasion. Advocacy is oft spoken of as the 'Art of Persuasion'. However, there is no effective persuasion absent focus on the issues in the case framed by a case theory that is revisited, revised and redefined (if necessary) according to the mode of appeal and the facts found.

[45] Outline of arguments for appeals should be drafted with these things in mind:

(a) Written arguments potentially favourably influence the Court prior to the hearing, during the oral argument, and during the writing of the judgment.

(b) You ought confidently assume that – before the appeal hearing – the members of the Court will carefully read and consider content of the outline of argument, discuss the issues raised in the competing outlines, and may have formed a tentative view of the merits of the appeal.

(c) Appellate Judges are not necessarily pre-disposed to finding error. They yearn to appreciate your best point early, in a concise outline.

(d) Written outlines inform the judgment writing well after the hearing. Outlines are often annotated and marked by the Judge, and provide a pivotal reference point when writing the judgment.

[46] It is the function of the written outline to pave the way for the oral argument. The written outline should facilitate and aid understanding of the advocate's prospective oral argument. So, it is critical that the structure and content of the oral argument be considered and properly reflected in the written outline. The dreaded question: "Where will I find that in your written submissions?" is often symptomatic of a poorly organised outline, or can dull the impact of the oral argument.

[47] Some matters are peculiar to written outlines of argument in certain types of appeals.

[48] For written outlines of argument **in criminal appeals**:

(a) when alleging errors in a ruling or a jury summing-up – set out the corresponding appeal record book page references; [28]

(b) when referring to the evidence at trial – set out the corresponding appeal record book page references;[29] and

(c) refer only to the evidence given at trial (evidence given at the committal proceedings cannot be considered by the Court unless, and only to the extent that, the evidence at the committal proceedings was in evidence at the trial.)[30]

(d) where alleging that the jury verdicts are inconsistent, unreasonable or not supported by the evidence:

(i) where possible, set out the prosecution particulars; and

(ii) summarise all relevant evidence, with appeal book references.

(e) the **respondent's outline** should indicate what parts of the appellant's written outline it accepts and rejects and provide relevant appeal book references.

[49] In an **application for leave to appeal against sentence** or an **application for an extension of time** within which to apply for leave to appeal against sentence – the first paragraph of the outline must include a short statement of the reason(s) said to justify the granting of leave.[31]

[50] In an **application for an extension of time to appeal against conviction** or to apply for leave to appeal against sentence - the first paragraph of the outline must state the reason(s) for the delay and why the extension of time should be granted.[32]

[51] For written outlines of argument **in civil appeals**:

(a) In an **application for leave to appeal** – the first paragraph of the written outline must shortly state why leave should be granted, addressing any legislative provisions relevant to the granting of leave.[33]

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[28] Supreme Court Practice Direction 3 of 2013, paras. 34(1)(a).
[29] Supreme Court Practice Direction 3 of 2013, paras. 34(1)(b).
[30] Subject Supreme Court Practice Direction 3 of 2013, paras 34(1)(c), except for an application to adduce further evidence (see paras 11 & 33).
[31] Supreme Court Practice Direction 3 of 2013, paras. 34.
[32] Supreme Court Practice Direction 3 of 2013, paras. 35.
[33] Supreme Court Practice Direction 3 of 2013, paras. 41(2); for example, s 4.1.56 *Integrated Planning Act 1997* (Qld) (repealed), s 498 *Sustainable Planning Act 2009* (Qld) or s 74 *Land Court Act 2000* (Qld).

(b) In an application **for an extension of time** to either appeal or for leave to appeal, the first paragraph of the written outline must address the reason for the delay and why time should be extended.[34]

(c) Parties **wishing to submit on costs** must do so in the outlines and/or orally at the hearing, and if wishing to make further submissions on costs – the party must seek leave to do so in the outlines of argument and/or orally at the hearing.[35] Costs submissions are restricted to 2 pages.[36]

Specific, accurate and relevant

[52] First, for the first instance they should contain short, coherent and readable encapsulation of the essence of your argument (your case theory perhaps). The less argumentative outlines impress as being more intelligible, coherent and powerful. A long, meandering or poorly structured and proofed outline will also be likely to have made an impact before you get to your feet.

