

Cairns 20 June 2019

Wanted: Oral advocacy, apply at first instance

How the undiscerning use of tender bundles, evidence-in-chief by affidavit or report and long form written submissions impairs effective advocacy and delays justice.

I intend tonight to make good the case for the following proposition: the over-supply of documents to a trial judge in the civil jurisdiction impairs effective advocacy *and* delays justice.

Those documents take the form of tender bundles, evidence in chief by affidavit or report and long form written submissions. The undiscerning use of those devices has become so incrementally ubiquitous that their twin evils parade openly before, yet largely unrecognised by, many judges and advocates.

Those evils are, firstly, the more that advocates seek to advocate through the undiscerning use of tender bundles, evidence in chief by affidavit or report and long form written submissions, the less disciplined they are about the content of those documents and the more they surrender the opportunity for persuasion which oral testimony and oral submissions provide. Secondly, the more documents a judge is given to read and absorb, rather than the information playing out orally in real time during the hearing, the harder it becomes for the judge to comprehend the evidence and submissions at the time they are presented and the longer it takes for the judge to decide the case.

Acknowledgments

Before elaborating on my thesis there are some matters to be acknowledged. What follows are my own views, not the corporate view of the court of which I am a judge. It should also be appreciated some judges engage more effectively with written information; others find oral dialogue more helpful. The same judge's preference may vary depending on the nature of the

¹ Justice of the Supreme Court of Queensland and Far Northern Judge. The author gratefully acknowledges the research assistance of his associate, Ms Amelia Bell.

case. I also acknowledge the practices I now criticise can have benefits in particular types of cases and were evolved with good intentions for use in such cases. The problem is the *undiscerning* spread of these practices into the many mainstream cases which do not need them. Finally, I confess I have been slow to apprehend the magnitude of the problems caused by judges, including me, facilitating the very practices I now criticise.

Case management mindset

My former timidity on this subject flowed in part from my reluctance to resist the case management mindset which pervaded courts' approaches to managing litigation in the last few decades. The genesis of that mindset is well illustrated by observations in 1995 by Justice Ipp, then of the Supreme Court of Western Australia. In his paper to the Australian Bar Association, entitled 'Judicial Intervention in the Trial Process', his Honour wrote:

Litigation has grown both in complexity and in quantity of cases. The load on judges has increased unreasonably. Governments have failed to provide resources to deal with this major accretion in the demand for court services. Judges have to cope with these changed circumstances. Accordingly, there is a deep need to shorten trial time, save costs and maximise earlier settlements.²

The force of some aspects of that reasoning may have diminished over time. Identifying a "need to shorten trial time", as the means of accommodating the hearing of more cases, assumes that shortening trial time will free up available judge working hours to judge more cases. But, if the method of shortening hearing time is to deluge the judge with documents, it will not deliver a net gain in available judge hours. That is because it shifts much of the time needed to judge the case from the courtroom to the judge's chambers or home office. Moreover, the time spent judging the case outside the courtroom will be longer. That is because the twin hits of less assistance from oral advocacy and written materials of undiscerning quantity and quality slow, rather than quicken, the task of comprehending the evidence, the issues and the merits.

As to the perceived rise in case complexity, Eleanor Roosevelt wrote that each generation supposes the world was simpler for the one before it. Are cases really more "complex" nowadays? Is it not as true now as ever it was that the outcome of most cases invariably turns on only a handful of issues? If there be a relevant generational difference might it actually be

² D A Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 *Australian Law Journal* 365, 368.

this: the digital era has increased society's rate of document creation³ and that numeric increase in documents has correspondingly increased the challenge to litigants of sifting through documents to determine their relevance and probative value. The need for discipline in that process and for courts to insist that only relevant and probative documents should be received in evidence, is therefore more important now than ever.

It appears to be a contradiction of judges' own making that, in the very era when the need for that discipline is more critical than ever, a perceived need to shorten trials has at times resulted in the undiscerning adoption of trial management practices that facilitate the erosion of that discipline; that make it easier for the parties to dump swathes of documents upon the trial judge and thus harder for the judge to render timely judgment. The crowning irony of this unhelpful trend is its adverse impact upon oral advocacy, a discipline which does make it easier for judges to judge.

