# Preparing and arguing an appeal

By the Hon Michael McHugh AC QC

John W Davis is generally regarded as the best appellate advocate that the United States legal profession has produced. Judges of the stature of Chief Justice Taft and Learned Hand said that he was the most persuasive advocate they had ever heard. Such was his reputation that in December 1953, when he was aged 80, South Carolina briefed him to defend their segregation laws in the famous case of *Brown v Board of Education of Topeka* 347 US 483 (1954) in the Supreme Court. He lost that case. But the probability is high that, if the case had been argued nearly 30 years earlier in 1924, the year he was the Democratic Party's candidate for vice president of the United States, the result would have been different. The difference between the outcome in 1954 and the probable outcome in 1924 was the result of changing circumstances, particularly the recognition that the segregation laws were unjust and could not be tolerated in a free society. The difference in the actual and supposed outcome of *Brown* is a reminder that human beings decide cases, not computers, and that judicial decisions to a significant extent reflect the prevailing social attitudes, values and understandings of their time.

It is impossible to stereotype the way judges decide cases, although Judge Richard Posner has made a good attempt at it in his book, *How Judges Think*. But the judges who sit in appellate courts almost always have 'form' as evidenced by their previous judgments. Some will be conservative, some will be radical and some will be unpredictable in their approach to deciding cases. When the composition of the bench is known, as it always will be for the oral argument, it is important to tailor the argument, so far as it can respectably be done, to fit in with the perceived approaches of at least a majority of the judges. As Justice Sackville has pointed out, the multi-membered nature of appellate courts ('Appellate advocacy', (1996) 15 *Australian Bar Review* 99):

> …means that the members of the court to be persuaded will not necessarily be, and often are, not, of one mind. Part of the advocate's art is to understand, so far as he or she can, the temperament and judicial personality of each member of the court. This task is often more challenging than where the court consists of a single judge. Arguments that are received with scepticism or downright hostility by one member of the court may be attractive (or even, by their very response, become attractive) to another.

John W Davis understood better than most advocates that appeals are not decided by the mechanical application of fixed rules and that decisions are often the product in whole or in part of the way the judges think about the appeal process and approach the particular case before them. In a famous 'Lecture on Advocacy', he pointed out that, if fish could be induced to give their views on the most effective methods of fishing, no one would listen to a fisherman's account of the best way of catching a fish. So he thought that the best way to learn about appellate advocacy is to learn how judges think cases should be argued. With that in mind, as a former appellate judge, I shall put forward some views about appeals for your consideration and, I hope, enlightenment.

## Preparation

It is pointless lodging an appeal unless you know what you want to do and why. No appeal is likely to succeed unless you have done extensive preparation before filing the grounds of appeal. You must master the transcript of the trial or other hearing and the judgment which will be the subject of appeal. You should make a note of every relevant fact favourable or unfavourable to your side. Bear in mind that to succeed, you must persuade the court that those facts that are, or appear to be, against you are not decisive. You will have to deal with them in your written submissions and at the hearing of the appeal. So make a note of them as well as facts that favour you.

You should also ensure that your research has led you to every statutory provision, case law or secondary materials that are relevant to the appeal. Unless you are a legal genius, you will have to do more than one bout of research, as you think through the law and the facts. If you think you will be relying on a case you find, check its subsequent history immediately. Don't wait until your memory has faded and you have forgotten it. Find out whether it has been followed, criticised, distinguished or overruled?

## Nature of the appeal

An appeal is not a common law right: *Commissioner For Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225. The availability of an appeal depends on statute or rules of court. Many rights of appeal are limited by reference to subject matter, the amount involved or in some cases by the identity of the appellant. For example, in criminal cases, the Crown may have no right or only a limited right of appeal. Again many appeals may only be brought by the leave or special leave of the court. This is the case in respect of interlocutory appeals, that is to say, appeals against orders that do not dispose of the case.