[53] A good advocate minimises the errors that distract a Court from the substance of the case. The good advocate should be able to state the facts, the findings and the law simply and correctly. Remember that the Judges will have read the outline and a persuasive and well constructed outline is likely to have already made a favourable impact.

[54] The former Chief Justice of Australia, Sir Anthony Mason, gave this advice in a paper he delivered in 1984:

> "The opinion and the advice, the written medium with which the barrister is familiar, are not a sufficient introduction to the formulation of a persuasive argument in writing... The result is that written submissions tend to be either too lengthy so that the arguments are lost in the forest of detail, or too scanty so that the points are listed seriatim like particulars of negligence without the supporting elaboration which gives flesh and blood to the bare bones of the propositions. In the process, persuasion, which is the object of all presentation, seems to have been overlooked."[37]

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[34] Supreme Court Practice Direction 3 of 2013, paras. 41(3).
[35] Supreme Court Practice Direction 3 of 2013, paras. 52(1) & (2).
[36] Supreme Court Practice Direction 3 of 2013, paras. 52(4).
[37] AF Mason, "*The Role of Counsel and Appellate Advocacy*" (1984) 58 ALJ 537 at 541.

[55] Sackville J made the point this way:

> "At the risk of stating the obvious, part of the art of advocacy is to make it easy for the decision-maker to understand what issues need to be resolved and to explain clearly, cogently and concisely how and why the crucial issues should be resolved in favour of a particular party. To leave the Judge, if not completely at large, then without a reliable working compass in a vast sea of factual material, is not a technique calculated to advance a party's case. This, I hasten to say, is not because any Judge would consciously penalise a party by reason of the bulk of its submissions or the manner in which its arguments are presented. It is because the cogency and persuasiveness of submissions depends on the ability of the Judge to follow them and to isolate the critical legal and factual issues upon which a case is likely to turn."[38]

Organised logical structure

[56] An overall structure for the outline should be planned with the audience in mind, the Appellate Judges, and must assist those Judges to comprehend the evidence in relation to the judgment below.

[57] Consider those parts that should be **organised topically** commensurate with the grounds of appeal**,** whether any parts of the evidence or procedure should be organised as a **chronological narrative**. Dense or unstructured outlines are hard to grasp, irritating during argument, and will be avoided as part of the process of information gathering and intellectual synthesis by the Court.

[58] Blindly adhering to page and font limits should not be at the expense of readability. A microscopic font (or voluminous footnotes) does not assist you or the Court. The rules of court are not an arbitrary imposition – compliant readable and coherent outlines are most effective and helpful to us.

[59] An appellate outline of argument should never resemble a dissertation of detailed written submissions. The task is to extract from the whole – relevant, admissible material and the relevant legal test in concise and logical way.

[60] Use a heading of the contested grounds of appeal.

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[38] *Seven Network Ltd v News Ltd* [2007] FCA 1062 at [34].

Not "*Argument*"

[61] "Outline of Argument" is a misnomer, because the outline should not be argumentative. Outlines should efficiently explain of how the relevant legal principles apply to the facts.

[62] They should not be bald assertions about the quality or lack thereof of the other side's submissions, or the decision below, for example:[39]

- "This ground of appeal is nonsense."
- "Ground 3 is incoherent and fanciful."
- "The ground is not pressed. Query how it ever came to be raised."
- "The final ground of appeal was always unarguable and hopeless."

[63] But the appellate court cannot be as dismissive. Properly so, it must discharge a very heavy obligation to give reasons for a decision, and is entitled to and ought expect assistance from the advocate to know **why** the point is good or bad; **why** the trial Judge was correct or not correct.

[64] The value of the adversarial mode of hearing, is not just for the Courts' discernment, but also serves to alert the opposing party to examine and perhaps abandon unmeritorious grounds well before hearing.

Style matters

[65] Some matters of style enhance persuasive force of outlines, and some have a negative unpersuasive impact which distract, annoy and alienate Judges.

(a) Prolixity replete with irrelevancies, excessive quotations (of evidence, legislation and and case authority). Avoid long quotations of evidence, legislation or cases.

(b) Issue exhaustion – taking a 'shotgun' approach of relying on too many issues or points, failure to discard weak or unmeritorious points;

(c) Disorganisation – disjointed, illogical or not inter-related;

(d) Inaccuracies – misstatement of facts and issues, omitting or misquoting authorities, quoting out of context. Inaccurate references (authorities and transcript references);

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[39] Beazley J AO, "*Appellate Advocacy*" New South Wales Bar Association Sydney CPD Conference, 27 March 2015.

