"WRITTEN ADVOCACY"

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by

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Written advocacy plays an increasingly important role in Australian courts. It is, therefore, a subject to which the Australian legal profession must give close attention.

As you would expect, I intend to focus my attention, in these presentations, on written advocacy in appeals but much of what I say will find direct application to written advocacy at trial.

Most if not all Australian appellate courts now require parties to file some form of written argument before the day on which the appeal is fixed for oral hearing. This written argument is, therefore, the first opportunity you have to persuade the court. In applications for special leave to appeal to the High Court of Australia, which may be dealt with entirely on the papers, the written argument may be the only opportunity you have to persuade the Court. Written argument is therefore very important in the proper presentation of a party's case.

It is inevitable that, in the course of speaking about written advocacy, I will touch upon questions of English expression and style that the audience may think more appropriate for a Year 8 or Year 9 English class. Saying anything to any group of lawyers about use of language or about questions of style is very dangerous. All lawyers know that these matters are important but almost all are equally certain of their own mastery of these subjects. Despite the prevalence of such attitudes, or more accurately, because of the prevalence of such attitudes, it is as well to say that I think it very important that every lawyer review frequently the way in which he or she writes.

Go back to basics. Look again at a recent piece of your written work in the light of what you understand to be the precepts of good writing. You may have a very firm view about what those precepts are. But have you looked recently at what others have said on that subject? Start with the general works, like Strunk and White, *The Elements of Style*, *Fowler's Modern English Usage*, Sir Ernest Gowers' *The Complete Plain Words*, Fowler's *The King's English*. Look at the more specialised works like Garner's, *The Elements of Legal Style*. Look at the judicial writings that you admire.

What do you see when you look at your own writing? Do you see, as Jonathon Swift put it, "proper words in proper places"? Or do you find a torrent of words poured into a dictaphone and faithfully reproduced (more or less) by voice recognition software? Do you find text that is

properly spelt and that is arranged according to accepted rules of syntax? Or do you find something that may have passed the Microsoft Word spell checker but, with its blizzard of green underlining, failed even Mr Gates' rudimentary style filters? Is what you wrote clear and concise? Or, when you return to read it, some time after it was written, are you left wondering why you wrote what you did? Are you left wondering what you wanted to convey?

All of these questions are inextricably bound up with the subject of written advocacy. It will be necessary to say something more about several of the questions that underlie the issues to which I have just referred. But let me begin by looking first at the "advocacy" questions, before returning to say something further about more general questions of written style.

Two basic considerations inform every piece of written advocacy: What is the author trying to do? How is that to be presented? The second of these questions, "how", is all too often ignored.

Rules of Court or Practice Directions prescribe required content for written submissions and the form in which they are to be presented. It is surprising how often parties ignore requirements about the form of presentation of written argument. Too often, documents are presented in typefaces smaller than the prescribed size with margins too small to use for annotation. It may be that this occurs through ignorance. If it does, it is inexcusable. It may be, however, that the document is

presented in this form to "make it fit" within the relevant page limits. That may mean no more than that the author will not take the time or effort to revise and edit the work to a more manageable size. Why? Surely the importance of the work requires it. Is it that the author cannot revise and edit the work? What does that tell the reader about the content of what is filed and the capacities of the author? Has the document been proof-read properly? Is it set out properly? Is it of such a length that it requires an index, a table of contents, a table of cases?

Issues like these, though important, require no further elaboration. Let me therefore pass on to the more difficult question of what the author should be trying to do in any piece of written advocacy. Again, it is as well to go back to the basics.

The principal task of an advocate is to persuade. The principal purpose of written advocacy is, therefore, to persuade. If the author is to persuade, the written submissions must be useful to the audience to whom they are directed – the judges who are to decide the case. If the submissions are to be useful to the judges, the author must convey the requisite information clearly, concisely, accurately and comprehensively.

You cannot write any piece of writing intended to persuade an audience without knowing who is your audience. You will often not know who your bench will be until after you have filed your submissions. But there are some things you do know. In particular, you know what appellate judges do.

Every appellate judge spends his or her professional life reading, and then thinking, and then listening, thinking some more, writing, and then thinking still more, revising, and then repeating the last two steps for however many times it takes to be satisfied with the end product. Every one of those steps must be informed by an understanding of what it is that has to be decided. Your object, as advocates, is to inform that understanding and so mould it that the court arrives at the result your client seeks.