In general terms, appeals fall into three categories. First, there is an appeal in the strict sense. In that class of appeal, the case is decided in accordance with the law and the facts that existed when the original judgment was given: *Victorian*

*Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109, 110-111. Second, there is an appeal by way of re-hearing. Most appeals to intermediate courts of appeal fall into this category. In this class of appeal, the court determines the rights and liabilities of the parties in accordance with the law as it exists at the time of the appeal: *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Committee* (2000) 203 CLR 194 at 203. However, the appeal is not a retrial of the issues between the parties, as if the case was being heard the first time. Even in this class of appeal, the appellant must demonstrate error: *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Committee* (2000) 203 CLR 194 at 203-204. Usually in this class of case, the court has a discretionary power to hear further evidence, but exercises the power sparingly. The third class of appeal is a hearing *de novo*. In reality, this is not an appeal but an original hearing. The plaintiff, claimant or prosecutor will have to prove its case again. Appeals to the District Court from a magistrate's decision in criminal cases and many appeals to courts from the decisions of administrative tribunals or administrators are examples of this class of case.

### Standard of review

Before lodging an appeal, it is imperative that you understand the standard of review exerciseable by the appellate court because the standard of review will be decisive as to whether the appeal will succeed. Sometimes, a statute or rules of court will specify the standard of review but usually it depends on principles worked out in decided cases.

If the case involves a point of law, then the appellate court can do what the trial judge should have done. If the case involves a question of fact, the standard of review is more complex. A finding of primary fact based on credibility of witnesses will be reviewed only where the finding is demonstrably improbable or contrary to other established facts or documents. A finding of fact based on inference is open to review on the basis that the appeal court is in as good a position as the trial judge to make the finding. A discretionary judgment, however, is only appellable in accordance with the principles in *House v The King* (1936) 55 CLR 499 at 505. That is to say, the appellant must establish error by showing that the court exercising the discretion has acted upon a wrong principle or given weight to irrelevant matters or failed to give weight or sufficient weight to relevant consideration or made a mistake as to the facts or that the result is so unreasonable or plainly unjust that the appellate court can infer that there has been a failure properly to exercise the discretion. In cases where the finding will affect the character or reputation of a person, the finding of fact will be reviewable only in accordance with the principles expounded in *Briginshaw v Briginshaw* (1938) 60 CLR 338.

### Final or intermediate court of appeal

In practice, the right of appeal to an intermediate court of appeal is invariably much wider than the right of appeal to a final court such as the High Court of Australia. Furthermore, the approach of the court will be different depending upon whether it is the High Court or an intermediate appellate court.

The High Court is concerned with legal principle and what the law should be. Law making is a significant part of its function. Questions of policy therefore play an important part in many decisions of the High Court. Its primary function is not the correction of error but the formulation of principles which will have application beyond the instant case. The implications for legal doctrine of accepting or rejecting the appeal are therefore matters of significant importance in the High Court. The occasions on which the High Court will reverse factual findings in the courts below are comparatively rare. For the most part, the court will not grant special leave to appeal where the appeal will require the High Court to determine questions of fact. Even in cases where the High Court is asked to make findings of fact for the purposes of applying a legal rule or principle, it will usually refuse to do so where the intermediate court of appeal has upheld the factual findings of the trial judge (the concurrent finding rule).

The primary function of an intermediate court of appeal, however, is the correction of error. Its law making function is merely an incident of that primary function. Hence in an intermediate court of appeal, factual findings are usually open to review in theory. In practice, however, those courts are reluctant to interfere with findings of fact based on credibility. Moreover, for an appeal – even one by way of re-hearing – to succeed, the appellant must demonstrate error. In *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Committee* (2000) 203 CLR 194, the High Court said that, even in that class of case, statutory powers of appeal are construed on the basis that, unless the statute indicates otherwise, the power is to be exercised for the correction of error. Once error is demonstrated, however, the intermediate court of appeal will decide the case on the law and the facts existing at the time of the appeal and, subject to the findings of the trial judge on credibility of witnesses, on its own assessment of the facts.

