
TRANSCRIPT OF PROCEEDINGS

SCV/CCV WEBINAR

THE DOS AND DON'TS OF VIRTUAL HEARINGS

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on

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5 system or transmitted without prior written permission of the
6 Authorised Officer.

7 CLAYTON JR: We might make a start and there will probably be
8 some further participants who continue to join us. For
9 those of you who don't know me, I'm Judicial Registrar
10 Julie Clayton of the Common Law Division of the Supreme
11 Court.

12 I acknowledge that I'm hosting this seminar from the
13 lands of the Woi Wurrung and Wurundjeri peoples of the
14 Kulin nation and I also acknowledge the traditional
15 custodians of the various lands on which you all work
16 today and the Aboriginal and Torres Strait Island people
17 participating in this webinar. I pay my respects to
18 elders, past present and emerging.

19 Over the past 10 weeks, we've all had the most
20 extraordinary experience. There's been a lot to grapple
21 with and in the midst of everything else, trying to
22 master a new way of appearing in court has presented an
23 enormous challenge. So, firstly, congratulations to all
24 of you listening in today. You have clearly managed to
25 get yourself into this webinar and that's something that
26 might have been beyond some of us just a few short months
27 ago.

28 You've all undoubtedly had now virtual meetings with
29 your colleagues, your instructing solicitors, with
30 clients, experts and witnesses and platforms like Zoom,
31 Webex, Google Classroom, Microsoft Teams are now as
32 familiar as AustLII and Jade. It has been, as they say,
33 a lot and whilst within the community there's a sense

1 that we are perhaps over the worst of it and can relax a
2 bit, the reality is that we will continue in a virtual
3 world at least in some fashion for a long while yet.

4 I am not sure, for example, if we will ever return
5 to a packed court for a busy Friday directions list or
6 queues at security as everyone starts their hearings at
7 10.30, pools of 200 jurors assembled in the County Court.
8 So even as schools return and workers start coming back
9 into the city, in all likelihood there will be at least
10 some part of your work and of the court's work that
11 continues in a remote environment. So that makes this a
12 good time to have a seminar. We've had 10 weeks now of
13 experimenting, learning, and sometimes blundering our way
14 through. We've learnt a lot but there is more yet to
15 learn.

16 We thought we would assemble a panel who have been
17 working in the virtual environment since the beginning of
18 the restrictions to share what we've learned about
19 appearing in a virtual court. On our panel we have
20 Justice Andrew Keogh, the joint head of the Personal
21 Injury and Institutional Liability lists and the judge in
22 charge of the Supreme Court circuits. Justice Keogh has
23 just finished an entirely remote personal injury trial
24 that ran to completion in the Supreme Court.

25 We are also joined by Judge Arushan Pillay in the
26 County Court. If you have appeared in the County Court
27 since COVID-19 began, you've been to one of the Judge
28 Pillay's hands-on Zoom training sessions which I am
29 reliably informed have been instrumental in assisting
30 many practitioners master the basics of the virtual
31 platform.

1 And we also have with us Richard Attiwill QC.
2 Richard has a broad practice. He's currently briefed for
3 the State of Victoria in the Royal Commission into
4 National Natural Disaster Arrangements. It is
5 particularly helpful to hear from Richard, not only
6 because he brings his vast experience of being on the
7 other side of the Bench to the discussion, but because,
8 unlike the rest of the panel, he doesn't have an IT
9 department to run to for help every time there's a
10 technical problem. His experience in the world of
11 virtual hearings will be particularly illuminating.

12 So before I turn to our panel and get their
13 experiences, I wanted to share just four tips that have
14 come up repeatedly when I asked judges for their feedback
15 about their experiences in the virtual world.

16 The first thing is to remember that you're in a
17 hearing from the moment you are admitted from the waiting
18 room. Chitchat at the virtual Bar table will be heard by
19 everyone and even when the judicial officer is not yet in
20 the virtual court, it's likely that other court staff
21 will be and can hear what they say. So proceed with
22 caution.

23 Backgrounds: if you choose to use a virtual
24 background, make sure it's neutral or one of the four
25 court approved backgrounds which show different styles of
26 courts and I'll give you a brief look at what those
27 courts are. You can see one behind me now. This is
28 another option. Something slightly more modern. And
29 very old school. You don't have to use a virtual
30 background, of course, but we'd recommend that you leave
31 the Hawaiian beach holiday or the galaxy far, far away

1 for your social calls.

2 Thirdly, don't be afraid to ask for an opportunity
3 to confer with your junior or to seek instructions. Zoom
4 offers the possibility of break out rooms and some
5 judicial officers are now using these and I think they'll
6 probably be more widely deployed as people get more
7 familiar with the technology. But where the platform
8 doesn't offer that option, for example, Webex, which is
9 also used in the Supreme Court, it's fine to seek a
10 moment to put yourself on mute and confer, just as you
11 would at the Bar table.

12 And, finally, where the chat function is not
13 disabled, use with great caution. It's very easy to
14 unintentionally chat to everyone when you intended only
15 to chat with your instructor, and as different platforms
16 that you might be using all have slightly different
17 interfaces, it's very easy to make an error. You might
18 forget that the default setting is chat to everybody
19 rather than to just the one person.

20 Turning now to the panel. Judge Pillay, can you
21 firstly take us through your top tips for virtual
22 attendance.

23 JUDGE PILLAY: The first top tip really is to maintain the
24 notion that we are in a court hearing and it's a formal
25 one and I say that because it leads to all sorts of
26 problems if we don't maintain the notion that we are
27 actually in a formal courtroom. It leads to problems
28 with etiquette so that people don't address each other
29 properly; it leads to problems with dress and the real
30 problem with all of that is that it leads to the
31 perception from witnesses or plaintiffs and defendants in

1 person that they are not in a real serious court hearing
2 and that's when I think there is a loss of faith in the
3 justice that we're dispensing through this medium.

