

# Progressing litigation in the time of COVID-19

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## Witnessing documents remotely

### *Electronic Transactions Regulations 2000*

1. The first step to consider prior to witnessing a document electronically is to confirm, under the *Electronic Transactions Regulations 2000*, common law and other legislation, if a document can be electronically signed or if a “wet” signature is required.
  - a. For wet signatures, either post a hard copy of the document or email the document to the person signing (signatory) for printing.
  - b. For electronic signatures, it is acceptable to send the document electronically using appropriate software, taking care to make detailed file notes.<sup>1</sup>
  - c. In *Bendigo and Adelaide Bank Ltd & Ors v Kenneth Ross Pickard & Anor* [2019] SASC 123, Stanley J, in consideration of whether a deed can be executed electronically under section 127 of the *Corporations Act*, stated that as section 127 of the *Corporations Act* contemplates two officers attending to execution, there is good reason to consider that there must be a single, static document. The electronically signed “deed” was not enforceable.
2. A number of Regulations and Determinations have been put in place to address some of these issues in response to COVID-19.

### *COVID-19 Regulations and Determinations in relation to witnessing documents*

3. The *Corporations (Coronavirus Economic Response) Determination (No 1) 2020* allows electronic signature of electronic documents under section 127 of the *Corporations Act*.
4. The *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020*:
  - a. The Regulation provides broad allowances for witnessing to occur via audio visual link. The scope extends to the verification of identity, as well as “seeing the face of the signatory” for witnessing affidavits.
  - b. The requirements for virtual witnessing are set out in regulation 2(2) and state:
    - i. The witness must observe the person signing the document in real time;
    - ii. This means that you must be able to see both the face of the person signing and the actual signing of the document simultaneously. In circumstances where electronic signatures are suitable, a video link with share screen may be appropriate.
    - iii. Attest or otherwise confirm the signature was witnessed by signing the document or a copy of the document;
    - iv. Be reasonably satisfied that the document the witness signs is the same document or a copy; and
    - v. Endorse the document, or the copy of the document with a statement specifying the method used to witness the signature of the signatory; and that the document was witnessed in accordance with the regulation.



## Expert medical assessments via videoconference

1. An expert medical report prepared following examination of a plaintiff via videolink which provides a diagnosis or opinion on the plaintiff's injuries, needs and capacity will most likely be admissible under the UCPR and *Evidence Act*; provided that the expert sets out how they applied their specialised knowledge to the facts observed or assumed when reaching their opinion.

There is a risk that the evidence may be given little weight because of its methodology, and of discretionary exclusion under section 135 of the *Evidence Act*.

### Admissibility

2. Case law interpreting section 79 of the *Evidence Act* requires a medical expert to:
  - a. describe their qualifications and experience, and identify the subject matter about which the opinion is proffered;<sup>2</sup>
  - b. set out the facts upon which their opinion is based;<sup>3</sup>
  - c. explain how the field of specialised knowledge applies to the facts assumed or observed;<sup>4</sup>
3. An expert report is likely admissible so long as the expert explains:
  - a. how, in coming to this diagnosis or opinion, they have applied their specialised knowledge to the facts assumed or observed during their assessment via video conference.
4. This will also likely satisfy the requirements of the UCPR's Expert Code of Conduct.

### Probative value

5. Even if such a report is admissible, opposing parties may still make submissions that the report should be given little weight because of the method of examination.
  - a. Case law establishes that the process by which an opinion is formed and an expert's methodology are relevant to the weight of that evidence.<sup>5</sup>
  - b. Based on any such submissions made by opposing parties, there is a chance the court may decide to give the evidence little weight, or even invoke the general discretion to exclude it pursuant to section 135 of the *Evidence Act*.
  - c. In doing so, the court would assess whether the probative value of this report is outweighed by the degree of unfair prejudice, the possibility of confusion and waste of time.<sup>6</sup>



## When will the COVID-19 pandemic be grounds to adjourn?

Here we analyse recent developments in case law which highlight some issues to consider for parties intent on proceeding to hearing during the coronavirus crisis.