A written argument must be prepared in a way that makes it valuable at three radically different stages in the disposition of an appeal. It must be useful to each judge preparing the case. It must be useful to each judge during oral argument. It must be useful to each judge preparing reasons for judgment.

At every one of those stages, the utility of written argument is diminished, even destroyed, if it is not clear, concise, accurate and comprehensive. If it is not clear, when do you propose to clarify the point? You cannot depend upon the court not noticing obfuscation. If it is not concise, why would you expect the reader's attention to remain focused through the diffusion? If it is not accurate, why would the judge not be minded to put your document aside in favour of your opponent's? If it is not comprehensive, when do you propose to fill in the gaps?

Each judge has his or her own approach to reading the papers for an appeal. There are, however, three documents or sets of documents that loom largest in a judge's preparation for an oral hearing: the notice of appeal, the judgment below and the parties' written submissions. In preparing an appeal, an appellate judge is looking to identify the connections between those three elements. When a judge picks up a set of written submissions filed in an appeal, the judge wants to know, and needs to be told, what the case is about, what information he or she needs to decide it, and what is the path that is best followed in deciding it. The judge will therefore be mystified if the written argument bears no relationship to the grounds of appeal. The judge will be mystified if the written argument is not related to what was decided at trial. The judge will gain no assistance from the written argument if he or she cannot understand what the case is about, what information is necessary to decide it and what this party says is the path to follow. Only if that information is presented to the judge can the judge read the papers with an eye to what is in issue.

If your written argument is to persuade, it must be related to what later is to be said in oral argument. Of course, we are all familiar with cases in which argument takes an unexpected turn. If it does, you have to deal with it, whether or not your written argument anticipated the development. But your written argument must be one that reveals the essence of the argument that you will put orally. If it does not, you have wasted the opportunity presented by the requirement to provide written argument.

And then, of course, your written argument must be of value to the preparation of reasons for decision. Does it give the judge a sufficient guide to what is in the appeal book (that your side says is important) and does it tell the judge where that information is to be found? Does it give the judge a useful chronology, a useful dramatis personae, a useful reference to relevant authorities (identifying the parts you say are particularly relevant and important)? Does it tell the judge what are the relevant statutory provisions, where they can most conveniently be found and, most importantly in this age of relentless statutory amendment, why the form of the legislation you say is relevant is the correct version to consider?

How then do you set about making written submissions useful at each of these stages of consideration of an appeal?

It is convenient to break the examination of that question into four parts: the statement of the issue, the statement of the facts, the statement of the argument and the statement of the orders sought. Let me say something about each of those.

The Statement of the Issue

Many American writers discussing the preparation of briefs for use in American appellate courts lay very great emphasis on the way in which the issue for consideration by the court is framed in the brief.

Bryan Garner, the Editor-in-Chief of *Black's Law Dictionary* and author of *The Elements of Legal Style* and *A Dictionary of Modern Legal Usage*, has written extensively on this subject. One convenient place in which to find the essence of his views is in the second edition of *A Dictionary of Modern Legal Usage* under the title "Issue-Framing".

Appellate rules in the United States require the parties to identify, in their written briefs, the issue that the party says arises in the appeal. The High Court's Practice Directions require the appellant to state the issue or issues that the appellant contends the appeal presents and the Rules require an applicant for special leave to state the special leave question that is said to arise. Other Australian courts do not always insist upon the framing of an issue. It is, however, a step which is always desirable and, if it is done well, it can be of great benefit to the party who does it and to the court.

The issues in any appeal can be described at any of a number of levels of abstraction. I suppose that the issue in any appeal can be described as "should the appeal be allowed?". But to frame the issue in that way tells the reader nothing that will help in understanding what he or she needs to think about. Yet it is surprising how often one reads statements of issue that are framed in terms not very different from "Was the trial judge right to dismiss the plaintiff's claim?" or "Did the Court of Appeal err in sentencing the appellant to 20 years' imprisonment?". Telling the reader that the question to be examined in the case is

whether the court below was right to reach the conclusion it did provides little help to the reader.

When you are framing the issue that is to be considered by an appellate court you are identifying the question that the court must answer. Garner says[1] that:

> "Any piece of persuasive or analytical writing must deliver three things: the question, the answer, and the reasons for that answer. The better the writing, the more clearly and quickly those things are delivered."