4 So my top tip is to maintain and just very
5 practically that means dress properly, no polo shirts,
6 wear a tie if you're a male, speak properly, address
7 people using their surnames, don't say to your friend at
8 the Bar table, 'Well, John said this' - use the proper
9 name, as you would in court.

10 And, lastly, and I reiterate what you said, which is
11 use the proper background. Don't have one which is
12 inappropriate for a court setting, and it is your
13 responsibility as a practitioner to make sure that the
14 witnesses you are calling observe these rules as well.

15 It's not enough to say, 'This witness could only
16 appear from (indistinct) on a phone at a building site'
17 when that person is going to have bad coverage, can't see
18 the documents and is constantly being interrupted by
19 others on the site. It's your responsibility to ensure
20 those witnesses are appropriately presented. Those are
21 the top tips that I would have.

22 CLAYTON JR: Justice Keogh, have you got anything to add in
23 terms of the primary things that you'd look to for your
24 top tips for practitioners?

25 KEOGH J: I think Judge Pillay has stolen my thunder a little.
26 I emphasise the same point. The mere fact that we're
27 conducting virtual hearings doesn't mean that we're not
28 all in the courtroom and you should behave and conduct
29 yourself in a virtual hearing in exactly the same way
30 that you would conduct yourself in a physical courtroom.

31 CLAYTON JR: What about in terms of business attire and robing?

1 I know that there's been some different views taken about
2 the need to robe.

3 KEOGH J: When I'm conducting a trial I will robe and I expect
4 counsel to robe. I think that it's an important part of
5 maintaining the seriousness of the court process and
6 emphasising to witnesses and members of the public who
7 might be viewing the proceeding that we're conducting
8 serious business. I am in favour of robes.

9 CLAYTON JR: I know that the court - our court - on its website
10 has said robing is not necessary and I think that for
11 some judges that's the attitude that they take but I
12 suppose the important message would be check with the
13 chambers, just as you might in the ordinary course check
14 with chambers if it's necessary to robe in certain sorts
15 of applications. Does the County Court have a particular
16 position?

17 JUDGE PILLAY: Yes. Our position is that if it would be usual
18 to robe, that is for trial, then you should robe. If
19 not, if it's directions hearings and you wouldn't robe,
20 then you can appear in business attire. There's a whole
21 other issue about whether counsel appearing in trial
22 ought wig but that's perhaps not for this seminar.

23 CLAYTON JR: And we've had a question come through from the
24 audience, and I encourage all participants to use the
25 question and answer function; we'll answer them live when
26 we can but where that's difficult, we'll answer them at
27 the end, we will leave some time for that. And the
28 question is, 'Are practitioners required to stand whilst
29 addressing the court?'

30 KEOGH J: No, in my court and it will just create awkwardness,
31 I think. We've got to change the process or I've changed

1 the process of how we commence the court day to take
2 account of the different environment. So I don't do
3 standing because you get very awkward images of people on
4 the screen and I don't do bowing but we try and introduce
5 processes to ensure that practitioners and parties know
6 when the court hearing is starting.

7 CLAYTON JR: Richard, I've got a question that's come through
8 that I think you'll be more appropriate to answer. There
9 have been stories, apparently, I haven't heard them, but
10 apparently there are stories of lay witnesses appearing
11 remotely having been 'allowed' by the judicial officer to
12 behave in an informal manner, for example, smoking or
13 talking to others off screen or behaving more
14 aggressively than would be expected in person. What
15 should counsel do? Is it incumbent on counsel to ask the
16 court to pull up the witness in this situation?

17 MR ATTIWILL: Well, I think, in my experience when people are
18 giving evidence remotely, so a witness, the court always
19 inevitably asks them whether they're by themselves in the
20 room - that's critical - and you should ensure that
21 that's the case. I cross-examined somebody on their
22 mobile telephone; that seemed to go okay. But there are
23 risks - there's significant risks that somebody might be
24 looking at their mobile phone while you're cross-
25 examining. You'll never know the answer to that.

26 I haven't had smoking or drinking or having a cup of
27 coffee - I think if that occurred that would be something
28 for the judge to take up - or eating their lunch, for
29 example. The only really matter that I've had was where
30 I had a suspicion that somebody was receiving
31 instructions on their mobile phone so I just asked them

1 whether they can just look at me when they're answering
2 the questions and that was about it.

3 CLAYTON JR: Thanks. All right. Well, moving on, what are the
4 issues that the panellists have encountered when
5 participating in virtual hearings. Justice Keogh, I'll
6 ask you to answer that first.

7 KEOGH J: Well, the first thing I'd emphasise is issues with
8 witnesses, picking up on what Richard was just talking
9 about. It's important that the circumstance in which the
10 witness is giving evidence replicates as closely as
11 possible what would happen in a courtroom. So it's
12 important, in my view, that the witness is in a room by
13 themselves.

14 Often witnesses, when we're conducting remote
15 hearings, will have difficulty with managing court books
16 or their devices, the hiccups along the way. If that
17 were to happen in a courtroom, then it would be the
18 associate, somebody independent, who goes and assists the
19 witness and ensures that the hearing can get back on
20 track.

21 When we're dealing with a remote hearing, it's
22 likely to be an instructing solicitor or somebody else
23 within the solicitor's office who's assisting the witness
24 and you've got to be careful in doing so that, firstly,
25 you seek the court's approval to approach the witness
26 before you approach the witness; secondly, that when you
27 approach the witness you take account of the fact that
28 the witness is giving evidence and you don't in any way
29 interfere with that process.

30 Steps should be taken to ensure that the witness
31 doesn't have any documents with them other than the

1 documents to which they're going to be taken in evidence.
2 Steps should be taken to ensure the witness doesn't have
3 a device other than the device that they're using to
4 participate in the hearing or perhaps some additional
5 device so that they can look at a soft copy of the court
6 book or documents to which they're being taken. So no
7 phone, no other prompts.

