

# The appeal

*“Appeal: in law, to put the dice in the box for another throw.”*

*Ambrose Bierce*

Appellate advocacy is different from first instance advocacy. The most obvious difference is that this is not the first time the matter has been considered by a court. You do not start with a clean slate.

Your appearance will be designed to persuade the appellate court that another tribunal has erred in a way that needs to be corrected. Alternatively, if you appear for the respondent, you will be seeking to persuade the appellate court that intervention is unnecessary.

Commonly the appeal will focus upon the considered reasons of the another court recorded in a written judgment or the transcript of proceedings. The slate has been written upon, the water has been muddied, the course of the proceedings will be dictated by what has occurred below.

As always, thorough preparation will be the key to successful advocacy in the appellate jurisdiction. It will be necessary for you to achieve a detailed familiarity with the facts of the case both as revealed in the judgment and as appears from the evidence presented to the tribunal at first instance.

If you come to the proceedings for the first time at the appellate level an effective way of mastering the facts may be by the use of a chronology.

The chronology should record all of the relevant facts and identify the location at which the supporting evidence can be found. Of course you will also need to have a familiarity with and understanding of the applicable law.

Once you are familiar with the facts and the law it is prudent to revisit the grounds of appeal which, in many cases, will have been drawn in haste by another.

The grounds of appeal are the first opportunity that you have to influence the course of the appeal and to commence to persuade the court.

All too often the grounds of appeal which appear in the Appeal Book and

have been the basis of all pre-hearing consideration of the matter by the members of the appellate court, will not be the grounds to be argued.

At the commencement of the appeal counsel will indicate to the court that certain identified grounds are not to be pursued and certain other grounds are to be added. The effect of such an announcement is to tell the court that whatever preparation has been undertaken based upon the abandoned grounds has been a waste of time.

It is therefore prudent to ensure at an early time that the grounds of appeal reflect the argument to be presented.

It is desirable that the grounds of appeal are set out in a logical order and, where there are numerous grounds dealing with the one topic, those grounds are grouped in a convenient way.

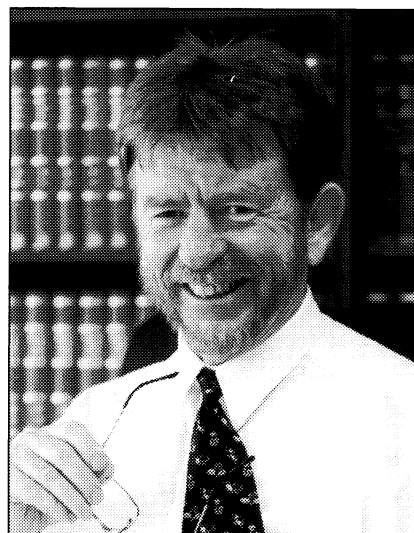
It is unnecessary and unproductive to state the same ground of appeal in numerous different ways.

Similarly it is unwise to include every possible ground of appeal no matter how weak. Be selective. Only pursue the grounds that have real merit.

A ground of appeal when pleaded should make clear the cause of the complaint. The reader should be aware of the precise nature of the problem.

Your next opportunity to persuade will be in the written argument or outline of argument presented in accordance with the rules of the court.

I have previously discussed this issue and will not repeat what I there said except to emphasise the importance of recognising and taking full advantage of the opportunity to persuade that arises.



*Hon Justice Riley*

Included in the written material to be placed before the court will be your list of authorities. That list should be limited to the leading authorities.

There need only be reference to other cases if there is some compelling reason for so doing.

So far as is possible references should be to the authorised reports and should include the page or paragraph numbers to which attention is to be drawn. It is of little help to refer simply to the Tasmanian Dams case or, indeed, any substantial case without directing attention to the relevant part of that case.