### New game

The findings of the trial judge are not provisional until they are affirmed by the appellate court. They are the reality with which you must deal. You have to accept them or attack them. Until error is demonstrated, those findings bind the parties. The primary focus of the appeal therefore is different from the focus of the trial court. The appellate court searches for error and will not make its own findings – whether of fact or law – until the appellant has persuaded the court that the trial judge or, in the case of the High Court – the intermediate court of appeal, has erred. The playing field in the appeal is therefore smaller than it was at the trial. Unfortunately, this is a lesson that many trial lawyers who conduct appeals fail to understand. As Mr DF Jackson QC has pointed out in a paper on Appellate Advocacy, these advocates 'are not *really* prepared to give full value to the fact that the slate is *not* clean.' (Emphasis in original). (8 *Australian Bar Review* 245) Many points open at the trial will no longer be open to debate. The appeal is not the place to re-fight all the lost battles. Nor is it the place to debate every area which might have some connection with the issues in the appeal. To do so inevitably results in that party's argument lacking force and coherence.

### Notice of appeal

The cardinal rule for drafting a notice of appeal is to be selective. If the appeal notice contains too many grounds, the best points are likely to be hidden in a thicket of weak points. The notice of appeal should identify only those errors of ultimate fact or law which affected the result, and the fewer the better. As Justice Branson has explained (*Sydneywide Distributors Pty Ltd & Anor v Red Bull Australia Pty Ltd & Anor* (2002) 55 IPR 354 at 355-356):

> Not every grievance entertained by a party, or its legal advisors, in respect of the factual findings or legal reasoning of the primary judge will constitute a ground of appeal. Findings as to subordinate or basic facts will rarely, if ever, found a ground of appeal. Even were the Full Court to be persuaded that different factual findings of this kind should have been made, this would not of itself lead to the judgment, or part of the judgment, being set-aside or varied. This result would be achieved, if at all, only if the Full Court were persuaded that an ultimate fact in issue has been wrongly determined. The same applies with respect to steps in the primary judge's process of legal reasoning. Although alleged errors with respect to findings as to subordinate or basic facts, and as to steps in the process of legal reasoning leading to an ultimate conclusion of law, may be relied upon to support a ground of appeal, they do not themselves constitute a ground of appeal.

In drafting a notice of appeal, the first question is, what is the nature of the error? Is it an error of fact or law or discretion? If the only error is one of fact, you have to carefully consider whether it is one which the court of appeal is likely to reverse. As I have indicated, the prospect of reversal of a finding of fact which depends on the trial judge's assessment of the credibility of witnesses is poor. Hard as it may be for your client to accept advice that the appeal cannot succeed because the findings were based on credibility, it is advice that must be given in the client's interests. If the supposed error is one of law, the prospects of success in the appeal are enhanced. The appellate court is in the same position as the trial judge to determine that issue of law. Misapplication of legal principle and incorrect interpretation of statutory provision are usually the most fertile source of legal error. But they are not the only source of such error. The trial judge may have incorrectly formulated a legal proposition, he or she may have erred in accepting or rejecting evidence or in jury trials in giving directions to the jury. If the error is one of the exercise of discretion, the difficulty of attacking the exercise is high. An appellate court will not interfere with an exercise of discretion unless the appellant can establish one of the grounds specified in *House v The King* (1936) 55 CLR 499 at 505.

One matter that must not be overlooked is whether the error that you now rely on was raised at the trial. An appellate court will allow a point to be raised even though it was not raised at the trial. But it will do so only if it is persuaded that evidence could not '*have been given which by any possibility could have prevented the point from succeeding*' *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438. A final matter which should not be overlooked in determining whether to appeal is whether the error affected the result. Unless it did, the appeal will be denied on the ground that there has been no miscarriage of justice.

It goes without saying that, whatever the form of error, each ground of appeal should be stated concisely.

### Orders sought

The orders sought in the notice of appeal should be the subject of careful thought and should be drafted with precision. It is surprising how often the orders sought in a notice of appeal do not reflect what the successful party is seeking. Are you seeking the entry of a verdict and judgment, a new trial, a declaration of right or liability, a mandatory order, a reference to a referee or expert or a variation of the orders made in the court below? In framing the orders sought, you should also remember that intermediate courts of appeal often have wide powers to end the case without a further hearing. Whether

they will do so usually depends on the presence of credibility issues. The court is most unlikely to determine the case itself if it must determine issues of credibility.