The role of case management in that collateral damage was well explained in 2010 by Justice Kiefel, as she then was, in her paper, 'Oral advocacy – The last gasp?'. Her Honour wrote:

[T]his more interventionist approach taken by the courts coincided with a marked move away from orality. What the courts required of the parties had to be provided in writing. Statements of evidence had to be provided to the opposing party and the courts at an early point. Chronologies were required. Documents were bundled and indexed. ... [Outlines of argument] came to be entrenched and expanded into written submissions. It would therefore seem to follow that if significant aspects of orality have been lost, it may be that the courts, in seeking to exercise some control over litigation, were the effective cause of it.⁴

In researching this paper with the aid of my associate, Ms Bell, we found research assessing the advantages and disadvantages of some aspects of case management⁵ but no assessment of

³ The photocopier, fax and email were once said to contribute to the tendering of masses of irrelevant documents: per John P Hamilton, 'Thirty years of civil procedure reform in Australia: A personal reminiscence' (2005) 26 *Australian Bar Review* 258, 262-263. These days it is said the existence of electronic documents allows even more substantial amounts of irrelevancy to be amassed: Peter Applegarth, 'The Rise of Documents and the Disappearance of Witnesses' (Paper presented at the Australian Lawyers Alliance National Conference, 20 October 2011) 7-8; T F Bathurst, 'After the Civil Procedure Act' (Speech delivered at the 10 year anniversary of the Civil Procedure Act, 18 February 2015) [16].

⁴ Susan Kiefel, 'Oral advocacy – The last gasp?' (Speech delivered at the Supreme & Federal Court Judges' Conference, Canberra, 27 January 2010) 4.

⁵ A Eyland et al, 'Case Management Reform: An Evaluation of the District Court of NSW and Country Court of Victoria 1996 Reforms' (Report, Law and Justice Foundation of NSW, July 2003); J S Kakalik et al, 'Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act' (Report, RAND Corporation, 1996); J Peysner and M Seneviratne, 'The Management of Civil Cases: The

the impact on the timeliness of judgments in consequence of trial judges acquiescing, in the perceived cause of efficiency, to swathes of documents being dumped upon them. The outcome of such an analysis, if undertaken, might be instructive in an era of seemingly increasing concern about long reserved judgments.

The tender bundle

Turning now to the practices of concern, let us consider the “tender bundle”, also known as the “trial bundle” or the “agreed trial bundle”.⁶

In his 2011 paper, ‘The Rise of Documents and the Disappearance of Witnesses’, Justice Applegarth wrote of the bundle:

As to the mysterious creature known as the “agreed trial bundle”, one of my colleagues once remarked that in most cases the only thing that the parties agree about is that it is a bundle. ... [L]arge parts of it are not mentioned by any witness or lawyer at the trial. Still, we call it the “trial bundle”, and mystery surrounds which parts of it the trial judge is expected to read.⁷

Justice Einstein sought dictionary guidance on the topic, in his 2005 paper on commercial litigation, writing:

I note that the Shorter Oxford English Dictionary includes within the sundry definitions of ‘bundle’ the words ‘to gather (up, together) into a mass – 1690’. There is no doubt but that the profession is currently following the use of the word ‘mass’ in that definition as closely as may be.⁸

The tender bundle is supposed to be a collection of the documents which are critical to the determination of the real issues and which the parties agree may be admitted by consent at the

Courts and Post-Woolf Landscape’ (DCA Research Series 9/05, UK Department for Constitutional Affairs, November 2005). For further reading see, James Allsop, ‘Judicial case management and the problem of costs’ (2015) 39 *Australian Bar Review* 228; Bathurst, above n 3; Ipp, above n 2; Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press, 2011).

⁶ A similar collection of documents for use in facilitating settlement discussions or mediation earlier in the life of a case is described in Practice Direction 18 of 2018 as a “resolution bundle”: Supreme Court of Queensland, *Practice Direction No 18 of 2018 – Efficient Conduct of Civil Litigation*.

⁷ Applegarth, above n 3, 1.

⁸ ‘Reflections on the commercial litigation landscape – lessons from the past – moving forward’ (2005) 26 *Australian Bar Review* 145, 148.

trial. Its use for cases on the supervised case list is promoted by Practice Direction 11 of 2012,⁹ and its preparation is often ordered amidst pre-trial consent directions proposed by the parties in other civil cases.