(e) Mechanical defects – content/index page, typographical errors and poor grammar and spelling;

(f) Acronyms – There is a modern tendency to use too many defined terms or used acronyms, which may distract from ready comprehension, and interrupt the flow of the narrative.

[66] Instead of setting out long quotations of evidence, legislation or cases, accurately condense and state the proposition or legal principle, accurately referenced. This better exposes the critical issues, evidence, argument and authority. If the case requires length quotation or detailed references consider the utility of annexures rather than incorporating them in the body of the outline.

[67] Brevity is gold! Outlines should be brief, concise, succinct and carefully used language. Rhetoric and adjectival flourish should be avoided, and minimised where appropriately necessary.

[68] Formatting is also important. Margins, font style and size, indenting, paragraph spacing, numbering, foot or end notes, etc. all contribute to the persuasiveness of the outline. Visually attractive outlines of arguments are more pleasing to the eye, and more attractive to the reader.

Appeal record

[69] It is now long standing practice to prepare an appeal book of documents.[40] The bundle should be chronologically or topically arranged, indexed, tabbed and paginated for easy location by the Court.

[70] The record book is yet another, but often unappreciated, opportunity for persuasive advocacy.

[71] Ensure that the appeal book is properly prepared and ensure all relevant documents (and no more) are included in the appeal book and accurately referenced in the outline. Most appeals do not warrant an exhaustively complete record, the Practice Direction requires

[40] Supreme Court Practice Direction 3 of 2013, para 21 & 31 (for criminal appeals).

that a complete record not be prepared.[41] Be judicious to include not only relevant documents, but the relevant parts of documents (as well as only those authorities which truly do bear upon the real point in issue). A well-focused record book will foster a well-focused appeal.

Appellant's outlines

[72] Paragraph 15 of the Supreme Court's Practice Direction 3 of 2013 prescribes essential content of the outline in a fact appeal:

(a) concisely state the grounds of appeal being argued and any grounds of appeal being abandoned;

(b) identify any error or errors said to have been made by the Court or tribunal whose order is subject to appeal and the basis in principle or authority for that contention;

(c) where it is contended that a finding of fact should not have been made or that a finding of fact which was not made should have been made, set out the basis for that contention by reference to the evidence;

(d) where it is contended that the decision-maker whose order is subject to appeal erred in law, the precise error or errors of law and the basis in principle or authority for that contention.

Unmeritorious grounds

[73] By the time of filing the outline, you have a greater appreciation of the strength of the merit of the pleaded grounds of appeal.

[74] Of course, clearly unmeritorious grounds should be abandoned at the earliest opportunity, at least at the outset of the outline. There is a continuing obligation not to advance unmeritorious appeals, and an ethical obligation to avoid undue expense, technicality and delay – especially for the client.

[75] At least be conscious of either weak or run on instructions without the advocate having any confidence in them. If these are properly covered in the outline, the good advocate

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[41] Supreme Court Practice Direction 3 of 2013, paras. 32 & 44.

can better orientate and focus oral argument on the best points and merely refer the Court to those weaker matters fully covered in the outline.

[76] The aim is to maximize due attention to the strongest points, without infection from the bad ones. The Hon. Mr Hayne described it this way:[42]

> "For my own part I am a firm believer in the "infection" theory of advocacy. A bad point always manages to infect good points. If a court concludes that one of the ways in which the case is put is legally infirm, human nature dictates that the other methods of putting the case are examined more closely. It follows that step one is to jettison the point which you think is bad. If, as sometimes happens, the Court picks up the discarded point and proffers it in aid of counsel, counsel will do far better to point out why that way of putting the case is flawed than they will if they simply adopt the gift from the bench and allow the Court later to discover for itself that it is wrong."

[77] Outlines must be as concise as circumstances allow. **'Red herrings'** reflect poorly on the advocate and distract the Court. Exclude extraneous and irrelevant material.

Issue identification

[78] Then (after identifying the grounds of appeal relied upon and those grounds abandoned), identify any contended appealable error. The appellant's counsel ought, in the words of Sackville J, "to identify early and precisely those rulings that are challenged and the basis for each challenge".[43]

[79] Issue framing, and weighing up the determinative and subsidiary issues, is just as critical on appeals as in any other mode of hearing:[44]

(a) An introduction states the exact point at issue, stripped of all extraneous matter.