### The written submissions

In the modern era, written submissions have become as important, if not more important, than oral argument. In the United States, where oral argument is frequently limited to 30 minutes on each side in an appeal, the written argument is the primary tool of persuasion. That point has not yet been reached in Australia or the United Kingdom, but more and more in those jurisdictions, courts increasingly rely on the written submissions of the parties. Written submissions make the first impression on the appeal court – each judge will read them before the hearing commences. They give the court an overview of your whole case quicker than is possible in an oral argument; they will frequently be referred to when the judges are writing reasons to make sure they have not missed any argument; and, in my experience, they are the last thing that a judge looks at before finalising the judgment.

If you wish to avoid irritating the judges, it is imperative that you read the relevant rules of court and practice notes concerning written submissions and comply with the directions contained in them. Make sure that the chronology you file is detailed and refers to all relevant matters and the evidence including exhibits that relates to them. Do not attempt to avoid page limitations by using very small print or the device of attaching annexures to the submissions. And emphatically don't seek to file additional submissions after the Appealed Index has been settled or after the hearing of the appeal unless the rules of court or an order of the court permits it. The judges will not read them, and I have seen a deputy-registrar tear submissions out of an Appeal Book because they did not appear in the settled Appeal Index.

### Books on legal writing

Unlike the United States, the tradition of Australian law is oral. Many counsel – including leading counsel – have had trouble adjusting to the demands that written submissions make on legal practitioners. If you have not already done so, it is a good idea to study the United States books on legal writing, particularly books on writing in the appeal setting. Among the books I would recommend are:

Wiener, *Effective Appellate Advocacy*

Wiener, *Briefing and Arguing Federal Appeals*

Stern, *Appellate Practice in the United States*

Aldisert, *Winning on Appeal*

### Content

Good written submissions will be brief, clear and accurate. They will expound a theory of the case that is based on the evidence, that seems to be fair and just, that is not inconsistent with accepted law, that is logical and accords with common sense and that explains away any unfavourable facts or countervailing legal arguments. You should always attempt to identify the assumptions the judges may make about the case – and your case in particular – so that you can exploit or rebut those assumptions in your submissions. Remember also that you are in the explanation business. So acquaint the appellate judges with information and arguments – much of which will be new to them – by a step by step process. The greatest sin for a writer is to have the reader feel lost so that he or she must go back and re-read material to understand what you are saying.

Your written submissions should:

- state the issues for decision at the beginning of the written submissions. It is often helpful to set them out under the heading: Question/s Presented;
- state your answers to those issues with a short summary of your reasons for the answers before setting out the argument, so that the court can understand your case in a few sentences; and
- present an argument broken down with point headings.

Importantly, you should never write or dictate your submissions without making an outline of its contents. Without an outline, unless your mind has the recall and clarity of a Bertrand Russell – who is said to have dictated his books straight out of his head – your submissions will probably lack coherence, particularly if they are of the maximum permitted length. You are likely to avoid a good deal of re-writing if you make an outline. The outline may change as your writing progresses, but it should be amended and serve as your guide to a coherent document.

It is important that you identify precisely the error which you want to reverse, preferably by a verbatim quote or, if it is too long, by a short summary and always by reference to an appeal book page. It is surprising how often counsel assume that it is sufficient to rely on a statement that the court below erred on a particular point without showing the court exactly what the judge said. Too often, appellate judges are forced to say, 'Where do we find that?'

You should always state your legal or factual proposition before going to the argument in support of it. You should always avoid the court thinking, where is this going or to what issue does this go? If it is a legal proposition, tell the court

what it is before you seek to make it good by reference to the interpretation of a statute or decided cases or legal articles. If it is a factual proposition, tell the court what it is before you go to the evidence that shows the proposition is right. And make sure you deal with all cases that arguably support the other side. The best way to deal with unfavourable cases is to argue that the facts of your case are so different that the reasoning in the unfavourable precedent does not apply. You should attack the correctness of an unfavourable precedent only as a last resort. Even the most radical judges will overrule a precedent only as a last resort unless it is demonstrably wrong. In most cases, if you have to attack the correctness of a precedent, see if you can show that circumstances have changed since the case was decided and would now be decided differently or that its holding has been undermined by later decisions or legislation. Otherwise, you will be forced to criticise its reasoning, which should always be avoided, if possible. Make sure also that you answer the arguments put forward by your opponent. You cannot rely on the inherent strength of your own case.

