A GUIDE TO WRITING SUBMISSIONS

Why this guide?

This guide addresses the following needs:

- Being explicit about the form requirements of written work in practice-centric units.
- Describing the process involved in writing, expressing, formatting and submitting legal arguments;
- Providing scaffolding instructions on how to write an appeal case submission.

1. Prepare you submission e-file

The first step in preparing written submissions is to fill out the variables in your precedent document. Filling out the submissions precedent may seem clerical and bureaucratic but it is vital obtaining a timely hearing in court and ensuring opposing counsel and the Judge have read and understood your submissions. Explaining to your client why there has been a stay in proceedings because of a form error is embarrassing, expensive and can detrimentally impact on your career.

In this course we will use the High Court precedent documents. You will find these at - http://www.hcourt.gov.au/registry/filing-documents/forms

Download the correct document, then access the seminar information for the relevant week, either in the Synopsis or on MyLo. Make sure you have the right details to fill the submission precedent with. Remember that each separate case listed for hearing must have its own authorities cover sheet. Now:

A. Form & Variables

Courts are very finicky about form and procedure. Check and double check you have inserted the right provisions and deleted any non-essential information. That requires, on each case-file in the folio, that you:

i. Fill in the party names. If this is not done your document may not be filed or listed. Worse still it will not be accepted into Court.

ii. List all parties. Make sure that, if there are multiple parties you fill in the party names separately under the Applicant or Respondent titles.

iii. Insert case file no. Make sure you have included the right case file number. Your client may actually have several cases listed, some against the same opponents. If you don't check the case file number allocated to the matter at hand you may find that it is not properly listed or there are a stay of proceedings.

B. Grammar & Expression.

Check your spelling, grammar and expression. Your sole physical 'product' as a lawyer, are your your written words. These should exhibit a level of professionalism and attention to detail above and beyond the general public; otherwise what is your client paying you for?

C. Format.

Court registries will also reject documents that are not properly formatted. Continuity in formatting ensures quicker processing but also equality amongst pleadings – party A has as much space and ability to express themselves in it as party B. Make sure you adhere to the formatting requirements. You will find these in the 'Seminars' folder on MyLo.

D. E-file conventions.

Make sure your electronic document is correctly named for e-filing. A number of jurisdictions now accept electronic submissions. However, for them to be properly processed the electronic file must contain the right naming convention so they are associated with the right e-file. You will find the e-file naming conventions in the Seminars folder.

You are now ready to analyse the issues and write your arguments.

2. Writing your seminar submission

Before you begin writing, or analysing the issues, make sure you are well grounded in the facts of the case (hypothetical).

A. Facts

Do not restate the facts (in your Argument section). You are not expected to recite the facts either in your seminar written or oral submissions or your exam. The facts of this case are agreed (as is the case in most appellate trials and many public law cases). Only highlight facts as a way of making out an element of an argument or in the context of your application.

B. Issues

Submissions to Court are presented in the form of questions and the arguments by the parties relating to those questions. It is for the Court to give the answer to the questions having considered the arguments of both parties.

Ordinarily the questions are determined by the parties pre-trial as 'issues' they cannot resolve amongst themselves, or require the Court's determination before they can resolve a larger dispute. In the hypothetical we have provided them to you.

Form of issues. Issues often are inter-related and overlapping forming part of an overarching argument or as a consecutive series of sub arguments. Subsequently they are generally presented in two ways:

i. A series of questions leading up to a conclusion; or

ii. A cascading series of questions that will individually result in an outcome if answered in one way (if the first question is answered 'YES' then the Applicant wins the case, but if it is answered 'NO', then the parties ask the court to consider an alternative argument which if the court answers one way may mean the Applicant wins and so on and so forth.

In practice both parties include the issues in their written submission. On rare occasions they are differently phrased, but generally they reflect the agreed questions to be addressed by the Court and are thus identical.

Do not restate the issues (in your Argument section). In our hypothetical submissions, to save space, you do not need to re-write the issues into your Arguments - either as headers or within the arguments themselves. However, you will need to address your arguments to these issues in the same order and using the same number as listed and it may help to use abridged issues as your headings .