(b) Any piece of persuasive or analytical writing must deliver three things: the question, the answer, and the reasons for that answer.

(c) Any work has to open with the specific issue that captures the essence of the

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[42] *Advocacy in the High Court of Australia*, An Address to the Western Australian Bar Association, 25 October 2004, Justice Hayne, published on the High Court's website.

[43] *Appellate Advocacy*, The Hon. Justice Ronald Sackville (1996 - 1997) 15 ABR 99 at 100.

[44] Applegarth J, "*Modern Advocacy: Issue Framing in Oral and Written Submissions*", Supreme Court of Queensland, QLS Modern Advocacy Lecture Series 30 August 2017.

contention.

Factual constraints

[80] The appellant must carefully identify each finding of fact (or failure to find a fact), or finding of law, under challenge, together with the evidentiary basis, or basis in principle or authority, for that challenge. The task necessarily involves consideration, of whether other cognate findings of facts and law ought be challenged in support of the appeal. This necessarily requires consideration of the trial evidence which supports or opposes the findings under challenge, or a contended failure to make a finding.

[81] The appellant's endeavour to demonstrate error in the decision at first instance is curtailed by some well-known constraints in the appellate process:[45]

(a) A party is ordinarily not permitted to take new points on appeal;

(b) Significant constraints apply to challenges to findings of fact based on the primary Judge's assessment of credibility of oral evidence;

(c) Significant constraints apply to findings of fact based on inferences based in findings of primary facts, unless the appellant demonstrates error by the primary Judge in drawing the inference;

(d) Significant constraints apply to findings that reflects a value judgment or an exercise of discretion;

(e) Appellate courts are more cautious in reviews of interlocutory decisions, especially not determinate substantive rights.

(f) Inconsequential and irrelevant errors may be dismissed if the result is plainly correct.

Reply outline

[82] An outline in reply is often not necessary or useful. If one is filed, it must indicate what parts of the respondent's outline are accepted.[46]

Respondent's Outline

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[45] Fraser JA, "*Appellate Advocacy revisite*d", Continuing Professional Development Seminar, 26 April 2012, paras. 13 – 30.

[46] Supreme Court's Practice Direction 3 of 2013, para 14(4).

[83] There are also some matters peculiar to the respondent's outline of argument.

[84] Paragraph 16 of the Practice Direction 3 of 2013 prescribes that the response:

(a) not repeat matters set out in an appellant's written outline;

(b) clarify those matters which are not in dispute; and

(c) summarise the respondent's answers to an appellant's arguments, referring to the authorities relied on and the evidence for any factual assertions made, particularly if the facts relied on by an appellant are contested.

[85] Whilst properly responsive to the appellant's outline and framed by the appeal outline, the respondent's outline will usually identify the direct or indirect evidentiary foundation for the challenged findings of fact. Sometimes, although rarely, the respondent may rely upon cognate evidence not relied upon in any finding, or even to impugn findings adverse to the respondent, subject to the constraints mentioned above. If so, a notice of contention will be necessary.[47]

Conclusion

[86] In conclusion, I respectfully adopt the imagery of the Honourable Justice M J Beazley AO in her paper delivered at the Sydney CPD Conference of the NSW Bar Association, on 27 March 2015:[48]

> "Advocacy is like crystal. When it is clear, precise, simple and polished, it sparkles. When it is dense, unfocussed or missing the point, it is like the dirty washing up. Your advocacy will thrive in the former case. Your reputation, at least with the Court, will suffer severely in the latter."

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47 *Uniform Civil Procedure Rules*, r 757.

48 Beazley J AO, "*Appellate Advocacy*" New South Wales Bar Association, Sydney CPD Conference, 27 March 2015.

PART C: ORAL ARGUMENT

Three overarching considerations

[87] We have already emphasised the overarching importance in appellate advocacy of preparation and issue identification. In turning to oral argument three other overarching considerations warrant emphasis, namely:

- the interactive nature of the hearing,
- the three issues arising in every appeal, and
- the need for alignment of grounds, argument and orders sought.