The assistance the tender bundle gives the court is, supposedly, logistical and legal. “Logistical” in that pivotal documents are conveniently assembled in a single collection. “Legal” in that the discipline of assembling such a collection assists focussed advocacy and, consequently, the trial judge’s understanding of the case. In my experience the tender bundle provides none of those forms of assistance because it is always too voluminous for speedy reference and it buries the relevant documents amidst a plethora of other documents that are not referred to during the trial.

Such a bulk dumping of documents on the court surrenders a valuable forensic opportunity – to introduce supposedly critical documents at a relevant time, with the aid of oral explanation. Indeed, the pedigree and meaning of many trial bundle documents often remains obscure because there is no oral explanation of them in evidence.

Time and time again I have wallowed in trial bundle remorse, castigating myself for admitting into evidence the multiple volumes of lever arch folders masquerading as a so called “bundle”. I bemoan the fact that judging the case would have been so much easier and quicker if the case had been run in the way handed down to us by the accumulated wisdom of judges past; if the parties tendered their documents one by one, as the case progressed, at the time when the document arose as explicable and relevant in the case. Even if such tender is by consent, the judge will then have a realistic opportunity to exercise the quality control which some parties, left to their own devices, seem unable to apply; to then and there query the document’s relevance, pedigree and meaning before deciding whether to admit the document as an exhibit. In that way, the judge will actually keep up with the evidence, grasping its relevance and probative value. Simultaneously, the parties will reclaim their opportunity for the orally integrated, coherent and persuasive presentation of the documentary evidence in the case.

Justice Einstein identified conditional admission as one means by which trial judges may cope with the voluminous nature of trial bundles. His Honour wrote:

It is common to find that hundreds, sometimes thousands, of the documents forming part of the agreed bundle are never referred to during the hearing or

⁹ Supreme Court of Queensland, *Practice Direction No 11 of 2012 – Supervised Case List*.

during submissions. ... My own general practice is to make clear that unless a document has been referred to during the hearing or in submissions, or is referred to in a statement, it will not be taken into consideration as part of the evidence before the court.¹⁰

I used to adopt that practice of conditional admission but became concerned by it for four reasons. Firstly, it is at odds with the general principle that if a document is admitted as an exhibit it is evidence in the case. Secondly, it is distracting to have to continually keep track of which pages of a lengthy trial bundle have been referred to. Thirdly, there is a real prospect of confusion, with a party, the judge or an appellate court wrongly assuming the condition of admission has been met. Fourthly, the practice does nothing to deter parties from tendering voluminous tender bundles in the first place.

Surely the wiser course, and the course which will make for better advocacy and timelier judgments, is to reject the tender of voluminous tender bundles. Such swathes of documents are obviously not what was in contemplation when the “trial bundle” entered the lexicon of trial management.

Evidence in chief by affidavit

We turn next to the substitution of evidence in chief by affidavit.

The practice of written evidence in chief was introduced in courts of equity “upon the assumption that in equity cases the facts were usually not disputed”.¹¹ Its use has expanded in recent decades, particularly in the federal jurisdictions and variably elsewhere,¹² in apparent response to the perceived need to address systemic “delay, complexity and expense”.¹³

In Queensland, with the exception of expert witnesses, with whom I will later deal, there is no default position in favour of written evidence in chief at trial. Rule 367 *Uniform Civil*

¹⁰ Ibid 148, 149. Justice J D Heydon made a similar observation in ‘Practical Impediments to the Fulfilment of Judicial Duties’ (2004) 6 *The Judicial Review* 429, 438.

¹¹ Bryan Beaumont, ‘Written and oral procedures – The common law experience’ (2001) 21 *Australian Bar Review* 275, 276.

¹² Applegarth, above n 3, 3; Bathurst, above n 3, [12]; Hamilton, above n 3; Alan Sullivan, ‘Written Evidence: Witness Statements and Affidavits as an alternative to oral evidence’ (Paper presented at the NSW Bar Association Bar Practice Course, August 2015).

¹³ Bathurst, above n 3, [12]. In 2007 the Hon J J Spigelman reported expert evidence had been identified as the second largest cost in commercial litigation: ‘Commercial Litigation and Arbitration: New Challenges’, *First Indo Australian Legal Forum*, New Delhi, 9 October 2007 cited in J J Spigelman AC, ‘Access to justice and access to lawyers’ (2007) 29 *Australian Bar Review* 136.