When you state the issue that is to be considered in an appeal not only do you have an opportunity to deliver the question, you also have an opportunity to deliver, at least inferentially, the answer to that question and the reasons for that answer. You have wasted an opportunity if you do not deliver at least the question that is to be answered. But you have to do it concisely. Garner would have it that you must do it in 75 words or less.

Let me leave aside for the moment the case in which there really are several distinct issues. Such cases are rarer than many lawyers seem to think. Most appeals turn on one, or at most, two issues. For the moment, let me assume that the appeal is a single issue case.

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1 *A Dictionary of Modern Legal Usage*, 2nd ed (1995) at 471.

Garner says, rightly, that the statement of the issue in an appeal is, in most cases, best done by a string of sentences which, together, are less than 75 words. He suggests that each sentence should be about 15 words. He proposes that the statement of issue takes the form of statement, statement, question or, to put the same proposition in different terms, premise, premise, question.

The issue must be stated in terms that are specific to the particular case. It must, as the Americans say, be "fact specific". That does not mean, however, that the statement of issue in every case will take the form of statement of fact, statement of fact, followed by legal question. On the contrary, there may be cases where the issue is better framed as statement of law, statement of law, followed by factual question. But let me proceed to explain what I mean by reference to some concrete examples.

Garner gives[2], as his first example of proper issue framing, an issue that was framed in 1835 in the following terms:

> "A Turk, having three wives, to whom he was lawfully married, according to the laws of his own country, and three sons, one by each wife, comes to Philadelphia with his family, and dies, leaving his three wives and three sons alive, and also real property in this State to a large amount. Will it go to the three children equally, under the intestate law of Pennsylvania?"

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2 *A Dictionary of Modern Legal Usage*, 2nd ed (1995) at 471.

Compare that issue with some of the propositions I tried to identify a moment ago. First, notice its form. It takes the form of statement, statement, question. In this case, the statements are statements of fact. The question is a question of law. The question is related to the facts. The whole statement is very short: 67 words. As Garner says, "Anyone of moderate legal sophistication can understand [the] question. And most readers, having seen the question, would probably like to know the answer."

Notice, particularly, how the facts are stated. At this stage of the written argument you do not need to know when and where the marriages were solemnised, what the names and birthdates of the sons were, or when the deceased came to America. All of those are matters that may find their proper place in a subsequent statement of facts, although even there I would wonder about the utility of more than bare references in footnotes to the findings to this effect in the court below and the evidence that supported those findings.

Overparticularising the statement of facts when setting out the issue leaves the reader bewildered. The reader, faced with those particulars, would ask, in the case now under consideration, why am I being told that the deceased arrived in America on such and such a date? Is there some point that turns on the precise chronology? Should I be looking to the details of that chronology? The reader's attention is thus distracted from what you, as author, want the reader to focus on.

Compare the utility of the statement of issue I have read with an issue that is stated as "whether the trial judge erred in concluding that the plaintiffs were entitled to share equally in the intestate estate of the deceased?". The original version is much more useful. Why?

The central reason is that, in the alternative form of statement, the reader is left to gather the relevant facts elsewhere. Perhaps the reader will do so. Perhaps the reader will identify what you would wish to say are the critical facts. But there is a possibility that the reader will not do so or will not fasten upon what you consider to be the critical facts. Why should you allow that to happen?

The issue I have just been discussing was arranged in the form of statement of fact, statement of fact, followed by question of law. Sometimes the premises for the issue are legal rather than factual premises. One example which Garner gives[3] is as follows:

> "Texas law provides that a lease predating a lien is not affected in foreclosure. Nelson's lease predates Marshall's lien, on which Marshall judicially foreclosed last month. Was Nelson's lease affected by the foreclosure?"

This states the issue in 33 words. The first premise is a proposition of law. Presumably it is not a controversial proposition of law. If it is

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3 *A Dictionary of Modern Legal Usage*, 2nd ed (1995) at 472.

controversial, that will be one of the issues in the case. The issue I have quoted proceeds from two premises, one legal, the other factual, to the posing of the issue that is to be decided. The reader who digests this statement knows what the party presenting the issue says he or she should be looking for when reading the rest of the papers – especially the judgment below, the statement of facts and the statement of argument.

So far, I have dealt with the statement of the issue in single issue cases. What do you do when there is more than one issue that is to be tendered for consideration by the court?