8 I've had somebody describe to me a situation where a
9 witness was giving evidence and constantly looking to one
10 side apparently to look at a prompt and that will just
11 rob the whole process of confidence and integrity. So
12 practitioners have a very important role to play in
13 ensuring that that sort of thing doesn't occur.

14 Of course, the usual rules apply that when a witness
15 is being cross-examined, they can't be spoken to by
16 practitioners on their side and if an order is made for
17 witnesses out of court that that's dealt with in the same
18 way as it would be in a hearing in a physical courtroom.

19 My preference is that witnesses, particularly lay
20 witnesses - perhaps this really applies to lay witnesses
21 - lay witnesses give evidence from a solicitor's office
22 or perhaps from somewhere close to the barrister's
23 chambers. I think that's important because of the duty
24 that practitioners owe to the court and the role that
25 practitioners, owing that duty to the court, will have in
26 ensuring that integrity is maintained in the way a
27 witness gives evidence. I don't know whether either
28 Judge Pillay or Richard have any comments about that.

29 JUDGE PILLAY: I would reiterate what Justice Keogh has said
30 about that and I would add only one thing which is that
31 it is incumbent upon the instructing solicitor to make

1 these arrangements. The court relies on instructors to
2 make those arrangements and certainly we will reinforce
3 that message when the witness comes to give evidence. So
4 that's the first part of it.

5 The second thing, though, is about simply the
6 technical device on which the witness gives evidence. As
7 people become more and more familiar with the technology,
8 there is more and more use of documents and screen
9 sharing and annotation of documents, either photographs
10 or diagrams.

11 And as that's going to become more and more
12 prevalent, it's very important that witnesses are not on
13 phones. Sometimes that's inevitable and we can deal with
14 that but as much as possible, we should be trying to get
15 witnesses to be using laptops or iPad devices, at least,
16 where they've got the ability to manipulate the document
17 and see it all.

18 So on a phone, for example, you can only see a
19 little bit of an A4 page and then you've got to scroll
20 across and try to read all of it. It becomes very
21 difficult and almost impossible to mark it up. So I
22 would say instructors and counsel should also really be
23 looking at the device on which the witness is going to
24 give evidence.

25 CLAYTON JR: In terms of those sorts of technical issues, have
26 you been experiencing a wide variety of responses from
27 practitioners in terms of the availability of appropriate
28 internet connections and that sort of thing and how has
29 your court been able to manage that?

30 JUDGE PILLAY: We have seen that occur a lot but it's occurring
31 in a situation where it shouldn't. So, for example,

1 someone says, a witness says, 'I can't come and give
2 evidence at 2 o'clock on a Wednesday' and at that stage
3 the witness says, 'Well, I'm going to be on a building
4 site at I'm going to use my phone in my car. That's the
5 only time I've got spare to give evidence'. Well, quite
6 frankly, if we were back in the old days the witness
7 would simply be sent a subpoena and they would have to
8 come into court.

9 So they're managing to avoid all that but they then
10 can't simply say, 'This is a minor inconvenience to my
11 life and I'm going to treat it as such and therefore I'm
12 not even going to break my work day to go to a secure
13 area with an appropriate device to give evidence' and I
14 think if we can, it we can in these difficult times, we
15 should be saying what's a more appropriate venue and
16 what's the more appropriate device. It can't work in
17 every case but we should be trying.

18 KEOGH J: Judge Pillay, what do you think about the idea of
19 requiring that parties in advance provide to the court
20 and to other parties details of the arrangements for a
21 witness giving evidence as in where they will be, what
22 device they'll have, et cetera? So that the day
23 beforehand or at some stage everybody knows what the
24 arrangements are, including the witness.

25 JUDGE PILLAY: I would like to at least know that as the case
26 is starting, we've got our witnesses lined up. I would
27 hate to create another layer of administrative effort for
28 instructors but they certainly should be making those
29 inquiries and they should be able to tell the other party
30 what those arrangements are because if it's going to be
31 that a party is faced with cross-examining someone in

1 completely inappropriate circumstances, then it might
2 derail the entire trial and they should at least have a
3 bit of advanced warning about that, so I am sure we could
4 fashion something to that effect.

5 CLAYTON JR: I know that in the Supreme Court our IT department
6 have a strong preference that they test all of the
7 connections at least the day prior to the hearing and
8 that include connections for witnesses but I know that
9 this also can present problems, especially where there's
10 a lot of expert witnesses who might not be available for
11 a 15, 20 minute test the day before, and I think as we
12 move on and the idea of remote hearings becomes less
13 novel, the willingness for people to put aside a 20
14 minute slot the day before a hearing will reduce.

15 But I think in the early days everybody understood
16 that there was a need for that because everybody was
17 learning, but as people become more and more familiar
18 with the technology, I think there are two possible
19 repercussions of that.

20 One is that they get better at it so there's less
21 need for testing and they know how to fix things up
22 themselves but the other is that there will be less
23 willingness to participate and I think it's important
24 that the courts really keep an eye on that because, as we
25 all know, poor connections, bad internet, poor devices
26 really have a significant impact on the quality of the
27 hearing that can be undertaken.

28 KEOGH J: And the question of whether a fair trial can be
29 conducted.

30 CLAYTON JR: Absolutely.

31 KEOGH J: One other issue was the testing of the credit and

1 reliability of witnesses. Obviously, there's been a
2 traditional view that that's much more successfully done
3 with witnesses and counsel present in court. I don't
4 know what the experience of others has been in that
5 regard in the virtual environment.

6 I must say from a judge's point of view if you've
7 got a witness and you pin that witness as the picture on
8 screen and the witness is taken through a lengthy cross-
9 examination, you get a very good view of the witness'
10 demeanour and reaction to the question, the level of
11 emotion they display, whether they display things like
12 frustration or agitation. In many ways I thought the
13 view of the witness was better on the screen than it
14 would be if the witness is in the witness box.

