



Précis Paper

Court Hearings by Audio Visual Link

A discussion about the ways in which Australian courts have responded to the Covid pandemic by shifting court hearings from in person hearings to audio visual link hearings, focusing in particular on the recent matter of *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430.

Discussion Includes

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- Jury Hearings
- Rapport with clients
- Procedural considerations of the decision of *Porter v Mulcahy & Co Accounting Services Pty Ltd*

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Court Hearings by Audio Visual Link

In this edition of BenchTV, Peter Cawthorn QC (Barrister, Chancery Chambers, Melbourne) and Peter Caillard (Barrister, Owen Dixon Chambers East, Melbourne) discuss the ways in which Australian courts have responded to the Covid pandemic by shifting court hearings from in person hearings to audio visual link hearings, focusing in particular on the recent matter of *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430.

Background

1. The case of *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430 was a ruling that was handed down by Justice Delaney and concerned an application to adjourn a trial because of restrictions imposed during the pandemic.
2. The circumstances of the Covid pandemic have forced the courts to rapidly adjust the way in which they conduct court hearings. This has had a radical effect for court hearings in all states in Australia, most particularly in the context of juries which have not been operating at all in Victoria since March 2020.
3. In a number of cases, people have endeavoured to have their jury cases heard by judges alone both in the context of criminal cases and civil defamation cases in Victoria.
4. The case of *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430 concerns commercial issues, which has the hallmarks of many documents which can be brought up readily and lend themselves to having successful remote hearings.

Legislation

5. Each jurisdiction in regard to remote hearings is different and there is the overriding consideration of what do the interests of justice require and looking at the circumstances and facts of each case
6. The legislation in Victoria which governs the hearing of a trial remotely by video is section 42E of the *Evidence Miscellaneous Provisions Act 1958* (Vic). It provides that if the court is satisfied that certain technical requirements are met, then it may direct that a trial proceed by audio-visual link.
7. It is not automatic and the legislation is not overly prescriptive of the issues to be taken into account by the court when deciding to proceed by conventional methods or by audio visual link.
8. The legislation in NSW is a little bit different. Section 22C of the *Evidence (Audio and Audio Visual Links) Act 1999* (NSW) prescribes that the court must be satisfied that it is in the interests of justice for a trial to be heard by audio visual link. The act then sets out certain

criteria that the court is to consider before deciding to proceed in that manner. These include the public health, the health risk imposed by the pandemic, the efficient use of available judicial and administrative resources as well as any other matter that may be raised by the parties.

9. This is not to say that the discretion of the court to order the trial take place by audio visual link is entirely open. In Victoria, there is the *Civil Procedure Act 2010* (VIC) which has an overarching purpose to essentially make sure that all trials are conducted in a manner that is just, efficient, timely and cost effective to determine the real issues in dispute.
10. Although the relevant legislation in Victoria is not as prescriptive as it is in NSW, the overarching rules that apply to all legal practitioners still applies.

Communications with legal representatives

11. One of the specific criteria in NSW legislation in section 22C(7) of the *Evidence (Audio and Audio Visual Links) Act 1999* (NSW) is that the court must be satisfied if the party is able to have private communications with the legal representatives of the party and has a reasonable opportunity to do so.
12. This was an important consideration in the case of *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430 where the parties wanted the judge to adjourn so that there could be the best possible chance for a face-to-face hearing.
13. In the case of *Capic v Ford Motor Company of Australia Limited* [2016] FCA 1020, Justice Perrin declined to vacate a trial so that it could be in person noting that it was an important consideration for everyone to be present in one room as it is useful to have people standing behind counsel providing critical information.

Credibility

14. It is clear that an in-person trial is always the best way to proceed however in circumstances of the pandemic, the courts have made a very rapid move toward audio visual hearings as being one way to accommodate the restrictions posed by the pandemic.
15. One difficulty surrounding audio visual link hearings are in cases that concern issues of credibility, such as where the assessment of the credit of a witness is important. In these cases, it has been argued that audio visual link is not as satisfactory as the judge does not actually see the person in the flesh. There is an advantage about being in the same room as someone and watching their body language.
16. In the case of *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430 Justice Delaney cites some of the authorities going both ways in his decision, concluding that the credibility issue was not a persuasive issue due to the fact that one can zoom in

on witnesses and sometimes that can be advantageous when determining issues of credit.