If the issues are separate, treat them separately. Make a separate statement of issue for each issue that you say arises. Show the relationship between the issues. In that respect it will usually help if you identify the issues by putting them under separate headings and if those headings are a little more imaginative than "the first issue", "the second issue" etc. Organise the issues in a logical sequence. Presumably, this will match the way in which you intend to deal with the issues in oral address.

Then, when you have finished your first draft of the issues, stop and ask whether you need them all. Perhaps you do, but are you sure about that? Are you making the case needlessly complicated? Are some of the issues that you have prepared better discarded, or dealt

with in combination? Those are questions for the advocate's judgment in the particular case.

Then we come to a much more difficult aspect of issue framing. In "A Lecture on Appellate Advocacy"[4], Karl Llewellyn said that:

> "[T]he first art [of effective advocacy] is the framing of the issue so that if your framing is accepted the case comes out your way. ... Second, you have to capture the issue, because your opponent will be framing an issue very differently. ... And third, you have to build a technique of phrasing of your issue which not only will help you capture the Court but which will stick your capture into the Court's head so that it can't forget it."

How is framing the issue to be used as a tool of persuasion?

The answer usually lies in the way in which the premises for the question are stated. At once you encounter a difficulty: the issue you frame will be discarded by the court as irrelevant if you base it on disputed premises. Especially is that so if you base it on disputed factual premises. So, to take a very simple example, if you framed the issue in a shipping collision case upon the premise that the defendant ship was travelling too fast, and argument subsequently showed that this premise was false, your whole statement of the issue would be falsified. So beware of the disputed and disputable premise.

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4 (1962) 29 *University of Chicago Law Review* 627 at 630.

Likewise, the statement of an issue is not made more persuasive by simply sprinkling it with intensifying epithets like "clearly", "flagrantly" or "obviously" or, if they are disputed, conclusory legal statements like "in clear breach of its contractual obligations". Of course, if the conclusory legal statement is not disputed, use it. Often that is an important part of defining the issue. Sometimes it can be used to great effect. But what is often deadly, is the unadorned recitation of critical facts which, together, form the premise for a question that can be answered only one way. The best example I know is the statement of an issue in a capital case where the accused had been denied an adjournment of his trial. It read:

> "John Smith will likely be convicted of murder and sentenced to death at next week's trial unless he can lead evidence of his mental retardation. Smith's expert on mental retardation must undergo emergency surgery to remove a cancer that his doctors have just discovered. Did the trial court abuse its discretion in refusing to grant Smith an adjournment?"

Notice how simply the facts are stated. There are no intensifiers, no coloured words, only facts. But they are facts that point unambiguously to one outcome rather than the other.

Now I know that not all cases present such compelling facts. But the facts in every case can be presented in a way that puts them to best effect. Your task, as an advocate, is to marshal the facts in that way.

I have no doubt that an appellant's written submission should always contain a statement of the issue that is to be decided. Should

the respondent's? I would answer that: "Sometimes". Much turns on how the appellant has framed the issue. Of course if the appellant has not, the respondent has been given a free kick in front of goal and should take it. If the appellant has framed the question neutrally you may want to consider reframing the issue according to your statement of the premises. And if you do not reframe the issue, you are stuck with whatever the appellant has done. The case is on a set of tramlines that you did not lay. Is it heading to the terminus the appellant wants? All of these are considerations that bear upon deciding whether to include a statement of issue in the respondent's argument. All should be considered. But, perhaps they all come down to asking yourself two questions: What would you say that is different? Can you get any advantage for your case by recording the difference?

Let me pause at this point to remind you of some of what I have said. Good written argument will assist an appellate judge at three different stages: preparation of the appeal, the oral hearing, and writing reasons. To do that, the argument must convey the requisite information clearly, concisely, accurately and comprehensively.

A very important step in persuading the court is stating the issue that the court is to consider. The court can answer a question only when it knows what the question is. Framing the issue must be done concisely. (Remember the suggestion of 75 words or less.) It must be fact specific (not, "Did the court below get it wrong?"). It will usually be

in the form of premise, premise, question. The premises may be factual or legal or both. They must lead to the question that arises in *this* case.

The issue that you have framed will inform the way in which the judges read the case before oral argument begins. It will also, you hope, inform the way oral argument proceeds. (I leave aside the case where the opening shot from the bench is "You say the issue is this, but isn't it really that?") It should also underpin the way in which the Court sets about preparing its reasons for decision.

The statement of issue appears at the start of a written argument. What about the rest of the written argument: the statement of facts, the statement of the argument and the statement of the orders you want the court to make? These are subjects with which I will deal in the second of these presentations.