15 So, so far I haven't been troubled by the idea of
16 testing a witness' credibility. I suspect, though, that
17 it might be more an issue for counsel and developing a
18 way of engaging with a witness that's successful and test
19 them when you don't have the benefit of being in court in
20 an environment that you're very familiar with and the
21 witness is likely to be very unfamiliar with and perhaps
22 intimidated by. Do you have any comment about that,
23 Richard?

24 MR ATTIWILL: Yes, I do. Prior to my first virtual hearing, I
25 had my serious doubts that it would be successful, that
26 is the cross-examination, but for all the reasons that
27 you've articulated, Judge, I found it to be completely
28 fine. In fact, the cross-examination that I undertook
29 where the witness was on their mobile phone was no
30 impediment at all because I had actually a close-up view
31 of the witness and the expressions and so forth.

1 But the critical thing, I think, in the cross-
2 examination of a witness in a virtual hearing is that
3 you've got to make sure that your own image, that is your
4 visual image and also your audio is spot on to maintain
5 the connection because, you know, for example - I can
6 give you an example.

7 If I'm here and I'm talking like that and blah,
8 blah, there's no connection so you've got to really test
9 it out, so I get up a bit like this and maintain it and I
10 found it to be completely fine. The witnesses aren't
11 often distracted by drinking coffee and food and so forth
12 but they find their own stresses, I think, in engaging
13 with the technology a bit, which can be a bad thing
14 really all round sometimes, but, on the whole, I think
15 the cross-examination is fine.

16 I've heard of some judges actually calling the
17 parties in because the judge has taken the view that the
18 only way the judge can assess the credit is in the
19 courtroom but from my provide, I think that you can
20 easily assess the credit of a witness in a virtual
21 hearing, as long as the audio and the visual is fine.

22 So that if the witness is prominent on the screen
23 like Your Honours are, it's fine. I have seen a witness
24 in a case in a huge boardroom where they're right at the
25 end and you get a long panoramic shot, that's no good.

26 So as long as that's not done it's a fine system.

27 KEOGH J: What about you, Judge Pillay, do you have any - - -

28 JUDGE PILLAY: No, I must admit - and a small war story - I saw
29 Richard Attiwill cross-examine someone to tremendous
30 effect on a virtual hearing and the potency of having the
31 witness so close actually to you on screen made the task

1 of assessing that witness' demeanour a bit easier. So
2 I'd agree with what you've just said.

3 KEOGH J: In a sense, in a virtual hearing, there's nowhere to
4 hide.

5 JUDGE PILLAY: No.

6 KEOGH J: You can't avoid being front and centre on the camera
7 and everything you say and do is well and truly on
8 display. I would emphasise that Richard, in my
9 experience, is a very well-prepared, is very well-
10 prepared counsel so - and that will be critical to
11 successfully challenging a witness' credit and
12 reliability, that level of preparation.

13 MR ATTIWILL: So, yes, you can have difficulties with court
14 books and other documents so you've just got to make sure
15 that that's working. So as long as the witness has got
16 the court book, either electronically or hard copy,
17 preferably in hard copy sometimes because otherwise
18 they're distracted by too much technology, that can be a
19 good thing.

20 CLAYTON JR: Richard, how have you found preparing for a
21 virtual hearing to be different from preparing for an in-
22 person hearing?

23 MR ATTIWILL: Well, I'd say that there's two major differences.
24 One is basically just the technical aspects of the
25 preparation and then two is the preparation for the
26 hearing and the advocacy itself.

27 In relation to the technical aspects, and I won't
28 just address this from a counsel point of view, but in a
29 technical aspect the practitioners in an in-person
30 hearing just turn up to court, so solicitor goes to the
31 Bar table, sits down, the barrister sits on the other

1 side and off they all go. So the most that might happen
2 is there's a realignment at the lectern potentially a
3 getting of the microphone for the transcript and re-
4 positioning that. But if nothing else is working or the
5 lights aren't on or something else or the door's looked,
6 then that's all for the court to address.

7 The real difficulty that you've got to engage with
8 in a serious way is when you're preparing for a virtual
9 hearing as counsel or as a solicitor, what you've got to
10 do is fully engage with all the technical aspects so that
11 it works, so you've got to download the line of software,
12 you've got to establish your background, your lighting,
13 you've got to have the right microphone and so you've
14 basically got to participate, together with counsel on
15 the other side, in making the whole thing work.

16 If you don't do that and it doesn't work, then, in
17 my experience, and I've seen some pretty major ways in
18 which this has gone seriously wrong at the real prejudice
19 to the party concerned, if you don't get it all right and
20 your microphone's bad and your lighting's bad and your
21 software is terrible and your internet connection's
22 terrible then as counsel, basically, you're sort of like
23 the mumbling barrister at the back of the courtroom,
24 can't really be seen, can't really be heard, so it's very
25 prejudicial, so you've really got to get it right.

26 And what I'd say is you can't just leave it for the
27 15 minutes that the court set aside to see if it's all
28 working, you've got to get it working by yourself, test
29 it with your friends or family, if you like, to make sure
30 that it's all working properly.

31 And I just can't emphasise that enough. I have been

1 recently in a reasonably major case and somebody was
2 making a very important submission and their connection
3 with terrible, you could only hear every sort of second
4 word and basically the trier of law and factors wasn't
5 really tolerant of the whole thing and really, as a
6 result, their submission really heavily suffered. So
7 you've got to get that right.

8 But the second thing I'd just briefly say is in
9 relation to the hearing preparation, it's really critical
10 that you think through how that's going to actually work
11 as counsel and as the practitioner. So the first thing
12 is the whole dynamic between the solicitor and the
13 barrister, including senior counsel, is all disconnected
14 in a virtual hearing, often you're in separate places, so
15 you've got to formulate a plan and so I use WhatsApp
16 often with instructors and junior counsel and you've
17 really got to formulate how that's precisely going to
18 work and on what device so that it's not on the same
19 computer.