The interactive nature of the hearing

[88] The performance of appellate advocacy at the hearing involves a dialogue with the Court. It is an interactive process, a conversation of sorts, in which you advance arguments calculated at persuading a bench which will keep interrupting you with questions and comments as it tries to understand and assess the force of those arguments. That two-way dynamic provides an opportunity which was well explained by Fraser JA in his paper *Appellate Advocacy Revisited*. His Honour wrote:

> "The hearing of the appeal presents the advocate with two valuable opportunities:
>
> (a) To persuade the Court to the advocate's point of view, particularly by emphasising the best points.
>
> (b) To discover what the judges think about the arguments and tailor submissions accordingly.
>
> The question is how to best take advantage of those opportunities." [49]

The three issues arising in every appeal

[89] The three issues arising in every appeal were identified by David F Jackson QC, one of Australia's finest appellate advocates, as:

(a) What aspect of the judgment below is being attacked?

(b) Why is it said to be wrong?

(c) What is the consequence if it is wrong?[50]

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[49] Fraser JA *Appellate Advocacy Revisited*, Continuing Professional Development Seminar 26 April 2012.

[50] D F Jackson *Appellate Advocacy* 1991 ABRev 245, 247.

These three issues invariably inform the effective preparation and performance of oral argument.

[90] The late Justice Peter Dutney posited that the last of the above three issues is often forgotten. He wrote:

> "There is no point in identifying an error in the judgment appealed if it does not result in an outcome more favourable to the appellant … It is essential that counsel understands the consequences of the finding appealed against being shown to be wrong. It does not follow that because a Judge is in error about a point the decision will be reversed. Sometimes the error is not critical to the decision. Sometimes, although the Judge has wrongly decided a point the decision can be supported on other grounds."[51]

His Honour went on to use the illustration of how, in a criminal case, an appellant may succeed in establishing error but not prevail in the end by reason of the application of the proviso in s 668E of the *Criminal Code*. His Honour's point was that you must keep in mind the ultimate purpose of your role in the appeal: to secure orders favourable to the party you represent.

The need for alignment of grounds, arguments and orders sought

[91] This heralds the final overarching consideration: the need for alignment of grounds, argument and orders sought. Your arguments, however clever, may all be for nothing if they target a non-existent ground or result in unhelpful orders. As you progress the preparation of the appeal you should continue to review whether your intended grounds, argument and orders align. In doing so you may realise you need to amend an existing ground of appeal or introduce a new ground. You may realise you need to re-shape or introduce a new argument. You may realise different orders should be contended for. If so then, however embarrassing or inconvenient, you should correct the oversight promptly lest it cost your client a favourable ultimate order on the appeal.

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[51] Dutney J *Appellate Advocacy* paper presented to CQLA Conference 10-12 August 2007.

Preparation for oral argument

[92] Your written outline of submissions does not mark the end of your preparation. It remains for you to prepare for the oral argument. Complete mastery of the law and facts is essential to your preparation, but more is required.

[93] Review and refine your arguments. Focus in on the determinative issues and how best to argue them. Never assume the arguments you flagged in your written outline cannot be improved upon. Carefully review your written outline of argument and your opponent's written outline of argument. Consider the weaknesses in your case and how your oral submissions should cater for them. Remember that even if your opponent's outline has not identified a weakness it will not prevent your opponent or the Court identifying it during oral argument.

[94] Prepare to perform by planning how you will argue the case. Plan the sequence and structure of your oral submissions. Plan what parts of the record book and what cases you may refer the Court to during oral argument.

Notes for oral argument

[95] Your planning should culminate in a set of notes drafted by you for your guiding reference during oral argument.

[96] Your notes should be brief and clearly indicate your intended sequence of submissions overall and the intended structure of each of your arguments. They should include references to relevant passages from the case under appeal or from relevant authorities, to facilitate speedy location of such passages as necessary during oral argument. They should be notes only, for you will be conversing with the Court and will need to be flexible. Your responses to questions from the bench or an opponent's new argument may cause you to depart from the planned sequence of your submissions, but your notes will be your touchstone to return to, to prompt you, to ensure you do not overlook advancing arguments of importance or answering or anticipating an argument of your opponent.