<u>The Statement of Facts</u>

In considering the statement of facts, the statement of the argument, and the statement of the orders you want the court to make, it will be necessary to say something about what I earlier described as questions of English expression and style. As I said earlier, those are very dangerous subjects. So before daring to enter upon them, let me make some other points about these three sections of written submissions – fact, argument and orders.

I have already emphasised that written submissions must be clear, concise, accurate and comprehensive. These principles may be thought to have particular application to the section of written submissions that is devoted to stating the facts.

Ordinarily, it is the appellant who is primarily responsible for setting out the principal statement of the relevant facts. The facts that are to be stated by an appellant are not just those which the appellant relies on to advance that party's argument, or those which the appellant hopes that the appellate court will act upon. Rather, the statement of factual background to an appeal "will not fulfil its function unless it states concisely but comprehensively the facts found or acted upon and considered relevant by the court whose order is the subject of the appeal"[5]. This proposition, stated by McHugh J in delivering reasons for refusal of an application for special leave to appeal, is of general application. The relevant facts to be stated in written submissions are the facts which the court whose orders are challenged, found or acted upon and considered relevant. As McHugh J went on to say[6]:

> "In the case of a jury trial, the statement of factual background should state the evidence as to every material fact that could support the jury's verdict."

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5 *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 201 CLR 347 at 349.

6 (2000) 201 CLR 347 at 349.

The need for this statement to be accurate and comprehensive should be self-evident but let me say something about why this is so. The statement of facts is intended as a tool for use by the court in understanding what happened in the court below. Only if that is known can there be a useful examination of whether what was done was wrong. So the statement of facts is a critically important building block for the court. It will usually be very important also to the development of the parties' arguments. But if you do not know what the court below did, you cannot decide whether what it did was wrong. And if a party does not state the facts found and acted upon by the court below in a way that is both accurate and comprehensive, what faith will the appellate court have in whatever else that party says in its written submissions?

Of course there will be many cases where an appellant will want to say that findings made and acted upon in the court below were wrong, or that findings that should have been made were not made. While I cannot exclude the possibility of saying something about either an allegation of incorrect findings or insufficient findings in that part of the written submissions directed to giving the factual background to an appeal, it seems to me to be much more probable than not that any such statement will find its proper place in the statement of argument.

Your summary of factual background may be clear, concise, accurate and comprehensive but it is, I think, essential to supply complete references to each of the propositions that you set out in the summary. Again, the way in which judges prepare reasons for judgment

is infinitely varied. But one way of approaching that task is to include in the draft reasons a complete critical apparatus that will enable a proof reader to check every factual assertion in the reasons against its source in the appeal record. In the High Court, for example, it is very common for reasons to be prepared in a form which reads:

> "On 31 May 2005 [AB 1], the appellant was convicted [AB 196] of a charge of murdering John Henry Smith [AB 3] after a trial that had occupied 37 days [AB 18] ..."

The appeal book references given in the reasons enable those who proof-read the judgment to check the accuracy of every fact asserted. The appeal book references remain in the draft reasons until the draft is to be made ready for publication.

Whether or not the court or particular judges follow a practice like this, the fact is that a judge, confronted by a statement of what are said to be the relevant facts, whether they are the facts found or acted upon in the court below or other facts said to be established in the evidence, will often want to go back to the source of the statement that is made in the party's written submissions. You cannot do that easily if the parties do not identify the sources they have used.

Enough about the statement of facts. Before dealing with the statement of the argument, which is, after all, not an unimportant part of written submissions, let me say something about the statement of the orders you want the court to make.

The Statement of Orders

The notice of appeal should set out the form of orders that an appellant seeks. Why then do the High Court's Practice Directions require the parties to deal with this subject in their written submissions?

Experience dictates that too little attention is given by parties to formulating the orders that they want the appellate court to make and their arguments, if accepted, would entitle them to have made. All too often, the parties think of the problem of orders as solved by identifying that, in the case of the appellant, that side wants the appeal allowed with costs and, in the case of the respondent, that side wants the appeal dismissed with costs.

If an appeal is to be dismissed with costs, little more need usually be said. By contrast, if an appeal is to be allowed, you have to consider what follows from that fact. What is to happen about the orders made in the court below? Which of those orders are to be set aside? Are any orders to be made in their place, or is the matter to go back to that court for reconsideration? What is to happen about the costs in the court below?