His Honour Justice Sackar granted an application to vacate the hearing of the *David Quince v Annabelle Quince and Anor* proceeding in the Supreme Court of NSW, following the imposition of a COVID induced regime requiring that cross-examination of all witnesses occur by way of video-link following the chaos ensuing from COVID-19.

The plaintiff made an application to vacate on two bases, one of which being that the regime required that cross-examination occur by way of video-link.

Many of the issues in dispute ultimately boiled down to a credit finding as between the opposing key witnesses. These proceedings related to a claim that transfers of shares purportedly executed by the plaintiff were a forgery. Due to the serious nature of the allegations, the plaintiff's senior counsel informed the Court that he wished to be able to cross examine the defendant in a conventional setting on the basis that the defendant's demeanor in answering those allegations were crucial in assessing her credit, and in properly assessing her denials. His Honour acknowledged that the plaintiff may be faced with an unfairness in not being given a full opportunity at least to ventilate the issue of creditability in the conventional way.

## Western Australia Supreme Court of Appeal denies similar application to *David Quince v Annabelle Quince and Anor*

In the recent decision in *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38, an application to adjourn was grounded on issues said to arise from the COVID-19 pandemic. The Chief Justice of WA has made a directive that cases are to proceed by way of telephone, unless all parties have access to video-link, in which case they may take place utilising video. The applicants went so far as to assert that they were "entitled" to a conventional hearing. The Supreme Court of WA rejected the application on the basis that it would be antithetical to the administration of justice to accept such a position.

### Criminal and civil proceedings

On the basis of the cases to date, criminal matters appear to be more readily adjourned due to concerns regarding a fair trial of the accused. This basis was cited by Her Honour in adjourning the long-awaited hearing(s) against Eddie Obeid and Ian Macdonald to August of this year.

The courts seem to remain reticent to adjourn civil proceedings. This is reflected in the recent decision to refuse such an application in *Roach v Malsave Pty Ltd*, a personal injury claim where the plaintiff sought to adjourn.

### Factors courts are considering in decision to delay a matter due to coronavirus

Recent decisions, including the above, and our own recent experience, show that the courts will likely assess the following criteria in deciding whether a matter should be delayed due to COVID-19:

1. Whether there will be a material disadvantage or unfairness to a party by the continuation of the proceeding.
2. If a material disadvantage will result from a virtual hearing, such as the loss of an ability to assess a witness's demeanour where allegations turn on an assessment of credit.
3. If the Court is able to provide a venue for the matter to proceed safely.
4. The complexity of the hearing and the extent to which Counsel will be required to confer with their junior or instructing solicitors.
5. The agreement of the protocol as between the parties, and the ability of any witnesses to comply with that protocol.
6. The extent of inefficiency in utilising the Court's time caused by adjourning the proceeding.
7. The ability to maintain a protocol for the duration of the hearing in the rapidly evolving environment. Courts are unwilling to entertain split trials, particularly when they are unable to ascertain when the matter will be able to resume.

<sup>1</sup> See *Stuart v Hishon* [2013] NSWSC 766 for discussion on what constitutes an electronic signature

<sup>2</sup> *Dasreef v Hawchar* [2011] HCA 21 at [37].

<sup>3</sup> *King v Jetstar Airways Pty Ltd* [2011] FCA 1259 [7], *Visy Packaging Holdings Pty Ltd v Commissioner of Taxation* [2012] FCA 1195 at [255]

<sup>4</sup> *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at [85].

<sup>5</sup> *ASIC v Rich & Ors* (2005) 218 ALR 764 at [94]; *Ample Source International Ltd v Bonython Metals Group Pty Ltd (No 6)* [2011] FCA 1484 at [300].

<sup>6</sup> *King v Jetstar Airways Pty Ltd* [2011] FCA 1259 at [9].

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