[97] The preparation of your notes for oral argument will also bring discipline and focus to your preparation. To paraphrase an observation of Fraser JA on appellate advocacy, planning what you must stand up and say in the near future to three Judges of Appeal tends to concentrate the mind.[52]

Use of the written outline of argument

[98] Preparing notes for oral argument is also a safeguard against the laxity of merely relying upon your written outline when on your feet. Over-reliance on the written outline in the course of oral argument is unwise for a variety of reasons. Firstly, the written outline of argument is just that, an "outline". It is not supposed to detail your submissions in full. Secondly, by the time of hearing the issues are likely to have refined in such a way that the associated arguments will also have refined and new or varied arguments may have emerged. Thirdly, unless the Court makes it clear you will win, and thus does not need to hear from you, you should never merely stand and announce you rely on your written outline of argument. Effective advocates use the opportunity for persuasion inherent in making oral submissions. Fourthly, the Court will already have read the outline of argument so there is nothing to be gained, and you risk irritating the Court, by reading it out.

[99] None of this is to suggest your written outline of argument is irrelevant to oral argument. If fit for purpose it should provide an already well considered structure to adopt in planning your oral submissions. The fact that the Court will have read it by the time you advance your oral argument is a fact you should also take into account when planning the substance and sequence of your oral submissions.

[100] Remember the Court will usually have your written outline in front of it during your oral submissions. So, if you do not intend to follow the sequence of the outline in advancing your oral argument you should plan to address that fact during your oral argument, to avoid confusing the Court about what issue you are addressing. For instance, you might say, "*If it please the Court I am now moving to the wrongful admission of evidence point, which is dealt with in page three of my written outline*".

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52 Fraser JA *Appellate Advocacy Revisited*, CPD Seminar 26 April 2012.

[101] What if your preparation for oral argument causes you to identify an argument you have not foreshadowed in your written outline? If the newly identified argument is worth advancing, then of course you should advance it. Your outline of argument is not expected to detail the minutiae of every argument. Matters of degree will influence whether you file a supplementary outline or at least put your opponent on notice of the newly identified argument. Such a course will be more imperative if the newly identified argument raises a fresh substantive issue rather than merely being an elaboration on or illustration of an argument already foreshadowed in the outline.

Focus on the determinative issues

[102] Issue identification remains important beyond the completion of the written outline. The need to identify the determinative issue(s), to abandon old complaints and grievances which go nowhere, to strip away the dross and expose your best arguments is at its most acute by the time of oral argument. It is a discipline you must impose upon yourself if you are to persuade an appellate court.

Purpose

[103] Persisting with that discipline once on your feet requires that there is purpose to each of your submissions. Make every sentence count. Do not let your submissions drift off topic into irrelevancies or unwarranted minutiae. Ensure your submissions are targeted at the determinative issues. The need to do so was well explained by D F Jackson QC who wrote:

> "To translate preparation to advocacy, you must always be able to identify why you are doing something, for example, you must be able to say to what issue a reference to particular evidence goes, or to what issues a particular submission goes. You have to impose that discipline on yourself in relation to appeals. If you don't, there are three, or five, or seven Judges – at least as smart as you are, and probably more experienced – who won't hesitate to make you do it."[53]

Opening

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[53] 1991 Vol 8 Australian Bar Review 245, 248.

[104] The opening provides the opportunity for initial favourable impact upon the minds of your audience, the Judge(s). It provides you with the opportunity to frame or, if appearing for the respondent, to reframe the issues for determination.

[105] Remember you are not opening as if for a trial. Your audience already has some appreciation of the facts. Of course, it may be necessary to later take the Court to some critical aspects of the facts in developing your argument. But at the start the Court's interest is in understanding what issues it must decide. It will appreciate an opening so focus your opening on introducing the issues for determination.

[106] There is no harm in your opening foreshadowing the sequence in which the issues will be addressed or in framing them in a way which enhances the persuasive force of what will follow. However, be wary of overt argumentative flourishes. They will be of little persuasive impact upon judicial minds and will likely undermine the Court's confidence otherwise cultivated by your opening's brief analysis of the issues for determination.

Developing the argument(s)

[107] The substance of each of your arguments will of course depend upon the substance of the individual case. Remember though that your submissions should always explain what aspect of the judgment below is being attacked, why is it said to be wrong and what is the consequence of it being wrong.

[108] As to the sequence in which you run your arguments, as a general rule it is best to argue your major point as soon as possible. The sooner the Court realises you are getting to the meat of the determinative argument the more receptive to your submissions it will be.