It is important that the written submissions do not overstate your case. If they do, they:

- will be a red rag to the court;
- will be a source of many early questions at the hearing which may be and usually are hostile;
- will produce questions that interrupt the flow of your argument;and
- may result in your better points being lost in the discussion of your overstated case.

Instead of overstating the case, it is far better to recognise its weaknesses. It is sure to have some. The court will appreciate your candour in recognising and dealing with them in your written argument. Chief Justice Gleeson has correctly said ((1998) 17 *Australian Bar Review* 9):

> Clients are usually ill served by those whose passionate commitment to their cause blinds them to its weaknesses and sometimes even its strengths.

Your argument should invariably follow a logical order. Your submissions should begin with a general statement of those facts necessary to understand what the case is about. In the United States, this is usually done under the heading: Statement of the Case. It is a heading I often used in writing judgments, and I have noticed that McColl JA also uses that heading. However, those facts, statutory provisions and legal principles dealing with a particular point should be dealt with in the discussion of that point, not in the opening section. Importantly, don't set out statutory provisions or legal principles in the early part of the submissions and then deal with an issue to which they relate many pages later. Appellate judges are busy people, and they do not like to waste time having to turn back to look at statutory provisions or legal principles which are not firmly in their minds when they come to your argument.

You should always argue the best points first. If you begin with weak points, the judges will be wondering whether the appeal is a waste of time. That is not a state of mind that is receptive to allowing an appeal. Each point in the argument should be the subject of a heading in capitals, and an independent and free standing ground for finding in your favour. The heading should be a general proposition. The argument in support of each heading should be followed by a series of logical subheadings and sub-subheadings that support the general proposition. Thus, in a defamation action where the judge has found that the publication was made on an occasion of qualified privilege and the appellant has failed to prove that the publication was actuated by malice, the points and sub-points in support of the appellant's argument might follow this format:

### First point

**The District Court erred in finding that the occasion was one of qualified privilege because the appellant had not proved malice.**

Then set out the finding and the Appeal Book reference.

### First sub- point

**Malice is established in a defamation action and defeats a defence of qualified privilege if the defendant was actuated by an improper motive in making the publication.**

Then set out and discuss the authorities to persuade the court that this proposition is correct.

The next sub-point should show the court where the trial judge erred.

### Second sub-point

**The judge's reasoning shows that he/she mistakenly equated malice with ill will when he/she said, 'The plaintiff's failure to establish ill will on the part of the defendant means the claim of malice fails.'**

Then set out or summarise the relevant passage in its context and cite the Appeal Book pages.

Logically, the next sub-point should prove the defendant's motive.

### Third sub-point

**The defendant's motive in publishing the defamatory material was that he feared the plaintiff would get the contract for which the defendant had tendered.**

Then summarise and discuss the evidence showing that the defendant made the statement defamatory of the plaintiff because he was motivated by the fear that he would not get the contract for which he tendered. If the judge has rejected the evidence of a witness or failed to draw a relevant inference that you rely on in respect of this sub-point, it will often be necessary to make another sub-point, e.g.,

**The judge erred in rejecting the evidence of Ms Black.**

Whether or not you have to interrupt the flow of your argument to persuade the appellate court that a particular finding of fact should be reversed, the argument must show that the defendant's motive constituted malice in this branch of the law.

### Fourth sub-point

**The defendant's motive was an improper motive for the purpose of the law of qualified privilege.**

Then set out and cite identical or analogous factual findings in other cases. This is most effectively done by blending the reasoning and facts of the illustrative case/s with the facts of your case. If there are no such cases, it will probably be necessary to discuss the rationale of malice in the law of qualified privilege to show why the factual findings for which you contend are within the rationale. Alternatively, you might show why it is consistent with good legal policy to bring your factual contention under the rubric of malice.

Remember point headings and sub-headings are most effective when they identify the legal propositions for which you contend. They should also identify and incorporate the determinative facts that are essential to your case. They should always be forceful, argumentative propositions that advance your argument. You should avoid topic headings. In the above example, headings such as Malice, Motive, Improper Motive tell the court little and do nothing to advance your argument. It is much more persuasive to have forceful, argumentative headings.

