DRAFTING

Court and Tribunal Documents

What this paper is about

This paper discusses drafting skills specific to Court and Tribunal Documents. As such, we will examine:

- Drafting submissions;
- Drafting written evidence;
- Pleading a case;
- Dispersed among each of those topics – some thoughts on the use of language and structure, to best achieve your purpose.

What this paper is <u>not</u> about

This paper does not cover every Court and Tribunal document, just those a litigator might use very regularly.

The *Uniform Civil Procedure Rules 1999* (UCPR) contains rules about how to plead a Claim and Statement of Claim and how to draft a Defence. Whilst some of those rules (found in Chapter 6, Part 3 of the UCPR) are used in demonstrating drafting skills, this paper does not cover them in depth.

Submissions

Recent times have seen Courts shift towards written argument.

Submissions are used to persuade the Court to adopt your client's application of the law to the facts. Thus, they should use persuasive methods aimed at the particular reader. In Court and Tribunal proceedings, submissions are aimed at the Tribunal Member, Magistrate or Judge.

Written submissions can assist you with your oral argument, so that it is structured and logical. They also stay with the reader, as a permanent reminder of, and reference to, your argument. In some circumstances, written submissions completely replace oral argument.

For all these reasons and more, it is important to make your written submissions the best they can be. Although oral argument is often invited to clarify and expand on written submissions, the written component should be strong enough to stand on its own feet.

Structure of Submissions

Structure is important. The document should provide a road map for the reader so that, from the outset they are able to follow the significance of what they are reading. Use the first few paragraphs to set the context and explain where the document is leading. Headings are also very useful.

The following is one example of how to structure your submissions:

1. Summary

Robinson Locke Litigation Lawyers Pty Ltd
ABN 96 151 428 929

Level 4, 231 George Street
BRISBANE QLD 4000
Telephone: (07) 3210 5200
Facsimile: (07) 3210 5299

PO Box 12019
GEORGE ST QLD 4003
Email: mail@robinsonlocke.com.au
Web: www.robinsonlocke.com.au

This is essentially an overview statement, which puts your submissions in context. It prepares the reader for what is to come, and in a sense, directs their mind to the particular area of law.

2. Relevant Law

Depending on the particular purpose of the submissions, it may be necessary to inform the decision maker of the relevant law, and sometimes, how to apply it.

Consider your audience when you are referencing the relevant law. Some Judges will be familiar with the area, and may not appreciate you spelling out every section over three pages. On the other hand, some may require much more guidance. If unsure, include relevant sections and case references, and ask the Judge whether they would like you to address the law in your oral submissions.

Consider context – this will be necessary where you refer to a case which you are applying to the facts of your own case, however it may not be necessary if you cite or quote from a case to confirm a broad principle of law.

3. Statement of Facts

Firstly, and most importantly, the facts should be fair, accurate and complete. Officers of the Court must be honest and must not do anything that may mislead the Court. Persuasion is not achieved through hiding facts or misstating them, it is achieved through emphasis.

How you order and present the facts can be a powerful tool for persuasion. Decide what facts are favourable to you and highlight them in a way that diverts attention from the less favourable facts.

Keep the facts simple, without needless or prejudicial adjectives. Remember, this is not the place for argument.

4. Statement of Issues

A well-framed issue provides the roadmap for the presentation of the facts and argument.

- State the issue in terms of the facts of the case and eliminate unnecessary detail;
- Ensure the issue can be understood on first reading;
- Identify for the Court what must actually be decided;
- Avoid self-evident propositions. The issue should be so stated that the opponent has no choice but to accept it as an accurate statement of the question;
- Be subtly persuasive.

5. Argument

Arguments should be clear and concise (so as not to confuse or annoy the person reading them). They should proceed logically, and use simple expression.

The order in which you present your arguments is important. Lead with your argument, not your opponent's argument. By focusing on your opponent's argument you will divert the Court's attention to that argument rather than to the content of your own.

