66TH ANNUAL MEETING OF THE IAJ 2024 – CAPE TOWN (SOUTH AFRICA)

SECOND STUDY COMMISSION: CIVIL LAW AND PROCEDURE

Written submissions – when do they turn from a help to a hindrance?

Response by the Australian Judicial Officers Association

Background

1. At the meeting in Taipei, Taiwan it was decided that, in 2024, the Second Study Commission would focus on how written submissions in civil litigation can turn from being a help to a hindrance, and whether there are limits on written submissions across jurisdictions and, if so, what those limits may include.

2. The questionnaire is limited to six questions; short and concise answers are expected.

Preamble

3. Australia has a federal system of government. In addition to a Federal judiciary, each of the six States and two Territories has their own judicial system comprised of a hierarchy of courts. Any rules and practices in relation to the use of written submissions in civil litigation are specific to particular courts in each jurisdiction, and sometimes to specific practice areas within particular courts. Where they exist, they are usually embodied in rules and practice notes or directions issued by particular courts.

4. There is accordingly limited uniformity across Australian jurisdictions in relation to the use of written submissions. At best, some patterns and common approaches may be identified. The following responses to the questionnaire attempt, where possible, to identify common or general features in the superior courts across the various Australian jurisdictions.

Question 1: Are there limits for written submissions in civil litigations in your jurisdiction in terms of the maximum length?

5. Where there is a requirement for written submissions, a page limit is imposed. The limit varies between about 5-20 pages, with submissions in reply typically having smaller page limits than principal submissions.

Question 2: Are there time limits for filing written submissions?

6. There is no consistent position across the Australian jurisdictions.

7. In many instances where there is a requirement for written submissions, they are to be filed at the commencement of a proceeding. Where responsive or reply submissions are required, as in the High Court of Australia, time limits are often imposed on such submissions after the service of an application.[1]

Question 3: Are there limits in terms of a maximum number of additional submissions in a case?

8. Where there is a requirement for written submissions, the moving party will typically have a right to file reply submissions. There is otherwise no provision for a party to file multiple written submissions. The filing of any further submissions beyond those permitted by the applicable rules or practice notes would ordinarily require the leave of court.

Question 4: Are there rules, including penalties or cost implications, for breaches of these requirements?

9. Generally, there are no prescribed rules prescribing consequences for breach of requirements in respect of the filing of written submissions. An exception is

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[1] For example, responsive submissions to an application for leave or special leave to appeal in the High Court of Australia are required to be filed and served within 21 days after service of the application pursuant to the *High Court Rules 2004* r 41.05.1. Any submissions in reply are to be filed and served within seven days after the service of the response: r 41.06.1.

the Federal Court of Australia Central Practice Note which provides that 'voluminous, repetitive and prolix submissions may be rejected by the Court with consequential costs orders.'[2]

10. More generally, disregard by a party of rules in relation to written submissions may be relevant to the exercise of judicial discretion in relation to the award of costs in a proceeding.

Question 5: Are these limits or requirements effective in terms of reducing the number and length of written submission and the time spent preparing for and determining a case?

11. For the reasons already mentioned, the federal nature of Australian constitutional arrangements and the number of different courts within the judicial arm of government at a State and Federal level means that it is not possible to provide a definitive answer to this question. With that caveat, it is suggested that the following two propositions are generally representative of the experience in Australia superior courts:

    (a) Written submissions are a typical feature of many proceedings in most types of civil litigation, whether as a result of requirements imposed by relevant rules of court, or as determined by the presiding judge in a particular proceeding.

    (b) Limits or requirements relating to written submissions, such as the time for their provision and their length, are generally accepted as being important in aiding the efficient hearing and determination of civil proceedings.

12. Where page limits are imposed, there are instances where written submissions are formatted in a way to circumvent the limit, which in turn hinders their

[2] Central Practice Note: National Court Framework and Case Management (CPN-1), Federal Court of Australia [14.1].

effective use. As the Honourable Justice Hayne, former Justice of the High Court of Australia, stated extra-judicially: [3]

> It is surprising how often parties ignore requirements about the form of presentation of written argument. Too often, documents are presented in typefaces smaller than the prescribed size with margins too small to use for annotation.

Question 6: What is the effect of written submissions on any hearing which subsequently takes place?

13. For the reasons indicated above, it is not possible to provide a definitive response to this question given the federal nature of Australian constitutional arrangements. However, generally speaking, it is suggested that the ultimate effect of written submissions on hearings is principally determined by two factors: the quality of the submissions themselves, and the capacity of counsel who delivers them.

14. It is perhaps self-evident, but important to restate, that whatever procedural rules may exist in relation to the filing of written submissions, if the submissions inaccurately state the evidence or the law, or are prolix or repetitive, they are likely to hinder judges in the performance of their task. It may even be suggested that, in terms of the effect on the judicial function, bad written submissions have a more adverse effect than bad oral submissions as a result of their sometimes voluminous nature and their capacity to spawn irrelevant and peripheral issues.

15. However, even if their content is satisfactory, the effect of written submissions, in those proceedings where they are intended to supplement and not replace oral submissions, depends critically on the capacity of counsel. The mere oral repetition of submissions already made in writing is unlikely to make any positive contribution to the process of judicial decision-making and instead only adds delay and cost. However, in the hands of competent counsel, the

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[3] The Honourable Justice Hayne AC, '*Written Advocacy*' (5 and 26 March 2007) Continuing Legal Education Program of the Victorian Bar, 3.

previous exchange of written submissions will enable oral submissions to be focused on the real issues of disagreement between the parties, with minor and tangential issues often falling away. Aided by the filing of written submissions, competent counsel is expected to be able to assist the court by responding to questions from the judge which have been able to be formulated by reference to the previous exchange of written submissions.

16. As stated by the Honourable Justice Hayne, former Justice of the High Court of Australia:[4]

> Oral advocacy retains a central place in the way in which Australian courts transact their business. Written argument in Australian courts is intended to make the transaction of that business more efficient.

Question 7: Comments or suggestions as to what could otherwise prove to be effective

17. The first general comment to be made is that a generic approach to written submissions across specific jurisdictions or courts is unattractive and unhelpful. Their utility, as well as their capacity to hinder judges in the discharge of their function, will be affected by, amongst other things, the nature of the civil proceedings in question. In some instances, oral submissions may be a more efficient way for judges to determine cases. In others, for example those involving large amounts of documents or technical information, written submissions may facilitate the work of judges. These observations underline why it is important that judges sitting in particular courts and jurisdictions have the capacity to determine the form in which submissions will be made and the rules which will govern them.

18. To the extent judges consider that submissions should be provided in writing, it is suggested that clear rules prescribing their sequencing and length are essential. In order to ensure compliance, it may also be appropriate for the

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4 Ibid 29.

rules of court to provide that submissions which do not comply with these requirements may not be formally received by the court.

The Honourable Justice Steven Moore

Vice President of the Australian Judicial Officers Association

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