## Observe the rules of good writing

You should write in the active voice, as often as you can; passive voice often leads to ambiguities as to who did what. The active voice is more forceful and allows for more concise writing. You can usually eliminate two or three words in a sentence if you change from the passive to the active voice. Writing is most effective when the subject, verb and object of a sentence are close together. Prefer verbs to nouns, particularly weak nouns. Verbs are more forceful. Use concrete nouns – e.g., Holden instead of car, vehicle or conveyance. Avoid nominalisations – verbs turned into nouns. It is much more forceful and shorter to write, 'She resigned' instead of 'She submitted her resignation.'

You should use every day words, but avoid slang and jargon. You should keep the sentences short but vary their length. Try to put qualifications, exceptions or modifications in a separate, following sentence rather than loading up a sentence with qualifications or exceptions. Put main ideas in main clauses and subordinate ideas in subordinate clauses. When dealing with an opponent's argument, it helps to weaken it by putting it in a subordinate clause and your rebuttal in the main clause. You might say, for example, 'Although the defendant says that Dr X said the defendant's opinion was in accord with professional practice, Dr X said that only a minority of doctors would have given such an opinion and that she herself would not have done so.'

You should also aim to give context to a point or idea before setting out its detail. New information is best put at the end of a sentence after a transitional, contextual introduction at the beginning of the sentence. Try to avoid using adjectives and adverbs, so far as you can. Avoid prepositional phrases introduced by 'of', 'to' and 'after' or 'in relation to'. Adjectives, adverbs and prepositional phrases clutter your sentences with unnecessary words and rob them of vitality. You should seek to avoid clutter by eliminating every needless word. And always avoid using barbarous legalisms such as 'thereof', 'hereinbefore' and the word 'said' when used as an identifier.

Organise your paragraphs so that the first sentence introduces a new point, usually a legal or factual proposition and make sure that the rest of the paragraph develops that point.

Finally, check all your references, legal and factual, and the wording of quotations.

## Study the standard texts on good writing:

Strunk and White, *The Elements of Style*

Kane, *The New Oxford Guide to Writing*

Zinsser, *On Writing Well*

Williams, *Style Toward Clarity and Grace* (which I think is the best of all).

### Special leave applications

The written argument is more important in a special leave application in the High Court than is the oral argument. In over 90 per cent of cases, the written argument in the special leave application is decisive of the grant of an appeal.

As I said in *Milat v The Queen* [2004] HCA 17 at [29]:

> … the written submissions are the primary vehicle for persuading the court that there is a point worthy of a special leave grant. The 20 minutes allotted for oral discussion are not a substitute or supplement for the written argument. The principal function of the oral argument is to enable the Justices to test the arguments of the parties by a Socratic dialogue, to ensure the parties deal with the key points of each other's case where their written submissions do not do so and to enable parties to emphasise particular points in the written submissions if they wish. Oral argument is not granted to enable a party to introduce new arguments.

In applying for the grant of special leave, an applicant must bear in mind that the primary function of the High Court in hearing appeals is to lay down principles of law that will be of general benefit to the community and which can apply to many cases beyond the case that is the subject of appeal. The High Court's primary function does not concern the correction of error. Consequently, something more than error must be shown to attract the grant of special leave. Grounds that may attract a grant include:

- The case involves questions of public importance because of the issues at stake or their general application
- The case involves a constitutional issue or an issue under federal law; federal law issues frequently have significance for the whole of the Australian community
- The case is one where there are divergent judgments in the various States on the issue
- The case involves a miscarriage of justice in the sense that there has not really been a trial according to law
- The case is important to the parties and there has been a division of opinion in the courts below on the law or its application

Factors that may tell against the grant of special leave are:

- The decision below is not attended by sufficient doubt
- There have been unanimous findings against the applicant at the trial and intermediate appellate level
- The amount involved is small and the cost of an appeal will be a burden on the losing party
- The case is not a suitable vehicle for an appeal because the court will have to determine issues of fact before it reaches what appears to be an important point of law or because a Notice of Contention filed by the respondent may be upheld with the result that the point, said to warrant the grant of leave, may never have to be determined.