Use logic, and deductive reasoning. When used effectively, these concepts will improve the strength of your submissions.

Choice of active or passive voice will have an impact. The structure of a sentence using the active voice is simple: subject, active verb and object. The passive voice uses: object, complex verb, subject. Compare these examples:

Active	*Passive*
The accused punched the victim in the head	The victim was punched in the head by the accused
The mechanic closed his shop	The shop was closed by the mechanic

Choose your expression. Expressing something positive in a negative way may have a more powerful impact or vice versa.

Use conviction - "*It follows that…*" or "*The case law supports…*" are both more persuasive than: "*It would seem that…"*.

Other basic tools that can (and should!) be used effectively to strengthen your written argument include grammar, punctuation, use of paragraphs and different sentence lengths.

Pleadings

The Purpose and Function of Pleadings

Pleadings are the written statements of the parties who are involved in the litigation process. The *Uniform Civil Procedure Rules 1999* (UCPR) requires parties to set out in summary form the material facts on which they rely in support of their claim or defence.

Pleadings define the issues for a trial. Where matters are not pleaded, and are not in issue, parties cannot adduce evidence on those matters. Thus, it is essential that pleadings cover all facts which are necessary to prove your claim (or defence).

Of course, there should also be a balance in that pleadings should not become so onerous as to cause confusion and exhaustion when reading them. Pleading an effective claim without going into evidence can sometimes be difficult because of the fine line between fact and evidence which sways depending on the viewpoint of the pleader.

Similarly, certain Tribunal documents require parties to state the important facts in a succinct manner so that the tribunal and the other side can ascertain the issues in dispute and what is to be proven at trial.

Whilst the UCPR does not apply to tribunals, the Queensland Civil and Administrative Tribunal (QCAT) has its own set of rules in its legislation, the aim of which is similar to the UCPR – to enable efficient and consistent conduct of proceedings. Thus, whilst tribunals rarely require parties to plead their case, the application form and various other QCAT forms serve a similar function.

Before You Start

Below is a list of some important questions to ask yourself before you start drafting. Conceptualising your action enables efficient, sensible pleading and avoids wasting time.

- What is the relevant area of law?
- What is my cause of action – are there any alternative causes of action?
- Am I within time to commence the action?
- What are the elements to those causes of action?

- What are the material facts which are required to make out the elements of my action?
- What Court has jurisdiction to hear the matter?
- What form is necessary to commence this action? (Originating Application; Claim and Statement of Claim?)
- Who are the potential Defendants to the action, and what is their legal status?

Some Rules of Pleading under the UCPR

1. Your **Claim** needs to tell the Court and the Defendants what remedy/remedies you are seeking. If you are claiming damages, those damages must be quantified. [1]

2. As to your **Statement of Claim**:

    a. This should set out all material facts relied upon to prove the elements of your cause of action. Facts that are inessential to the existence of the cause of action or defence are not material and should not be included in the pleadings.

    b. The first few paragraphs are usually dedicated to defining the status of the parties. There is no need to state that Billy Noel is a person capable of suing, but you should plead that Brainwave Pty Ltd is a company duly registered and also that Billy Noel is a Director of Brainwave Pty Ltd, if that is relevant.

    c. Rule 149 states:

    "149 Statements in pleadings

    (1) Each pleading must—

    (a) be as brief as the nature of the case permits; and

    (b) contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved; and

    (c) state specifically any matter that if not stated specifically may take another party by surprise; and

    (d) subject to rule 156, state specifically any relief the party claims; and

    (e) if a claim or defence under an Act is relied on—identify the specific provision under the Act.