Procedure Rules permits directions that evidence in a proceeding be by affidavit. Practice Direction 11 of 2012 also prompts parties in cases on the Supervised Case List to seek directions as to “whether the evidence of some or all of the witnesses is to be given orally or in some other form.”¹⁴

The advantages of evidence in chief by affidavit are said to be: saving court time,¹⁵ avoiding surprise or “trial by ambush”¹⁶ and potentially encouraging cases to settle early.¹⁷ Justice Callinan, of the High Court, was sceptical of such advantages in *Concrete Pty Ltd v Parramatta Design*¹⁸. His Honour observed:

The justifications for the provision of written statements in advance of trial have been thought to be the avoidance of surprise and the shortening of hearing time. These advantages will often be more illusory than real. The provision of written statements by one side will afford to the other an opportunity to rehearse in some detail his or her response. It is also impossible to avoid the suspicion that statements on all sides are frequently the product of much refinement and polishing in the offices and chambers of the lawyers representing the parties, rather than of the unassisted recollection and expression of them and their witnesses. This goes some way to explaining the quite stilted and artificial language in which some of the evidence is expressed in writing from time to time, as it was here. Viva voce evidence retains a spontaneity and genuineness often lacking in pre-prepared written material. It is also open to question whether written statements in advance do truly save time and expense, even of the trial itself. Instead of hearing and analysing the evidence in chief as it is given, the trial judge has to read it in advance, and then has the task of listening to the cross-examination on it, and later, of attempting to integrate the written statements, any additional evidence given orally in chief, and the evidence given in cross-examination.¹⁹

¹⁴ Supreme Court of Queensland, *Practice Direction No 11 of 2012 – Supervised Case List*.

¹⁵ *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 557, 635 [175]; Steven Rares, ‘Judicial intervention and caseflow management’ (Paper presented at the Access to Justice Conference, Johannesburg, South Africa, 7-10 July 2011) [21]; P W Young and Christopher D Curtis, ‘Oral or written evidence?’ (1997) 71 *Australian Law Journal* 459, 459-460; Bathurst, above n 3, [26].

¹⁶ *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 557, 635 [175]; Sullivan, above n 10, 2-3 [1.5]; Young and Curtis, above n 12, 460.

¹⁷ *Atkins v Abigroup Limited* (1998) 43 NSWLR 539, 551. Cf Applegarth, above n 3, 3.

¹⁸ (2006) 229 CLR 577.

¹⁹ *Ibid* 635.

I suggest there are at least six significant disadvantages of evidence in chief by affidavit. The first is the loss on paper of the witness's 'voice'. As Justice Callinan noted, it is commonplace for affidavits to be drafted by lawyers on behalf of the witness²⁰ and to therefore "reflect more of the lawyer's pen than the witness' own account".²¹

Secondly, the *advantages* of oral evidence in chief will be absent if evidence in chief is given by affidavit. Oral evidence in chief is illuminating at many levels. The account of the witness, given in real time, sometimes emerges more powerfully and more persuasively than the written word can convey, particularly when elicited by a skilled advocate. Sometimes the oral evidence in chief, given in the solemnity of the courtroom, does not match the optimistic heights of the pleaded or opened case. The absence of evidence in chief leaves witnesses without a chance to settle into giving evidence in the intimidating environment of the courtroom prior to cross-examination.²² The judge has no opportunity to develop an impression of the witness, not even to become familiar with their pattern of speech, prior to cross-examination. Further, the cross-examiner is deprived of the tactical opportunity of assessing the witness's demeanour and recollection during evidence in chief.²³

Thirdly, the judge may not have had adequate time to read the affidavit thoroughly, before the witness is called. Indeed, the judge might not have been provided with the affidavit at an earlier stage. Of course, the judge can adjourn to read the affidavit and keep the parties waiting but knowing a courtroom is waiting for you, even when you are the judge, will likely result in selective speed reading rather than thorough study of a document.

Fourthly, the judge's capacity to understand the significance of the cross-examination as it occurs depends upon whether the judge has truly understood and absorbed the information in the affidavit of the witness, prior to cross-examination. Whereas the oral evidence in chief will ordinarily assure that understanding, often prompting clarifying questions, it is not assured in the less interactive context of merely reading a document.