When you have successive appeals, as you do in the High Court, you have to repeat those inquiries about the orders of the intermediate court by asking generally similar questions about the orders of the

primary judge. At the end of that process you will find that the orders proceed sequentially. First, there are the orders of the appellate court: Appeal allowed with costs. Set aside the orders of the [ ] Court made on [ ]. Then there is any substitution that must be made for the orders of the court below: In their place order that the appeal to that Court is allowed with costs and the orders of the [ ] Court are set aside. Lastly, there is any substitution that must be made for the orders of the primary court: In their place order that there be judgment for the [ ] for [ ] with costs.

Formulation of orders is far more important than some obsession with forms and solemnities. Disobedience of court orders can bring serious consequences. Orders, therefore, are to be prepared with care and accuracy. But no less importantly, it is often the case that only when you work out what orders are sought that you can decide whether the argument that is advanced justifies those orders or some other, lesser, form of order.

Now is not the time to divert further into the otherwise fascinating byways of drafting particular forms of order. It is enough to say that the drafter can find guidance about the way in which orders should read if only he or she takes the trouble to look. Of course, your first port of call should be the relevant rules of court, and then recent decisions of the court concerned. But in the more complicated cases, why not go back and seek guidance from the old works like *Seton's Judgments and Orders*, or *Chitty's Queen's Bench Forms*, or Robertson's *Law and*

Practice of Civil Proceedings by and Against the Crown and Departments of the Government.

But enough about orders. What about the written argument? Is that not the heart of written advocacy?

The Statement of Argument

Those of you who have patiently waited for me to complete an apparently endless disquisition on issue-framing, a homily on the subject of summaries of facts, followed by reference to the minutiae of framing an order, must have begun to wonder whether I would ever come to what you thought would be the centrepiece of these presentations. I make no apology, however, for spending the time that I have on the three other parts of a written argument. Each part of a written argument has its place in moulding the thinking of the court. None of the three sections I have mentioned is to be put aside as being of no importance and suitable for a clerk to attend to while the great advocate focuses attention only upon the statement of the argument.

In stating your argument you must, again, be guided by the four watchwords: clear, concise, accurate and comprehensive. It is to be hoped that your statement of argument follows on naturally from the way in which you have stated the issue or, if you are for a respondent and have not restated that issue, from the way in which the appellant has identified it. If your statement of argument does not follow on from the

statement of issue, why did you bother stating the issue in the way you did? Why did you not restate the issue?

If the statement of issue is useful, it will tend to impose an order upon the statement of argument. If the premises for the issue are undisputed, a short restatement coupled with some cross-references to the summary of facts (if the premises are factual) or to the relevant statements of principle or applicable law (if the premises are legal) may well suffice. Then you may plunge into answering the question that has been posed in the statement of issue.

Do you need to break up the argument into separate steps? If you do (and in many cases you will have to), deal with the steps separately. Maybe it will help to state the steps one after the other and then develop each separately. Much turns on the nature of the argument that you are advancing. But whether the argument is one that proceeds in a single step or by a series of steps, each step must be encapsulated in a proposition that is clear, concise, accurate and comprehensive.

Formulating propositions of this kind is not easy. The fate of the appeal may hang upon the court's acceptance or rejection of what you say. The temptation therefore is to fudge the proposition: to give yourself room to move. I do not say that you must never do this. But you should do so only if you can articulate a reason for doing so, and a reason better than "I can decide about that later".

Lawyers are innately cautious. How often have you entered a lift in Owen Dixon Chambers, asked whether it is going up, and been met with the answer "I hope so". No definite affirmatives for lawyers.

It is, therefore, not surprising that advocates want to leave a back door ajar at all times. But do you need to? Must the proposition be qualified? Why? Does the qualification swallow the substance of what you want to say?

In the end, there can be no clear and accurate statement of the propositions unless there is clear and accurate thought underpinning them. If there is that clear and accurate thought underpinning what you are doing, you will usually find it not just desirable, but absolutely essential, to drop the qualifications.

Let me say something now about an appeal which raises the most common form of question that arises in the courts today – a question of statutory construction. I leave aside from consideration the practical considerations that bedevil the High Court of trying to find out what form of the legislation we are concerned with and where that form of legislation may be found. I will assume that those problems have been addressed by counsel and that we are all agreed upon the applicable form of legislation that is to be construed.