[109] In moving to each argument it will assist the Court if you headline the issue to which your ensuing argument will go. The Court will find it easier to understand your submissions if it knows where they are going.

[110] D F Jackson QC provided the following helpful advice on how to introduce the issue you are coming to:

> "If you are able to indicate the issue, you make your path potentially easier. Take, for example, a case where you're seeking to demonstrate that there was

> no evidence on a point where a finding was made against your side. The way *not* to go about it is to say: 'On the no evidence point, I'll go first to the evidence of A at page …'. The better way is to say something like this:
>
> > 'Our submissions is that there is no evidence to support the finding in question.
> >
> > There were only four witnesses who gave any evidence which might in any way be thought to touch upon the issue, and I will need to go to their evidence – as briefly as may be – to demonstrate that it did not go far enough.
> >
> > The four witnesses are A, B, C and D. A's evidence commences relevantly at page …'
>
> That is also the way to deal with 'hard' points such as an endeavour to set aside a finding of fact based on findings of credibility. You should start by recognising the test that is applicable, and by accepting that it has a relatively rare operation, but then urge that this will be a case where it applies. You can then proceed with the argument in support of the proposition without the Judge's interrupting to tell you how difficult the test is."[54]

[111] Referring to the facts in developing your argument carries the risk that you may lose the Court in minutiae. However, it will be a rare case where the facts do not matter to your argument. That point was well highlighted by Dutney J in his paper on *Appellate Advocacy*. His Honour wrote:

> "In the days when I practised as an appellate advocate I always told my juniors that authorities were the last resort of a weak case. In saying that, I was not suggesting that a knowledge of the authorities was unnecessary. Rather, I was merely saying that in most cases the law is not in doubt. Usually appeals turn on whether the facts will support a proposition of law on which both sides agree. Therefore, if the facts are favourable to the legal proposition on which you want to rely, start there. That does not mean that you start by giving the Court a recitation of the whole case. By the time a case comes to the appeal court most of what you thought at trial was fascinating and crucial evidence has become irrelevant. Knowing your case is what enables you to give the Court reference only to that part of the evidence essential to support the proposition you are then making."[55]

[112] The challenge of not losing the Court's attention by descent into factual minutiae is best met by carefully confining yourself to the facts which are critical to your argument and by identifying them succinctly. Facts can be identified without them being recited in full. Bear in mind the record is not just the transcript but also the exhibits. Do not overlook

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54 1991 Vol 8 Australian Bar Review 245, 251.

55 Dutney J *Appellate Advocacy* CQLA Conference 10-12 August 2017.

the possibility that reference to an exhibit, such as a photograph, may be the most expeditious way of explaining a critical fact.

Using authority effectively

[113] In Sir Harry Gibbs' aforementioned address on appellate advocacy, in noting the need for brevity and compression, his Honour noted:

> "That does not mean that any point of substance should be omitted or glossed over in argument, but that each point should be reached and dealt with as quickly as is consistent with its proper appreciation by a group of persons who, it may be expected, are where they are because they are able, with reasonable speed, to grasp a proposition of law or fact. They can also read, and do not wish to have read to them long passages from judgments when it is possible, by judicious selection, to find in a few sentences a clear expression of the views upon which reliance is placed."[56]

[114] The reading of long extracts from cases to the Court should be avoided. It is preferable that you summarise the proposition which you contend the case is authority for. If referring the Court to an important passage within the case, inform the Court of where the passage starts and where it finishes and invite the Court to read it. Do not recite it.

[115] As a general rule you should confine yourself to the seminal authority for the proposition you are advancing. Repetitive citing of intermediate appellate court cases which follow the seminal authority is pointless. Confine yourself to the seminal case unless a subsequent case actually develops the relevant principle further or illustrates a basis to distinguish the principle in a way relevant to your case.

Anticipating argument against you

[116] It is vital that your oral submissions answer or anticipate your opponent's arguments. As intimated above, if you can identify a sensible argument against you then the Court likely will. It is better to deal with that argument than remain silent until someone thinks to raise it.

[117] There is a powerful forensic advantage in dealing with an argument against you before it is raised or advanced by others. You get to frame the argument in a way favourable to

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[56] 1986 ALJR 60 496, 499.

you, defusing it, while simultaneously garnering the Court's confidence in you for taking them to the point.