Fifthly, linked with that point, the affidavit's content may detract from the communication of the relevant and probative evidence of the witness. It may be written in a way which makes it hard to understand. It may include inadmissible evidence which takes time to sort through²⁴

²⁰ Applegarth, above n 3, 4; Rares, above n 12, [22]; Sullivan, above n 10, 10 [4.6].

²¹ Kiefel, above n 4, 4. See also Young and Curtis, above n 12, 462, 463.

²² Sullivan, above n 10, 12 [4.13]; Rares, above n 12, [21].

²³ Sullivan, above n 10, 12 [4.14].

²⁴ Ibid 14 [4.19]; Kiefel, above n 4, 8; *Toll v Alphapharm Pty Ltd* (2004) 219 CLR 165, 177-178 [35].

and may attract distracting and time-consuming bulk objections at the time of tender. It may be unnecessarily long or annex unnecessarily voluminous exhibits. Oral evidence in chief by contrast “limits the material adduced, since the judge can indicate if it appears to be unnecessary. This is far preferable to requiring one to wade through a vast amount of written and documentary evidence prepared by lawyers.”²⁵

Finally, the mixed mediums involved in evidence in chief by affidavit and oral cross-examination make it difficult to identify, integrate and collectively assess relevant information in real time. Evidence in chief by affidavit therefore tends to diminish the likelihood of a timely judgment.

My own experience of those cases in which I have relented, and agreed to order evidence in chief by affidavit, is that I generally regret doing so and find it harder, not easier, to render a timely judgment. The exceptions are simple cases involving little factual dispute, where the affidavits are well drafted and short. Such cases are rare.

Evidence in chief by expert report

Turning to evidence in chief by expert report, the default position in Queensland, pursuant to *Uniform Civil Procedure Rules* r 427(1), is that the evidence in chief of an expert may only be given by the expert’s report. Rule 427(4) provides:

Oral evidence-in-chief may be given by an expert only—

- (a) in response to the report of another expert; or
- (b) if directed to issues that first emerged in the course of the trial; or
- (c) *if the court gives leave.*

There are sound reasons for r 427. It promotes commitment to a final opinion in advance of trial, which in turn may aid in the early settlement of the trial, hence avoiding other litigation expenses.²⁶ It diminishes the risk and potential cost consequences of experts surprisingly advancing a new opinion at trial.²⁷ Its requirement of written evidence in chief provides a way to reduce the high costs of expert evidence, particularly when parties are able to agree on a

²⁵ Rares, above n 12, [23].

²⁶ Paul de Jersey, ‘Expert Medical Reports – What’s between the lines?’ (Speech presented at the Medico-Legal Society of Queensland Workshop, Brisbane, 3 April 2004) 4.

²⁷ *Adrian v Ronim Pty Ltd* [2007] QSC 73, 26 [77] (Chesterman J).

single expert report.²⁸ Of course, whether such benefits are actually realised depends on the quality of the report prepared.

Expert evidence in chief by report also has shortcomings. It shares the final five of the six earlier listed disadvantages of evidence in chief by affidavit. They are such significant disadvantages that it is very surprising how rarely the party calling the expert seeks the court's leave, per r 427(4), for the evidence in chief to be given orally. The court itself has power to direct the giving of evidence in chief orally, even if leave is not sought by the party calling the witness.²⁹ I have not been able to ascertain how often that occurs. I have often regretted not doing it in cases where expert reports are poorly written.

This brings us to an additional and major problem with expert reports. Many expert reports are poorly written, or at least poorly written for a lay audience. It is rare that an expert report is drafted so well that its content could not be better explained orally.³⁰

It is the lawyer's role, in concert with the expert witness, to ensure expert evidence is presented in a way its intended audience can understand. Many experts are not used to having to explain their specialist knowledge and findings, jargon free, in ways a lay audience will understand. Moreover, most do not have a working knowledge of what the law expects of the content of their report. I speak of "content" not in the sense of what the ultimate opinion should be but in the sense discussed in Heydon JA's seminal judgment in *Makita (Australia) Pty Ltd v Sprowles*,³¹ namely content articulating the foundation for the opinion, such as the facts, the assumed facts and the expertise and reasoning applied. These challenges in presenting expert evidence properly,³² are magnified when parties deprive themselves of the assistance of oral evidence in chief. I have written elsewhere of why experts often do not receive sufficient assistance from briefing lawyers with the composition of a comprehensible report.³³ For present purposes it is sufficient to emphasise that if an expert witness report is difficult to

²⁸ *Daniels v Walker* (2000) WLR 1382, 1387 (Lord Woolf).