Save for exceptional circumstances it is likely that you will limit your list of authorities to those of Australian Courts. This will be especially so where the appeal is to be heard in the intermediate courts. Whilst a novel point may call for a consideration of the position beyond Australia this will not be common in the intermediate courts. In the High Court there is clearly greater scope for reference to what is happening in other jurisdictions and in particular in England, the United States, Canada and New Zealand.

In preparing for an appeal you may wish to commence with what one of Australia's leading appellate advocates, Mr D F Jackson QC, calls the "basic approach".

*continued next page*

*Advocacy, from previous page*

He described this as follows:

*There is no special mystery about appeals. As in any litigation the secret of success is to know what you are doing, and why. In appeals that manifests itself in three broad issues. They are:*

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

*(b) Why is it said to be wrong?*

*(c) What is the consequence if it is wrong?<sup>1</sup>*

Again you will develop a case strategy and the presentation of the argument will at all times be informed by reference to that strategy. As part of the strategy you will consider what is and is not to be argued, the order in which it is to be presented and the most persuasive method of presentation. In addressing these issues in preparing for your oral presentation in court you should bear in mind that the court will have received and considered your written submissions. There is no point in re-reading those to the court. There is no point in presenting the same argument in exactly the same way as appears in the written material. To do so is to waste an opportunity. A fresh approach consistent with your written submission is called for.

As part of your preparation you should anticipate the questions that are likely to come from the Bench. Such questions are likely to flag significant concerns held by the questioner and, if persuasively answered, can be decisive of the outcome of the appeal. You should therefore anticipate such questions and, when the question is asked, if possible, address it immediately. If you can not do so without laying some ground work then let the court know that you will answer the question and the method by which you propose to do so. Providing an answer to the question should be a priority.

<sup>1</sup> Appellate Advocacy D F Jackson QC (1991-1992) Vol 8 Aust Bar Rev 245

## **nt women lawyers association**

# **A great time to join the Women Lawyers**

The Dry season has arrived and Darwin is the most pleasant place to be whilst our southern counterparts are freezing.

It's also one of the busiest times of the year, and most of us have many social occasions to attend.

I understand that we are all busy and have many facets to our lives, but we need your support.

The Quiz Night was successful, though it was a shame to see such little support from legal firms in Darwin, most of the attendees are friends and family, and I thank them all very much for attending.

The prizes were great. A big thank you to the Fannie Bay Shopping Centre for the wonderful basket of goodies, Centrebet for a voucher.

A big thank you to friends who helped with the questions.

Our thanks also to all those who attended the Patrons Drinks on the Supreme Court Balcony.

It was a great chance to mingle and look out at the wonderful view of Darwin from the balcony.

Judge Thomas very kindly sponsors this event herself, and we thank her for patronage.

**MEMBERSHIPS EXPIRE ON 30 JUNE 2003.**

IT IS ONLY \$35.00

MEMBERSHIP FORMS WILL BE ON HAND AT THE PATRONS DRINKS.

THEY CAN ALSO BE OBTAINED FROM ME OR FRIEDA EVANS, SUPREME COURT LIBRARY.

**AUSTRALIAN WOMEN LAWYERS**

I attended the Australian Women Lawyers Board Meeting (AWL) on Sunday 13 April 2003.



*Sandra Robinson, president, NTWL*

It was a marathon event, starting at 9am and finishing at 4.30pm.

I will publish the budget and the minutes of this meeting when they are finalized.

It was great to catch up with these women who are really committed to raising awareness of women's issues in the law.

### **INDIGENOUS READERS COURSE**

AWL is sponsoring an Indigenous Readers Course for the Bar.

This is in conjunction with the University of New South Wales.

All of the graduates currently involved in this program are men.

We would really like to see a woman enter the course.

If there are any indigenous lawyers out there who are interested in going to the Bar and would like to find out more about the Course, please contact me on 8981 3133.

### **THOUGHT FOR THE MONTH**

**MUST BECOME MEMBER OF NT WOMEN LAWYERS!**

**MUST RENEW MEMBERSHIP OF NT WOMEN LAWYERS!**