20 You've also got to work out precisely how you're
21 going to work, firstly, as an advocate, so where are your
22 documents going to be because if they're on this screen
23 over there that I've got and you spend your whole time
24 doing this, it's pretty unpersuasive and I've seen that
25 happen a lot. I've seen cross-examination go like this,
26 you know, 'I put it to you you've done this' and it's
27 just disconnected so you've got to switch everything
28 around.

29 Now, if you've got a massive screen, you might be
30 able to have a document on your computer - I find I just
31 have my documents set out unfortunately in hard copy

1 often at the bottom of the screen. It's quite important
2 because imagine if you're in a courtroom and you spent
3 your whole time just doing this with the judge and the
4 witness. It's just unpersuasive. So you've got to
5 really think through how you organise your desk.

6 The only thing I'd say is a really another critical
7 part, which is just your organisation of how you get
8 documents to the court, and so you've really got to have
9 a discussion between your instructor, junior counsel so
10 everyone knows what's going to happen. So I've seen lots
11 of instances where somebody will just say, 'We'll get
12 that document to you, Your Honour' and then, you know,
13 delay, mucking around, 'I don't have your email yet, it's
14 not coming'. 'Let me share my screen'. 'How do you do
15 that?' Just delay, delay, delay - big mess. So just
16 sort it out.

17 One person should have responsibility for it; the
18 person who's most able, whether that's the instructor or,
19 in my case, the junior counsel, and you just know
20 precisely what we're going to do. 'Right, we're going to
21 send an email to the judge's associate' or, 'We're going
22 to share this live on screen' and everyone knows what
23 they're going to have to do.

24 So that's what I would say that you've really got to
25 get the technical aspect right and don't just leave it
26 for the 15 minutes beforehand and if you don't do that,
27 you're at serious peril because if you don't have a great
28 visual image of yourself as counsel and you don't have a
29 great audio as counsel, then your persuasion goes out the
30 window; and really prepare your work space so you know
31 how it's going to work.

1 So you've got your WhatsApp off to the side, maybe,
2 on your phone, and you can see that working as counsel,
3 and as the solicitor you know exactly what role you're
4 going to be playing with the barrister, so sending them
5 WhatsApp messages or you're going to be providing the
6 document. So you just sort those two things out. Once
7 you do that, you will be fine.

8 CLAYTON JR: That leads nicely into a question from the
9 audience, which is for some hearings counsel and
10 solicitors for a party have been gathering at one
11 location, for example, in chambers or a solicitor's
12 office, and for other hearings counsel and solicitors
13 have been joined from separate locations. From the
14 court's perspective, firstly, and then also from
15 counsel's perspective, has one approach worked better
16 than other?

17 KEOGH J: Well, there can be technical glitches either way. If
18 you're in a zoom hearing and two people are in the same
19 room on different devices, then you can get - and both
20 have their audio on, then you can get the feedback which
21 creates real problems. If you're all sharing the same
22 internet connection, that can create (indistinct)
23 problems, as I understand it. Obviously, if you're in
24 different locations then you're dependent on potentially
25 the weakest connection.

26 Having said that, if you can get over the technical
27 issues, my preference would be that a party's team is in
28 good close connection and often that will be a physical
29 connection where they're not too far apart. And, as I've
30 already emphasised, I think certainly for lay witnesses
31 my preference is that the lay witness be at the

1 solicitor's office or at barrister's chambers in a
2 separate room.

3 JUDGE PILLAY: I'd agree. I'd agree with exactly what Justice
4 Keogh has said. I think it does work better for partly
5 the technical aspects but also the presentation of a
6 particular party's case where they're in close physical
7 proximity. I've seen oftentimes counsel in the same set
8 of chambers being able to resolve an issue very, very
9 quickly while things are happening live. So I do think
10 that physical proximity is very useful.

11 CLAYTON JR: Opposing counsel being in the same set of
12 chambers, for example?

13 JUDGE PILLAY: Yes.

14 CLAYTON JR: Yes. Richard, do you have a preference or has it
15 just been circumstance that's dictated how it happens?

16 MR ATTIWILL: Largely circumstance. Prior to virtual hearings
17 I would have said there's no way I would be remote from
18 junior counsel but, actually, I found it to be completely
19 fine. It works very well as long as you've got a proper
20 system in place. Once you don't have a system in place
21 with WhatsApp and if you're not getting used to using it,
22 then it's a mess; but if you've got a proper system in
23 place, it's fine.

24 The rule of thumb I've given it now is that if I've
25 got an expectation that there's going to be a lot of need
26 for discussion and really passing a physical note from
27 the junior and so forth, then I'll go into chambers and
28 do it but I'd say that's only been, say, 20 per cent of
29 the time at the moment. I mean, things might change
30 but - - -

31 KEOGH J: But, Richard, what about if you're running a trial

1 with, say, over a five or 10-day period with multiple
2 witnesses?

3 MR ATTIWILL: Yes.

4 KEOGH J: Does it change in that circumstance, in your view?

5 MR ATTIWILL: Well, I think that it's - look, in some way - I
6 think the answer is probably yes if it's a five to 10-day
7 hearing with multiple witnesses but I think you do have
8 to be careful because I've often seen the system not
9 working and Your Honour's just pointed out, for example,
10 in Zoom, the barristers together in one set of chambers
11 in a room together, that doesn't work if they're both
12 live on the system so you get feedback and static and so
13 forth.

14 But, look, I've run a three-day case remotely that
15 was completely fine with, I think, three witnesses and we
16 just used the breakout room, made our own Zoom
17 conferences and it all sort of seemingly went okay. Next
18 week I've got a three-day hearing before the Royal
19 Commission but I'll probably go into chambers there just
20 for the immediacy of the instruction rather than relying
21 upon WhatsApp.

22 So I think for a five to 10-day hearing with
23 multiple witnesses I would probably go into chambers, but
24 maybe not for all of it. So I would use my discretion so
25 that there might be a whole day where another expert is
26 going to be giving evidence, I might do that remotely, so
27 I pick and choose a bit. You've just got to make sure
28 that it's going to work.