C. Argument

Following the statement of issues (remember you do not have to re-state the issues in this hypothetical exercise) written submissions will ordinarily contain the argument of the particular party with standing in the matter. Ordinarily this occurs as follows:

- The pleading party (Applicant/Appellant/Plaintiff) will make submissions;
- Then the responding party (Respondent/Defendant) will enter submissions in reply; and

- The pleading party will have a chance to update their submissions or make counter-submissions in reply to the Respondent.

This process will go on until each side is satisfied their argument is the one that they will make in Court.

In our hypothetical situation each party will make their written submissions at the same time. While this makes things easier and more efficient it means that the mapping exercise discussed below is more important.

The purpose of arguments

Written submissions contain the **skeleton** of arguments that will be presented in court and a list of authorities that will be cited. This is so that both the bench (the Judge or Judges) and the bar (the counsel making appearances on behalf of the parties) are fully apprised of all the law and arguments being made and are on the same page. The role of the Court is to make determinations on the law and evidence and the role of the barrister is to inform the Court about the law and their client's argument about how it is to be interpreted.

Be aware that the primary role of both bench and bar is to the administration of justice, not any individual person. That means if an argument is going to be raised, the Bench and the opposing counsel need to be prepared for it, and to have any cases you rely on to hand. Otherwise how will they know that what you are claiming is the law, *actually is* the law?

Form of arguments

Headings. Your arguments should be divided under issue headings. We would suggest you use titles, paraphrasing what the issue is about. i.e. "Do the parties have standing to bring an action under the Administrative Decisions Judicial Review Act" could be suitably paraphrased to "Standing". You may also wish to use sub-headings relating to the elements that you are attempting to establish to help guide the flow of your argument (i.e. "A special interest", "Matter", "Justiciability").

Authorities. Your arguments must be qualified by relevant authorities. Authorities may either be footnoted, or cited in text - different courts have different form rules. All courts require an authorities coversheet. The authorities coversheet indicates to the judge (or seminar leader) which cases you will rely upon and allows her or him to have them to hand when you make your oral submissions.**

- In our hypothetical we would prefer you use in-text authorities given the limits on word count.
- Once you have properly cited your authorities on your authorities coversheet you may use in-text short-hand to refer to these authorities in

your arguments. That is ([Case name],[page number]) i.e. (*R v. Burgess*, 24).

- You may have some authorities which have identical names; in that case include the year i.e. (*Commonweath v. Tasmania* (1983), 453).
- You can use accepted legal short-hand for some titles. These include "R" for "The Crown", "Cth" for "Commonwealth" and abbreviated state names i.e. "NSW"/"Tas"/"Qld","Vic" etc.
- Some cases are known by a short-hand published by the Court in its judgment. You will find this in the brackets after the party names i.e. '*Commonwealth v Tasmania ("Tasmanian Dam case")* (1983) 158 CLR 1'. In that case you may use the allocated shorthand in your arguments. i.e. "(Tasmania Dam, 351).

** Realistically you will complete the authorities coversheet after you have written out your submissions and determined what evidence base you will rely upon for your arguments.

For the present it is worth noting that **citations (year, report, volume, start page) are extremely important.** If you cite a case from the Commonwealth Law Reports (CLR) that is the case you must have to hand when you are presenting orally and that is the case you must have actually quoted from.

Page numbers differ between reports, so if the judge has the CLR, because that is what you cited in your authorities list, but you only have a downloaded copy from AustLII (which is in an unreported format, not in the CLR format) then the judge will not be able to follow your arguments. Avoid paragraph numbers unless absolutely necessary - i.e. there is no reported judgment. Some reports start paragraph number at the beginning of the case and continue them incrementally throughout. Other reports begin paragraph numbering afresh with each judgment.

Matching and confirming your citations is a serious business. **If you cite cases in your written submissions which do not match the page numbers before the Court on the day then they would, ordinarily, be struck out. I**n the hypothetical mini-moot you will lose marks or be asked to move on to a case you have actually properly cited.

Developing your arguments

Under your argument/issue heading you must set out your written argument and authorities. This takes time and thought. While the popular and perhaps romantic perception of lawyers is as oral advocates, realistically this only reflects a very small proportion of the work that goes into any one case.

Most of a case occurs outside of court, sending communications between parties, writing and exchanging documents, negotiating, researching, analysing and preparing (preparation, preparation, preparation). The same is true of your seminars.