    (2) In a pleading, a party may plead a conclusion of law or raise a point of law if the party also pleads the material facts in support of the conclusion or point."

    d. Don't plead the evidence. Unless precise words are material, the pleading should only state the effect of them as briefly as possible. [2]

    e. There should be sufficient particularity of your statement of facts to define the issues for and prevent surprise at trial, to enable the opposite party to plead and to support a matter specifically pleaded under rule 150, [3] Gaps in factual allegations should not be filled in by particulars, or matters outside of the pleadings. One cannot remedy incomplete pleadings with particulars. Rather, all material allegations must appear in the pleadings. [4]

    f. The Rules allow parties to plead inconsistent and *alternative* versions of a claim or defence. [5]

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[1] Rule 150 UCPR.
[2] Rule 152 UCPR.
[3] Rule 157 UCPR. See also Rule 150 sets out matters to be specifically pleaded, and Rule 155 for how to plead damages.
[4] In *Bruce v Odhams Press Ltd* [1936] 1 KB 694 the Court struck out a pleading for this reason.
[5] Rule 154 UCPR.

Other Helpful Commentary

Whilst it is true that to succeed the Plaintiff must plead and establish a cause of action, which cause of action is alleged or established is for the Court to decide from the facts proved at trial. Thus, as the parties plead facts, not conclusions of law, the Court can decide from the proven facts what cause of action and remedy are available. [6] Although, keep in mind that it is insufficient to simply allege random facts which may, in certain circumstances amount to some cause of action or defence. [7]

Legal conclusions or inferences are for the court to decide on the facts, not for pleading, although in certain circumstances, pleading a point of law is appropriate. [8] An allegation reflecting the words of an Act is inappropriate. [9]

To answer the question of whether an allegation is an allegation of law or fact, ask this question: "Does the truth of the allegation depend on the answer to a question of law or fact?"

Legal Vestiges

Arguably, some words and phrases no longer have a place in the modern litigator's productions. Some examples might be, "aforesaid", "heretofore", "null *and* void" (do you really need both?), "save as prescribed by" (this is a compound proposition which can be condensed to be less ominous), "loss occasioned thereby" (how about 'resulting loss'?), "thereupon" and "whence".

Written Evidence

The word "affidavit" comes from the Latin term "*affidare*" which means to pledge one's faith. A statement is an unsworn but signed written statement given by a person.

In a Court, written evidence is by way of an Affidavit, sworn or affirmed. In a Tribunal, it is an unsworn Statement of Evidence (SOE).

Some Formal and Informal Rules

In drafting either of these documents you should turn your mind to:

1. What is the purpose of the evidence? (to prove service of documents, to support an interlocutory application, to support an application for administrative review of a decision?)

   It is common for Courts to make orders to the effect that evidence in chief is by way of Affidavit. In QCAT, Members often make directions which limit the ambit of the oral evidence at hearing to what is contained in the Statements of Evidence.

2. If evidence is being given on information and belief, state the source of the information and the grounds for the belief, or the Court may reject the Affidavit. [10]

3. Is the evidence from an expert? If so, you will need to comply with Chapter 11, Part 5 UCPR.

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[6] An example is found in *Konskier v B Goodman Ltd* [1928] 1 KB 421 where the court found that there was no duty of care owed by the defendant to an action in negligence, but found that the plaintiff had established a trespass on the facts. Thus, the plaintiff succeeded on trespass, but not negligence.
[7] See for example, *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 20)* (1988) 14 NSWLR 124.
[8] Note specific matters to be pleaded set out in Rule 150 and also see Rule 149(2) UCPR.
[9] See for example *Trade Practices Commission v David Jones (Australia) Pty Ltd* (1985) 7 FCR 109 where the plaintiff's allegation merely reflected the words of the *Trade Practices Act 1974* and was struck out as a result.
[10] Rule 430 UCPR; *Deputy Commissioner of Taxation v Ahern* (No 2) [1988] 2 Qd R 158.

4. What facts need to be put into evidence by this person? Before a trial or hearing, you will have figured out what evidence is required to prove your case, and how you are going to get that evidence in.