29 KEOGH J: One of the things that I pick up on that Richard
30 spoke about is the degree of preparation that's required
31 and cooperation between parties and I think that's much

1 greater for the virtual hearing than it would be for a
2 hearing in a physical courtroom.

3 And the sorts of things that you need to prepare
4 well and where there needs to be a significant degree of
5 cooperation between the parties are court books or the
6 folders of key documents so that that's prepared well in
7 advance, it's prepared properly, the soft copy is
8 hyperlinked; there is certainty in relation to the
9 documents. You will be all be familiar with cases where
10 there are two or three or four versions of the one
11 document. It's critically important that everyone has
12 the same version, include, in particular, the witness.

13 You also need to make arrangements in advance to
14 ensure that those documents that are relevant to a
15 witness' testimony are going to be in the hands of the
16 witness in a way that the witness can interact with at
17 the time they're giving their evidence. You'll have to
18 think in advance about views and demonstrations, the
19 arrangements that would be necessary to conduct a view -
20 social distancing, the time that will be taken, whether a
21 view can be conducted in advance and video recorded and
22 shared during the hearing.

23 Physical exhibits: I know Richard and I were
24 involved in a case where there were a number of physical
25 exhibits and we muddled along with a process to try and
26 ensure that that could be dealt with but you'll need to
27 think in advance about physical exhibits. There's not
28 much point getting in to day 3 or 4, calling a witness
29 and trying to introduce a physical exhibit through the
30 witness. Just how on earth will you do that?

31 You need to think about physical exhibits in advance

1 of the trial and make arrangements with witnesses, with
2 the other party and with the court to ensure that that
3 can all work. It might involve introducing a physical
4 exhibit at the very start of a trial or even a day or two
5 beforehand so everyone gets a chance to have a look at it
6 and then perhaps making video recordings of the physical
7 exhibit so they can be used during a witness' testimony.

8 Obviously, the witness arrangements we've spoken
9 about. Video surveillance is another thing that parties
10 that want to rely on video surveillance will need to
11 think of in advance so that perhaps they get the video
12 surveillance to the judge's associate so that it can be
13 dealt with reasonably seamlessly during the case rather
14 than having to delay or stop the hearing until the video
15 surveillance can be provided.

16 CLAYTON JR: Justice Keogh, we've had a question from the
17 audience which I think is relevant to this part of the
18 discussion. If cross-examining an expert on documents,
19 is it better to do so by sharing the relevant document on
20 the screen so that the document on the screen is the
21 dominant feature of the screen rather than the witness'
22 face or by referring the witness to the electronic court
23 book? Do you have a preference, and from counsel's
24 perspective, Richard, after the judges have had an
25 opportunity to answer, which is more effective in
26 maintaining engagement between counsel and the witness.

27 KEOGH J: My preference would be having the witness have access
28 to the document separate from sharing it on the screen so
29 that you don't interfere with what's otherwise seen on
30 the screen. What about you, Judge Pillay, what do you
31 think?

1 JUDGE PILLAY: Yes, that would be my preference but it really
2 happens because most of the witnesses are just either at
3 home with only one screen or in a car trying to escape
4 what's happening inside the house for the time they're
5 giving evidence.

6 But generally I do have the shared screen as the
7 dominant feature with the witness off on a smaller tile
8 to the side and that's just the way it's worked because
9 once the relevant part of the document's identified,
10 everyone's got it in their mind and we can then go back
11 to having the witness as the dominant feature but that's
12 the way that I use it.

13 KEOGH J: Richard, as counsel, how would you prefer it to be
14 done?

15 MR ATTIWILL: Definitely from some sort of electronic court
16 book or hard copy rather than on the screen. Because
17 I've had instances where for 45 minutes you can't see
18 anybody because you've just got this dominant document on
19 screen and finding it hard to see people so that didn't
20 work well.

21 One interesting thing is Your Honours have talked
22 about the preference to have witnesses obviously at firms
23 of solicitors and obviously, particularly in the height
24 of the COVID-19 issues that we've had, that just wasn't
25 possible but really post 30 June when people are going to
26 be able to resume their workplace without restriction, so
27 it seems, apart from social distancing, you think that
28 that should be something that could be readily done more
29 often, that is that witnesses should be giving evidence
30 from the solicitor's premises insofar as that can be
31 practically arranged. I mean, it's so much easier and

1 better and - - -

2 KEOGH J: Yes, from the controlled environment.

3 MR ATTIWILL: Yes.

4 CLAYTON JR: I think that's very important.

5 MR ATTIWILL: Yes. Although I have had some instances with the

6 solicitors, they have so much technology that they use

7 their video conferencing facilities which just don't

8 work, so, like I said, big panoramic shots in boardrooms

9 and so forth - so they don't seem to be able to just set

10 up a simple computer screen - and that's to be avoided

11 because you just can't assess anyone's credit from big

12 panoramic shots in a boardroom. So that's the only

13 matter that's obviously to be avoided.

14 CLAYTON JR: Yes. In terms of the reduction in restrictions

15 and the prospect that work will be returning to something

16 like normal as at 30 June, we've had a question from the

17 audience as to our best prediction about when courts will

18 return to fully in-person hearings. And the answer to

19 that is that we don't yet know and that the indications

20 that we've had from government, like the indications that

21 everyone has had, is that if you can work from home, you

22 should work from home, and the court is taking that very

23 seriously.

24 So it will be an ever-changing space, I've no doubt,

25 and things will evolve but at the moment our expectation

26 is that remote hearings will continue for quite some

27 time. Now, that might not mean that a hearing that's a

28 35-day case with 70 witnesses will be entirely remote.

29 It might be that there are ways in which there are sort

30 of hybrid arrangements made, but I think that

31 practitioners should be expecting things like directions

1 days, circuit matters for the next little while, at
2 least, and applications will largely be done remotely.
3 Do you agree with that, judges?