Whilst ultimately you will write opinionated arguments (that is the point), preparing that one sided argument means taking into account all the counter arguments and responses to your argument as well as predicting how the other side and, ultimately the judge will view the issue.

This is very similar in fact to preparing for a problem-solving question in law school. That is:

i. Analyse the issues objectively.

ii Map out the argument you wish to make.
iii. Implicitly or expressly deal with counter arguments or alternative lines of reasoning.
iv. Provide authorities (a legal evidence base) to your argument.
v Write your arguments as a "skeleton of the oral submission".

Map your argument

Now that you have a good grasp on the issues you need to set out the line of argument relating to each one. In a famous U.S case Judge Cordoza described the role of a judge determining which submissions to accept as as follows:

> "It is easy to cite dicta that seem to give [each side's arguments] prominence … There are cross-currents and eddies in the stream. [The judge must] follow the main course."
> *Loucks et al. v. Standard Oil Co. of New York* (1918) 224 N.Y. 99

Your role as an advocate is to scout ahead, map out the stream and find a way of convincing the judge that your course is the correct (main) one. How you do this will depend on the nature of the issue and the nature of the law.

For instance if there is an accepted test you state what the test is, then structure your line of argument around the elements of that test.

Alternatively if there is a debate about the law or test, then you might start by highlighting the debate, stating the test you prefer, making an argument as to why it is the right one, then going on to apply the facts to it, and then 'in the alternative' apply the facts to the test you don't prefer, in a way that still results in the outcome you want.

This is very similar to how you would map out a traditional problem solving answer.

At each juncture in your argument there will be a counter argument which you need to deal with.

Counter-arguments and opposing lines of reasoning

By the time you have reached the point of formulating written submissions the following must have happened:·

- An action or exercise of power by one person/body that affects another;
- A denial by the affected party as to the legality of that action or exercise;
- A disagreement between the parties about the status of the law which cannot be resolved between the parties themselves; AND
- The agreement of the Court that the law is uncertain, or, at the very least it is not immediately obvious how the law should apply to the facts.

In other words *there are no court cases that are one sided*.

Your client will generally view the matter from their perspective. Recognising there is a contrary perspective – potentially a valid and strong contrary perspective – is central to your role as a lawyer. To effectively represent your client you must predict, respond and (hopefully) overcome the other side's arguments. That is why problem-solving skills are so central to legal education.

Written submissions are not, however, problem solving questions. They are, naturally, opinionated and one-sided. You are trying to convince the judge your view is the right one. Hence you do not write in an openly objective way 'i.e. the Applicant has a strong argument that …'. Instead you must choose how to recognise the other side's argument without elevating it beyond your own or providing it strength. In fact, you must expressly or impliedly recognise it and then go on to undermine it. There are a variety of ways to do this – you must choose strategically which one is best – including, but not limited to:

Silent implication. Not mentioning the counter argument but implicitly noting there are weaker alternatives. i.e.

> "Mason J's test is the accepted test for nationhood power as was recently confirmed by both the majority of the High Court , and Hayne J in dissent, in Pape".

This implies there may be an alternative test, but does not credit it with any compelling strength whilst solidifying your own position as the correct law.

Directed implication. Mentioning the two (or more) possible lines of reasoning, but not openly conceding that the other alternative line of argument is applicable to these circumstances. i.e.

> "There has been disagreement about the source of nationhood power and subsequently the scope of legislation made under it. However, in *Pape* the Majority of the High Court, clarified this uncertainty by articulating that the power finds its source in ss 61 and 51(xxxix) alone (see French CJ at 41). As the High Court now accepts that nationhood power derives its constitutional validity from executive power, it must also adhere to the same constraints – namely the restriction on punitive measures."

This recognises disagreement, implying the decision could go both ways (without openly stating that), but pre-emptively blocks the line of reasoning that goes against your client.

Express recognition. Expressly flagging a counter argument – potentially one that reflects the contemporary majority view of the law – but then going on to explain why it should not be favoured. This is important when you wish to rely on dissents or more convention / structural / policy based arguments and ensures you don't look like you are putting bad law to the Court or making unrealistic or unsustainable arguments. i.e.