[118] At what stage of your submissions should you rebut the arguments or anticipated arguments against you? It can sometimes be advantageous to deal with one of them early on. This is most effective when a rebuttal can be briefly explained and your opponent can be shown to have been clearly incorrect. Such a clean and easy early blow will at once diminish your opponent's credibility and enhance yours. Otherwise it is generally preferable to integrate your rebuttals, dealing with them from time to time as you progress your submissions when you arrive in the normal course at the topic to which a rebuttal goes.

Watch, listen, engage

[119] In his article *Ten Rules of Appellate Advocacy*[57] Justice Kirby, then President of the New South Wales Court of Appeal, wrote:

> "It is vital that advocates should watch those to whom they are addressing their arguments. In this way, they will be more likely to follow the tendencies of thought which may be expressed as much by body language and attitude as by oral expression. How many advocates I have seen clutching the podium as a support, lost in their books and in their reading and ignoring the very people whose decision is vital to their client's cause?"

[120] It is fundamental that you should both watch and listen to the bench. Failure to do so surrenders the powerful advantage, identified by Fraser JA, of discovering what the Judges think about your arguments and tailoring your submissions accordingly. For example, listening to the bench will allow you to gauge how familiar it actually is with the facts. That will in turn inform your judgment of whether additional descent into the facts is required.

[121] When questions and comments flow from the bench, seize the opportunity to engage with the bench, to assist it, to garner its confidence in your argument, to persuade it. Answer its questions. Do not say, "I will be dealing with that later". The timing of a question may not suit you but evidently it suits the Judge who asked the question. This is the moment which calls for the flexibility you have planned for. Provide the answer straight

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[57] 1995 ALJR 69 964, 971.

away, preferably in full. It is only when the complexity of the case requires you to develop more layers of analysis to provide a fulsome answer that you should try and content your questioner with an answer in summary form and assurance of more later.

[122] On occasion a member of the bench may posit a suggestion or analysis which, at least on the face of it, appears to support your position. There is no need to blindly agree with it merely because it is being made from the bench. Propositions from the bench do not necessarily reflect their proponent's commitment to them and may simply be a means of ventilating and testing an argument.

[123] Sometimes questions and responses from the bench may place pressure on your commitment to a point. Engaging with the Court does not require ingratiating agreement, any more than the Court's forceful testing of a point requires you to abandon it. Of course, there may at times be advantage in strategic concessions. As important as courage is, it does not require stubborn commitment to the unarguable. However, if there is genuine substance to your point, do not give in early because it seems the Court is against you. Rise to the occasion and advance a clearer explanation of why your point has substance.

Candour

[124] Candour is as important as courage in an appellate advocate. If you are uncertain about a point, admit it. Avoid over-statement. If there is a case or provision or fact against you then point it out to the Court and endeavour to explain why, despite that fact or case or provision, your argument is correct. Candour builds trust. Conversely, lack of candour, which will inevitably be exposed, will infect the Court's confidence in your arguments generally.

[125] Sir Harry Gibbs wrote on this topic:

> "It should go without saying that another quality which an advocate should endeavour to acquire, even if he has not had it bestowed upon him by nature, is that of candour. Sir Owen Dixon said that candour could be used as a weapon in advocacy; certainly the absence of candour can prove to be an Achilles heel. Nothing can be more destructive to an argument than for a court which has viewed it with favour to discover, when opposing counsel comes to address, or when the court retires to consider the matter, that counsel

> who was putting the argument has failed to refer to some fact, statutory provision or decision that seems to present an insuperable obstacle to the acceptance of his argument."[58]

Clarity

[126] Finally, we emphasise that effective communication with the Court requires clarity. The Court wants your argument to be clear to it, to judge your argument's worth. You want your argument to be clear to the Court, to persuade it of your argument's worth. The Court cannot understand your point if you speak too softly or too quickly. Clarity of speech is essential but, by clarity, we also mean clarity in the substance of what you are saying.

[127] The methods of appellate advocacy we have urged upon you will, if followed, all coalesce in clarity of substance. Effective issue identification, planning, avoiding unnecessary minutiae, focussing on the determinative issue and ensuring there is relevant purpose in what you say will all enhance the clarity of your message and its capacity to persuade.

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[58] 1986 ALJR 60 496, 498.