4 KEOGH J: Yes. But there are other complications beyond the
5 simple health restrictions that have been imposed that
6 will have implications for us. There will be a real need
7 to try and reintroduce jury trials in crime sooner rather
8 than later. That will take resources in terms of space
9 and personnel. Necessarily that will have an impact on
10 what's available for, say, the Common Law Division and
11 the impact of that will be that we're likely to have
12 remote hearings continuing for a considerable period, in
13 my view.

14 CLAYTON JR: All right. I'm mindful of the time so we have a
15 number of questions from the audience, so we might start
16 dealing with those. There are a number of questions
17 about whether Zoom hearings are recorded and, if so, how
18 that occurs and what the implications would be for both
19 privacy and appeals. I can say that in the Supreme Court
20 all hearings are recorded regardless of if they're in
21 person or not, so there's always a recording made.
22 Whether or not you choose to request a transcript of it
23 doesn't alter the fact that there is a recording, and
24 there's no difference in Zoom.

25 So if you have been in a directions hearing with me
26 you will have noticed down in the corner there will be a
27 little black box that says 'Auscript'. Auscript is
28 actually coming along as a participant in hearings, but
29 as well as that we are making a back-up recording in most
30 instances because every so often the transcript goes
31 wrong and there's a problem and we had that the other

1 week where the transcript couldn't log on to our hearing
2 and fortunately we had a back-up recording that we'd
3 made.

4 So the recording that is made on a local computer is
5 probably not as sophisticated as the recording that
6 Auscript might be able to make, but it suffices in terms
7 of being able to get the transcript. Where hearings in
8 our court are conducted in an actual court, albeit
9 remotely, then the transcript that is already - the audio
10 recording services that are already in the court just
11 kick in and record it in the normal way.

12 In terms of the privacy considerations that arise,
13 and I know that at the outset of this there were a lot of
14 concerns around privacy of Zoom and some government
15 departments and so on have just made decisions not to use
16 Zoom because of that.

17 One of the ways that our court has tried to resolve
18 that is not to publish widely links to Zoom hearings so
19 you have to be sent a particular link to be able to
20 participate and we are very mindful of the access to
21 justice issues so we do publicise on the daily list the
22 fact that parties or people who aren't parties to the
23 proceeding can participate by listening in but they do
24 need to contact the judge's associate to get the link
25 sent to them. It's not quite as easy as just being able
26 to walk into any court that you like and sit in but you
27 don't have to be vetted in any way, you will be a non-
28 audio, non-video participant in a hearing.

29 JUDGE PILLAY: Yes, there's only one thing I'd add to that. We
30 adopt a very similar process to that but we also have
31 available a number of iPads in a room next to registry,

1 so if someone comes in to watch any particular case, they
2 will see the case listed as being 'at registry' which
3 indicates it's a virtual e-Trial and they can then go to
4 the room and log in to a particular iPad which will take
5 them to that particular case.

6 CLAYTON JR: Yes. All right. Thank you. I've also got a
7 question, and this is an interesting one, and I have to
8 say I don't really know the answer, which is what if a
9 solicitor does not have an office?

10 KEOGH J: Well, particularly in this initial period where we're
11 all just getting used to virtual hearings, and that's
12 been imposed on us, I think courts would be fairly
13 understanding that not everyone is going to be geared up
14 to participate fully, whether that be by reason of
15 technology or office space or whatever, and if somebody
16 can't participate for good reason, then it may well mean
17 that fairness dictates that a matter's adjourned.

18 CLAYTON JR: I've got a question, 'Can witnesses attend court
19 to give evidence?'

20 JUDGE PILLAY: If I could - - -

21 CLAYTON JR: Judge Pillay.

22 JUDGE PILLAY: In some exceptional circumstances at the moment
23 our court is allowing people in person to come into court
24 to give evidence but it is an exceptional circumstance
25 where we might have, for example, complex interpreting
26 issues, and so we have arrangements in court, shields and
27 separation barriers and the like, if that was required
28 but application would need to be made for it to be deemed
29 an exceptional case.

30 CLAYTON JR: Yes. And I think that the situation is the same
31 in the Supreme Court inasmuch as there is no absolute

1 prohibition on an attendance in court but there would
2 have to be a reason why that was the appropriate option.
3 I know that within our court and probably something
4 similar has happened in your court, Judge Pillay, we've
5 had a team of people who have gone through the entire
6 court, the court building as well as all of the courts,
7 worked out how to achieve social distancing.

8 We've got a spreadsheet which says the numbers of
9 people who can be at the Bar table, numbers of people who
10 can be in the body of the court. Seats within the body
11 of court have been roped off so that if people were to be
12 in court, social distancing would be maintained and even
13 within the hallways and so on, and the stairways there
14 are things on the ground to indicate where you can stand
15 to maintain social distancing.

16 So we are obviously preparing for a future in which
17 people will be back in court but in a socially distanced
18 way, and there are particular exceptional circumstances
19 in which people might be back in court already but it
20 would be the exception rather than the norm, I think.

21 Now, I've also had a question about the virtual
22 backgrounds that I showed at the start of the session and
23 those backgrounds are backgrounds that we were asked to
24 provide by the Vic Bar and they are just photographs of
25 four of the Supreme Courts. I think that the background
26 that Richard is using is one that Victoria bar has
27 developed itself; is that right, Richard?

28 MR ATTIWILL: This is a - I'm not sure. I think this is a
29 County Court background.

30 CLAYTON JR: Or a County Court - the County Court might have
31 come up with some backgrounds as well.

1 MR ATTIWILL: That's a Vic Bar one.

2 CLAYTON JR: Right.

3 MR ATTIWILL: This is another one that - very prestigious
4 looking. (Indistinct words) looks very - I think I -
5 obviously, I think that's the Supreme Court.