²⁹ *Uniform Civil Procedure Rules* r 367(3)(d).

³⁰ *Contra* Fryberg J in *Holdway v Arcuri Lawyers* [2007] QSC 355, 4.

³¹ (2001) 52 NSWLR 705, 743-744 [85]; approved in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 604.

³² So significant that the presentation of expert evidence has attracted much legal writing – see, eg, Ian Freckelton and Hugh Selby (eds) *Expert Evidence in Criminal Law* (LBC Information Services, 1999) 153-154, 239-246; Ian Freckelton et al, *Expert Evidence and Criminal Jury Trials* (Oxford University Press, 2016) ch 3; J H Phillips and J K Bowen, 'Forensic Science and the Expert Witness' (Law Book Company Ltd, 1989) ch 11; Mike Redmayne, *Expert Evidence and Criminal Justice* (Oxford University Press, 2001) ch 4.

³³ J D Henry, 'Expert Evidence – A View from the Bench' (Paper presented at the Australian Lawyers Alliance National Conference, Port Douglas, 22 October 2016).

comprehend, practitioners should consider seeking leave to adduce evidence in chief from the expert.

Written submissions

We arrive, finally, at the subject of written submissions. At the close of the evidence in civil trials, before the commencement of oral submissions, it is common for counsel to hand up lengthy closing submissions in writing. To remove doubt, by “written submissions” I am not speaking of mere outlines of argument but of full closing submissions made in writing. They are not of short length, unlike the maximum 10 page written outlines of argument in Queensland’s Court of Appeal or the maximum four page written outlines of argument in the applications jurisdiction.³⁴ They are typically much longer than that – 30, 50, 70 pages long, some even longer.

I am conscious the practice was prevalent well before my appointment to the bench. I admit I often adopted it at the bar, essentially because it was the practice adopted by others, which is really to admit it seemed “the done thing”. What is less clear is why the practice became trendy, indeed common. It is not a practice mandated by any practice direction of the court.³⁵

In some instances, the practice was doubtless adopted for perceived logistical convenience. More broadly, the practice likely developed as a product of the case management emphasis on shortening trials. If so, it might be thought it would be accompanied by a “diminution in the frequency and length of oral argument” as a “trade-off for efficiency in case disposition”.³⁶ Yet that does not seem to have occurred. More often than not, the provision of the written submissions is also followed by comprehensive closing oral submissions.

The upshot of this practice, again, is that the trial judge is swamped with further written material, making it more difficult to keep up in real time and render timely judgment. The written submissions are generally so long, and handed up so soon before the oral submissions, that the judge has little real prospect of absorbing them thoroughly enough to properly

³⁴ Supreme Court of Queensland, *Practice Direction No 6 of 2004 – Applications jurisdiction – outline of argument, documents read, appearance slip – Amended*; Supreme Court of Queensland, *Practice Direction No 3 of 2013 – Court of Appeal*.

³⁵ Practice Direction 3 of 2008 gives logistical directions according written submissions the status of a filed document but does not mandate the making of them: Supreme Court of Queensland, *Practice Direction No 3 of 2008 – Filing written submissions*.

³⁶ As occurred in David R Cleveland and Steven Wisotsky, ‘The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform’ (2012) 13 *Journal of Appellate Practice and Process*, 10.

appreciate all of the parties' arguments by the end of oral submissions. To make matters worse, in the course of oral submissions the judge will invariably be trying to decipher how the oral and written submissions are related, distracting the judge from full focus upon the unfolding oral submissions. Judgment is then almost invariably reserved and the judge condemned to hour upon hour working back and forth between the written submissions and the transcript of the oral submissions, to ensure all of the relevant party's arguments have been understood and addressed as need be.³⁷

It speaks volumes for the unthinking acceptance of professional trends that some judges, me included, have allowed us to be beset by such a mind numbingly inefficient process. It is wholly avoidable if there is only one set of closing submissions in full.

Should those closing submissions in full be written or oral?