5. What evidence is truly relevant? The witness generally will not know the law or how to apply it; therefore they will be telling you all sorts of relevant and irrelevant facts, their opinion, what they heard their neighbour say etc. You should know the case well enough to spot the relevant facts, and filter out the rest. The *Evidence Act 1995* states: [11]

> *"**Relevant evidence***
>
> *(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.*
>
> *(2) In particular, evidence is not taken to be irrelevant only because it relates only to:*
>
> *(a) the credibility of a witness; or*
> *(b) the admissibility of other evidence; or*
> *(c) a failure to adduce evidence."*

6. What context is necessary to ensure the reader of the Affidavit / SOE understands it? Introductory facts are sometimes helpful and give a long Affidavit or SOE some helpful context.

7. The structure of the Affidavit – usually chronological order works well, but sometimes separating a long Affidavit with headings and ordering the facts topically is most appropriate.

8. Ensure that the person you are drafting the document for understands the language you are using. Your witness' credit will be damaged if they resile from part of the statement or admit under cross examination that they do not know what it means.

9. Aim to make the statement reflect the natural expression of the witness' recollection, avoiding embellishment or angle. Be careful not to twist the person's story into what you want it to be, because if this is not immediately evident to the reader, it will become evident when the witness is on the stand.

What to Avoid

Aim to avoid:

1. Anything prejudicial, scandalous, oppressive or unproven. [12] Do not merely be a mouthpiece for your client, blindly including anything and everything they say. Use your "lawyer filter" and decide what is inappropriate and objectionable.

2. Irrelevant facts. [13] These will detract from the important story, confuse everyone and waste time. You also risk giving away a line of enquiry not otherwise known to your opponent, creating prejudice, or having parts or the entire Affidavit struck out.

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[11] At section 55.
[12] Rule 440 UCPR;
[13] The basic rule is that no evidence is admissible unless it is relevant – s 56 *Evidence Act 1995*; *Smith v R* [2001] 181 ALR 354; *Papakosmas v R* (1999) 164 ALR 548.

3. Legal submission. [14] That is your job, when it is time for making submissions. In addition to making you look sill, it is rare that your client will understand the merits and application of complex case law to the facts of his matter.

4. Hearsay. This is "*evidence of a previous representation made by a person … [which is]… not admissible to prove the existence of a fact that the person intended to assert by the representation*". [15] Many exceptions apply, including Affidavits on information and belief in support of Interlocutory Applications. [16]

5. Statements that waive privilege (unless that is intended). Privilege can be lost if the parties waive the right, or partially disclose the evidence, and full disclosure of that evidence is reasonably necessary to enable a proper understanding of the other evidence that has already been adduced. [17]

6. Illegally obtained evidence (for obvious reasons), although exceptions apply. [18]

7. Opinion – unless it is the opinion of a relevant expert, [19] or the opinion is based on what the person saw, heard or otherwise perceived about a matter or event and evidence of the opinion is necessary to obtain an adequate account or understanding of the person's perception of the matter or event. [20]

8. Language that is pedantic or unnecessary. For example, "Exhibit ABC1 of this my Affidavit", "inter alia" (which your client may not know the meaning of unless they are a lawyer or speak Latin), "I verily believe that…" (is this any better than "I believe"?)

9. Responses to statements in other Affidavits which begin to sound like pleadings.

Rachel De Luchi

[14] *Gleeson v J Wippell & Co. Ltd* [1977] 3 All ER 54.
[15] Section 59 *Evidence Act 1995.*
[16] Exceptions are contained in sections 60 – 75 *Evidence Act 1995*, in particular rule 75 for the exception for interlocutory proceedings.
[17] See section 131 *Evidence Act 1995*.
[18] Section 138 *Evidence Act 1995* – "…*unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained*".
[19] Section 76 *Evidence Act 1995*; Regarding the exception for the opinion of an expert see section 79.
[20] Exception: Lay opinions – see section 78 *Evidence Act 1995*.