6 CLAYTON JR: Yes, the dome.

7 MR ATTIWILL: Yes.

8 CLAYTON JR: In terms of where they're available from, I am
9 told that the Supreme Court virtual backgrounds will
10 shortly be available on our website but at the moment I
11 think that they're only available at Vic Bar, from Vic
12 Bar.

13 JUDGE PILLAY: And just on that before every Zoom hearing we,
14 and with the invitation we attach the neutral background
15 that Richard's in front of.

16 CLAYTON JR: All right. Now, I'm just reading through a few of
17 the questions. 'Apart from the court making a recording
18 of the proceeding, is a solicitor permitted to make his
19 or her own recording of the Zoom hearing?'

20 KEOGH J: No.

21 CLAYTON JR: I think that's a pretty categorical answer. I've
22 got a question: 'When will plea hearings be done in
23 court?'

24 JUDGE PILLAY: Can I jump in on that one?

25 CLAYTON JR: Yes.

26 JUDGE PILLAY: I can say that plea hearings in some ways are
27 being done in court because for those pleas where someone
28 is still in gaol, then the only way we can connect to
29 them is via the judge going into a particular courtroom
30 and then having that particular individual appear via
31 Webex. But in the main we're still having counsel appear

1 remotely, if possible, and that will continue to be the
2 position for the foreseeable future.

3 CLAYTON JR: Yes, and it's the same in the Supreme Court, as I
4 understand it. Again on the virtual backgrounds a
5 question, 'If a background won't work, is it okay to have
6 a background of a home office?' And I think the answer
7 is that it's certainly entirely understandable to have a
8 non-virtual background and sometimes virtual backgrounds
9 just don't work on a device but I think everybody would
10 agree that the background should be appropriate, so you
11 don't want your washing hanging in the background or a
12 scene of chaos, if I can put it that way.

13 Something very neutral, facing a bookshelf or a
14 blank wall or a sort of an office-like set up I think is
15 entirely appropriate. Anyone have anything to add on
16 that?

17 MR ATTIWILL: In one of the hearings that I had, an important
18 expert gave evidence and it all looked fine but there was
19 a mirror, a prominent mirror and that was reflecting his
20 unmade bed so it was a distraction. So we sort of solved
21 that.

22 And also, too, don't underestimate that a lot of
23 people are looking at your photos and your books and what
24 you're reading and so forth so you've really got to - I
25 just go for a virtual background, otherwise people are
26 getting distracted on what's on your wall and the
27 painting and one of the judge's remarked on something on
28 my wall, they could see a map I had, so, you know, it's
29 just a distraction, you just need to have a neutral
30 background.

31 CLAYTON JR: Yes. This question has come through: 'An

1 audiovisual recording of the hearing would enable an
2 appeal court to be in the same position as the trial
3 judge to assess evidence and credit. Will this lead to
4 less cases being remitted for rehearing?'

5 KEOGH J: Somebody should have a look at the High Court
6 decision in Pell and the comments made in the High Court
7 about an appeal court reviewing the video of a hearing in
8 order to try and put themselves in the same position as
9 the jury. It's not necessarily the role of the appeal
10 court, is the short answer.

11 CLAYTON JR: Yes. And, in any event, I think having a
12 recording available doesn't necessarily mean that that is
13 what would be considered by the appeal court; the appeal
14 court would consider the transcript if they do, because
15 we already have audio hearings available of all our
16 proceedings but that is not what is provided - - -

17 KEOGH J: No.

18 CLAYTON JR: - - - to the court in the ordinary course. Well,
19 I'm mindful of the time. Are there any closing comments
20 that our panellists would like to make?

21 KEOGH J: With virtual hearings, there will be glitches. We
22 all understand that it would be useful to let witnesses
23 and participants know that in advance, if they're not
24 familiar with the process. We just need to be mindful
25 that it's a slightly different environment and you've got
26 to take that into account in the way in which you
27 communicate and communication is really what the court
28 proceeding is all about.

29 CLAYTON JR: Judge Pillay.

30 JUDGE PILLAY: I'd only say that I understand that this is a
31 difficult time and really all that the court is asking is

1 that practitioners try their best in terms of maintaining
2 the formality of these hearings so that we can continue
3 to inspire confidence in the community that we are doing
4 the right thing and that we are providing them a way to
5 have their cases heard. That's all we're really asking.

6 CLAYTON JR: And Richard, finally from you.

7 MR ATTIWILL: Just say to counsel get your audio and visual
8 thing as right as you can get it and really for
9 solicitors I'd just focus on two systems: (1), the
10 system with communicating with counsel, just get that
11 right and just know exactly how you're going to do it,
12 also; (2), get right the system for the provision of
13 documents during the hearing to the court and the other
14 parties and really think through exactly how that's going
15 to be done.

16 And otherwise I would enjoy the virtual hearings
17 because it's something different in our lives and so not
18 much can really go wrong, it's just a question of getting
19 it right and preparing for it.

20 CLAYTON JR: Thank you all to the panellists and thank you all
21 to the attendees. It's been an extraordinary period of
22 time that we've all lived through. Someone once said
23 never to waste a good crisis and although I don't think
24 anyone would have ever wished this upon us, we've learnt
25 a lot from it and I think that there's no doubt that in
26 terms of technological advances, the courts have been
27 able to move incredibly rapidly to positions that would
28 otherwise have taken years and years. I think that to
29 some extent there's no going back.

30 There are changes now that have been put in place
31 that will last forever in terms of the use of virtual

1 hearings, particularly for witnesses who might live
2 overseas - I can't see that there's just going to be
3 justification in the future for bringing out, you know,
4 10 experts at great expense internationally now that
5 people are so much more familiar with the technology. I
6 think that electronic court books are here to stay and I
7 know that I certainly will be conducting my circuit
8 directions via Zoom from now on regardless of the COVID
9 restrictions.

10 So we will all continue to learn, no doubt, but
11 thank you all for attending, thank you for participating
12 and we will see you next time. I am now going to
13 formally end the session for everybody.

14