As to which is more persuasive, Chief Justice Keifel, in her aforementioned 2010 paper, observed:

One would think that the opportunity presented by oral argument would be apparent to advocates. Justice Scalia more directly observes that oral argument is more than a chance to show off before the client. He points out that, whilst oral argument may not change the mind of a well-prepared judge, a judge may be undecided at the time of oral argument, especially where the case is a close one.³⁸

It has been said oral submissions allow for an interaction between the bar and the bench, better enabling judges to resolve any areas of uncertainty, direct the advocate to their most salient points and generally 'sift the wheat from the chaff'.³⁹ In contrast, as Plato wrote, written words "do not know to whom they should or should not speak."⁴⁰

Whereas advocates have a tendency to include too much information in their written submissions, oral submissions have been observed to be more concise.⁴¹ Written submissions also tend to be undiscerning in their selection of arguments. In his 2015 paper, 'Good Barristers; Bad Days', Justice Keane wrote:

³⁸ Kiefel, above n 4, 6.

³⁹ Beaumont, above n 9, 276-277; P A Keane, 'Good Barristers; Bad Days' (Address to the Queensland Bar Practice Course, 28 May 2015) 7-8; Kiefel, above n 4, 5-6.

⁴⁰ Plato, Phaedrus, in *Selected Dialogues of Plato* (Benjamin Jowett trans, Modern Library 2000) 191.

⁴¹ Keane, above n 39, 1; Kiefel, above n 4, 5.

Experience over the last three decades has shown, I think, that some barristers, writing in their chambers free from the pressures of oral argument, put their names to written arguments that they would never put orally, in open court.⁴²

Outside of court, written submissions have been described as weighing down the workload of judges in a way that oral submissions do not.⁴³ Conversely, oral submissions are seen as better allowing the court to move more directly to the determinative issues. For instance, in 1986, Sir Harry Gibbs wrote:

Now that American methods are becoming increasingly fashionable in the law, there are some who advocate an increased use of written submissions. I am not amongst them. My experience has been that written submissions are not as effective as oral submissions in bringing the attention of the court quickly to the heart of the problem. Moreover, in oral argument, counsel can, as the argument progresses, perceive and immediately correct any misunderstanding that may arise and dispel doubts that would otherwise remain unresolved.⁴⁴

Further to those beneficial qualities, oral submissions provide public visibility in a way that written submissions cannot. In American appellate courts a reduction in oral argument in favour of written submissions negatively affected the public perception of the courts' institutional legitimacy.⁴⁵ Justice Middleton of our Federal Court has sensibly warned that the increasing reliance on written submissions may negatively impact the openness of the court process.⁴⁶

My own preference, in other than exceptional cases, is for oral submissions. They allow for engagement between bar and bench, teasing out the true force of arguments, simultaneously assisting the judge and providing an interactive platform for persuasion. They also heighten the prospect of being able to render an *ex tempore* or at least prompt judgment. They remain my preference, even in complex cases. If a case's complexity precludes an *ex tempore* judgment then judgment will be reserved and the full transcript of oral submissions will soon be available – the point being that in such cases the judge will have the benefit of a full

⁴² Keane, above n 39, 1-2.

⁴³ Kiefel, above n 4, 6; John Middleton, 'Advocacy – where to now?' (Speech delivered at the 2011 Victorian Bar Conference, 5 March 2011) 5.

⁴⁴ Sir Harry Gibbs, 'Appellate Advocacy' (1986) 60 *Australian Law Journal* 496, 497.

⁴⁵ Cleveland and Wisotsky, above n 33, 9.

⁴⁶ Middleton, above n 40, 4-5.

transcript of the oral submissions to consult. There is no accompanying need for a second written version of the closing submissions in full.

A preference for oral submissions is hardly surprising. It flows from the recognition of the twin evils which I have identified tonight and which I now re-state in conclusion.

Conclusion

The more that advocates seek to advocate through the undiscerning use of tender bundles, evidence in chief by affidavit or report and long form written submissions, the less disciplined they are about the content of those documents and the more they surrender the opportunity for persuasion which oral testimony and oral submissions provide. Equally, the more documents a judge is given to read and absorb, rather than the information playing out orally in real time during the hearing, the harder it becomes for the judge to comprehend the evidence and submissions at the time they are presented and the longer it takes for the judge to decide the case.