> "Whilst the Majority in Pape determined the nationhood power permitted intervention in that specific case it must be noted that: Pape must be understood as a case where all states agreed the crisis was 'national in nature'; the Majority warned against an overly broad reading of the power where this was not the case (French CJ at 41); and, as Hayne J (at 245) emphasised, Mason J's test must be applied in its entirety – where states can otherwise deal with the crises, the Commonwealth lacks power. The current matter is one of those situations alluded to in Pape and Hayne J's opinion in that case should be preferred."

This recognises there is a more obvious way to go than the way your client wants, but encourages the Court to stop and consider whether it is the correct way in these circumstances, strongly arguing that the other path is the wrong one. Note how the paragraph is opened with a qualifier ("whilst","whereas", "although") immediately framing the ostensibly stronger proposition in a negative way.

Provide authority for your argument

In mapping your argument you should have identified each point at which you are stating what the law is (an assertion of legal principle) or how the law should apply (an assertion about legal application). As with any intellectual exercise or technical discipline the strength and weakness of such assertions must be tested against a discipline specific evidence base. In law this evidence base is generally made up of legal authorities (cases, statutes, secondary legal sources) - as distinct say to science which relies on data or existing literature. The more compelling evidence base the more likely your line of argument will be seen as the correct and main one. That means having a good understanding of the authorities **.

- At this point we expect you, at a minimum* to know and be able to argue based upon, the authorities listed in the synopsis.
- The next level of research would involve reading and citing the authorities listed in your casebook.
- You might also wish to search the legal databases for specific materials that might help you resolve a contentious point.
    - i.e. If you are considering whether schedule 5 of the *Broadcasting Services Act* is inconsistent with a state act, consider whether any other courts have made rulings on section 109 of the Constitution as applied to the *Broadcasting Services Act*.

      o Indeed, you may find that a court has made a decision about inconsistency with respect to Schedule 5 which is contrary to your line of argument. That will then change how you write your arguments.

      o Alternatively it may suit your line of argument, but only if you can establish the two state acts were similar.

* We would expect: a pass to credit answer to rely only on the synopsis/lecture cases; a credit-distinction answer to rely on these plus the casebook; and a distinction to high distinction answer to rely on additional research.

** Note. As a warning do not ever cite authorities you have not read. If you just copy a citation from a textbook without reading the case, knowing the facts, the reasoning and the majority and minority judgments then you are unable to prove to the Court that it is the correct law. The point of advocacy is to discuss with the bench the strengths and weaknesses of the arguments presented. That means engaging and testing the evidence base.

Expect to be asked questions about your cited cases; if you don't know about the case or are unable to take a judge to a relevant passage you will lose marks.

It is better to have fewer authorities that you are well versed in than many authorities you are not.

Writing your arguments

There is no one foolproof way to write winning arguments. If there was then everyone would do it that way and we wouldn't have to go to court. However, there is certainly a set of criteria that the Court is looking for and that will help

your argument gain traction. The Chief Justice of the Supreme Court of Tasmania states the following in Practice Direction 1, 2014:

> "The written submissions required are not full submissions and will supplement, not displace, oral argument. They are to be regarded as a skeleton of the oral submission, stating carefully and concisely the propositions to be argued, and the authorities to be relied upon in support of them, plus, where appropriate, references to the transcript, exhibits or other documents".

You must find a way that provides a framework to your oral submissions that is:

Clear– it should make sense to the judge and opposing counsel on the first reading;

Logical – an argument that does not make sense will not convince the judge your view is the right one.

Structured – this relates to logicality, and clarity. The more structure you can provide, the easier the argument is to follow and understand.

Concise – written submissions are not an essay. They need to flag your client's position, grounds, authority and points that you wish to raise before the bench. It helps guide proceedings and allows the judge and you to move through the issues and grounds efficiently during oral proceedings. You will expand on your written submissions in your oral argument.

Informative – Flagging to the Court the uncertain areas of the law that arise from the issues put to it and how you will attempt to address them.

Evidence based – Any assertions about what the law is or how the law applies, must be informed by proper evidence – ordinarily case-law or legislation.

Opinionated – this is where written submissions differ from a written problem solving question, which requires objective consideration of both sides (i.e. how a Judge would write their judgment). Your submissions reflect the position of your client and are therefore one sided only. That is not to say you don't take into account the other side – that is vital and in fact the process of preparing your written submissions is almost identical to how you would approach a problem solving question – but your arguments are very much written as if your argument is the correct one.

Good luck!

(BG 2014) [Updated 29/7/2015]