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TRANSCRIPT OF PROCEEDINGS

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SCV/CCV WEBINAR

THE DOS AND DON'TS OF VIRTUAL HEARINGS

Hosted from  
Supreme Court of Victoria  
Melbourne

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on

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3 any means (electronic, mechanical, microcopying, photocopying,  
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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 locked,  
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