### The oral argument of the appeal

Much of what I have said about the written submissions applies to the oral argument on appeal. It is especially important that you have thoroughly read every page in the Appeal Book and can quickly take the court to the relevant pages when asked about a matter. You should begin your argument with a statement of the issues. Then state the answer to those issues in summary form. Sometimes, instead of beginning with the issues, the case will lend itself to a humorous, moving or exhilarating introduction which is very effective. Walter Sofronoff QC began his successful argument for the Wik people in *Wik Peoples v Queensland* (1996) 187 CLR 1 by painting a moving word picture. He described the Wik people going about their traditional lifestyle in 1915 and 1919 oblivious to the fact that 800 miles away on the same days in those years, events were occurring at the Land Titles Office in Brisbane that concerned their land. At the Titles Office, European people were registering leases that Queensland later claimed dispossessed the Wik people of the land they had lived on and used for hunting and fishing since time immemorial and despite the fact that there was minimal, if any, subsequent 'activity on the part of the pastoral lessees in exercise of their leashold rights.'(ibid at 218).

As you develop your argument, make sure you distinguish between good and weak points. Either abandon the weak points or inform the court that you rely on your written submissions in respect of those points.

Try to be as brief as you can. But if necessary, do not hesitate to re-state a submission if you think the court has not grasped its import. Counsel will often say, 'I'm not sure that I put that point clearly enough. What I am saying is…'

Matters to avoid include:

- Critical or sarcastic statements concerning the trial judge or judges in the intermediate appellate court
- Displays of anger or irritation because of questions from the bench
- Reading to the court long passages from the evidence, the judgments in the court below and the precedent cases.
- Reading out the facts of precedent cases

- Leaning on the lectern instead of standing up straight
- Moving about while addressing the court

Instead of reading out long passages from the evidence or judgment, give the court page references, let the court read the relevant passage and then make any comments you wish concerning that passage. It is often sufficient to simply refer the court to those parts of your written submissions commenting on the passage in question.

Questions from the bench should be welcomed because it gives you the opportunity to deal with issues that may be troubling the judges. Socratic dialogue is at the heart of the appeal process. As Tom Hughes, QC said, when arguing the *Hospital Products Case*, ((1984) 156 CLR 41), submissions are best tested 'in the crucible of oral discussion'. Questions from the bench should not be regarded as necessarily hostile or supportive, and they should always be answered courteously and thoroughly. Before the hearing, you should spend a good deal of time preparing your answers to the questions you anticipate that you will get from the bench. It will pay dividends because it gives the court confidence that you are a counsel who has given careful thought to the case and its problems and that your solution to those problems is probably the best solution. You must expect as a minimum questions concerning the other side's case. Solicitors and counsel should work together to anticipate and work out answers to difficulties and potential objections to your argument. Whenever possible, you should try to turn hostile questions to your advantage by using your answer to them as a platform for further elaborating your argument.

Occasionally, but less frequently than in earlier times, your answers to questions may be sought for the purpose of undermining the apparent view of another member of the bench. This is a situation that will call for considerable skill and tact on your part because your answer – whatever it is – may cause you to lose the vote of one or more of the judges. Fortunately, the relationships between and the manners of appellate judges seem much better than they were in earlier times. It is unlikely that we will see again judicial conduct such as Starke J wrote about in *Federal Commissioner of Taxation v Hoffnung & Co Ltd* (1928) 42 CLR 39 at 62:

> This is an appeal from the Chief Justice, which was argued by this court over nine days, with some occasional assistance from the learned and experienced counsel who appeared for the parties.

If you are for the respondent, you must grapple with the appellant's case as quickly as you can. Sir Anthony Mason has said ((1984) 58 ALJ 537 at 543):

> It is vital to make those points which damage that part of the appellant's case which seems to have attracted the court, and it is important to make those points without delay. There is an element of anti-climax in beginning with inconsequential matters and it may convey the impression that there is no real answer on the critical issues.

There is nothing more anti-climactic in an appeal, after a persuasive argument by the appellant, than counsel for the respondent rising to his or her feet and saying something like, 'I want to correct the date that appears in footnote 12, the reference in footnote 42 and the quotation in footnote 73' and then go on to make the corrections. I have seen such occurrences on many occasions. Justice Kirby, who used to sit next to me in the High Court, would turn to me and we would shrug our shoulders in bewilderment at the lost opportunity to make an immediate impression on the minds of the judges.