The parties to the appeal will be contending, respectively, that the relevant provision on its true construction does, or does not, have a

particular operation in the facts of the case. The kind of case I want to direct attention to is one in which those contentions turn on a disputed question of construction of the particular provision rather than a disputed question of fact which, if decided one way engages the section, but if decided the other, does not.

What exactly is the construction for which your side of the argument contends? How exactly does your side contend that that construction follows from the words of the statute? It is of little use to say to a court that "On a proper construction of the relevant section, we win and they lose." And it is of only slightly more help to say "And what's more the Second Reading Speech supports us." If there really is a disputed question of construction it will very often be because those who drafted the legislation, or more relevantly, those who prepared the drafting instructions, did not have the particular combination of facts in mind that now fall for consideration. So how exactly do you say the statutory words work? How does that fit in with the rest of the Act in question? Is there anything in the extrinsic material which really does assist, or do you say that nothing is to be gained from that extrinsic material? All of this is capable of reduction to a series of propositions each of which can then be amplified in turn. All too often, however, the argument is wrapped up in a form that is only slightly more sophisticated than saying "we win; they lose".

Inevitably, principal focus will fall in argument upon the particular provision immediately in issue. But on no account should you confine

your attention to that provision. That provision can be understood only in its proper context.

Sometimes that context is very complicated. Without understanding it, the court will go astray. One particular example of the kind of problem I have in mind is provided by transitional provisions of the Corporations legislation considered by the High Court in *Forge v Australian Securities and Investments Commission*[7]. The oral exposition of that legislative chain was first rate. But it was a chain of legislative provisions that was described carefully and completely in the written submissions. Only when that chain of provisions was understood could the relevant statutory construction question be resolved. That was a task that had first to be undertaken in the written arguments. That required very clear thought and exposition.

So where have we got to? Clear, concise, accurate and comprehensive. I have said this several times. Formulate the propositions. Formulate them in more precise terms than "we win; they lose". But how are you to make any of this persuasive? Alas, here begins the Year 9 English expression class.

All of us know the rules. All of us disobey them constantly. How often are we told, "prefer the active voice to the passive voice"? And

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7 (2006) 80 ALJR 1606 at 1631-1632 [104]-[111]; 229 ALR 223 at 251-253.

what about Garner's rules: "strike out and replace fancy words"; "challenge vague words"; "shun vogue words"; "eschew euphemisms"; "toss out timid phrases"; "discard empty dogmatisms". How often do we disobey these? I will not say more about these precepts except, again, to invite you to go back and look at a recent piece of your writing with a view to seeing whether you are obeying them.

Perhaps the essence of all of these precepts is captured by the word "simplicity". And that is not the description that most readily attaches to a lot of legal writing. In part that is because legal writing deals with difficult and technical ideas. The use of technical terms is therefore inevitable. How can you write about the distinctions between "pledge" and "mortgage" without using the language of the law of property? But all too often we find ideas that are not difficult, and not technical, buried in a torrent of words. If there ever was any clarity of thought, it lies buried by the torrent.

The more you clarify and simplify what you want to say, the more apparent will be the order in which you need to deal with the content, and the more apparent will be the way in which you are dealing with it. The more apparent the way in which you are dealing with the problem, the easier it is for the reader to understand and evaluate what you are saying.

Clarity and simplicity are usually assisted by providing headings and other pointers to what you are about to deal with. The layout of the

page is also important. Sometimes, defining particular expressions may help. But I must say that overuse of definitions is distracting and can be confusing.

Long slab quotations are often unhelpful. If you consider that you must quote a lengthy passage of evidence, judgment or other material, introduce it by telling the reader why you are quoting the passage. Highlight the words that lead you to set the passage out in full. And then, after the quotation, tell the reader again why you have quoted it. Only then does the reader avoid the temptation to skip what someone other than the author of the document has said to find out what it is that the author next wants to tell the reader.

Preparing written submissions is not easy. I have tried to point out some considerations that affect how you may go about the task and in doing that I have, at least inferentially, tried to identify some of the reasons why the task is difficult.

Oral advocacy retains a central place in the way in which Australian courts transact their business. Written argument in Australian courts is intended to make the transaction of that business more efficient. That can be done only if the written argument is prepared in a way that focuses the reader's mind upon the determinative issue or issues in the case, explains how that issue should be determined, and why it should be determined in favour of one side rather than the other. That must be done clearly, concisely, comprehensively and accurately.

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