17. In the case of *Leyonhjelm v Hanson-Young* [2021] FCAFC 22, His Honour felt that he was not convinced of any material disadvantage with proceeding by trial by audio visual link.
18. In the case of *Rooney v AGL Energy Limited (No 2)* [2020] FCA 942, Justice Snaden took the opposite view noting that technology could not replicate the court room environment. Technology inhibited the cadence and chemistry between bar and bench and bar and witness box and those were forensic benefits of which a litigant should not be deprived.
19. In the case of *David Quince v Annabelle Quince and Anor* [2020] NSWSC 326 the court found that issues of credit were decisive and was not satisfied that credit could be adequately determined over audio visual link.
20. These cases illustrate that judges have different views on this aspect of the matter.

Other issues about audio-visual link hearings

21. Another issue with audio visual link hearings is that the technical requirements can present many difficulties. Technical issues are inevitable, pausing and delays. There are also inconsistencies and some courts do not use Zoom.
22. There is also the issue as illustrated in the case of *Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling)* [2020] VSC 430 about whether or not there can be appropriate communication between the parties and their legal representatives.
23. A judge making a decision whether or not to defer a case for Covid-type reasons has to be conscious that there is going to be a backlog at some stage where there is a catch up where many cases will be listed at the same time. On one hand there is the need to minimise delay in the efficient conduct of the court which is recognised in decisions like *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 and on the other is the safety of the parties and the desirability of having them in the room together for hearing.
24. Another issue of audio-visual link hearings, was illustrated by the court in *Capic v Ford Motor Company of Australia Limited* [2016] FCA 1020. The court made the point that there is mischief involved in the fact that when someone is supposedly home alone, it is impossible to know via audio visual link who is in fact with them and whether they have been prompted or are being coached, particularly if they are a witness. Thus, there needs to be a way to ensure that when a witness is being cross examined or giving their evidence that there is no opportunity for interference, collusion, corruption or general mischief.

Differences between the types of hearings

25. In Victoria, all the directions hearings and interlocutory matters are all being heard by Zoom. A directions hearing is mostly heard by audio visual link and indeed some may argue is even more satisfactorily dealt with in this way as the judge can listen to hearings at particular points in time, having received all papers beforehand electronically.
26. Further, in directions hearings and minor interlocutory disputes such as subpoena contests, there are a lot of advantages to being audio visual. For example, whilst a solicitor or barrister is in a Zoom waiting room waiting for a matter to be heard, they can use their time to deal with other matters. Alternatively, if you are waiting outside of or at the back of the court, there is a lot of time. This means that audio visual link can be a more efficient use of time for these types of matters.
27. Most of the time these days, appeals are dealt with by way of written submission well in advance of the hearing so the three judges have the chance to read them and take them in. What they don't have during audio-visual link hearings is the chance to have the kind of spontaneous exchange with the barristers that they may otherwise be used to in face-to-face hearings.
28. Appeal matters may be heard successfully without an in-person hearing as that is a circumstance where there is no witness, no issues of credit and presumably no issues of a technical nature as all documents are in the appeal book.

Jury Hearings

29. When jury hearings stopped, criminal trials stopped. They have had judge alone criminal hearings in NSW for a number of years, however it is only relatively recently that they were introduced in Victoria.

Rapport with clients

30. There is also the issue of human contact which is required for the job and it is very difficult to do this remotely. Rapport with clients, managing client expectations and going through progress with the client is difficult to do remotely and is an element that is extremely important to a client.
31. Technology and the increased use of technology is inevitable and it is likely that the use of audio-visual link will increase post pandemic. However, there needs to be a greater consistency based on when it is appropriate and when it is not

Procedural considerations of the decision of Porter v Mulcahy & Co Accounting Services Pty Ltd

32. The decision in this matter was to adjourn the matter from July 2020 to April 2021

33. The judge did not put weight on the issue of credit as he was not convinced that he could not adequately determine credit through audio visual link and he was mindful of not delaying the trial and the use of court resources.
34. The key issues that really convinced His Honour in the end were that the client's inability to communicate with their lawyers in circumstances where the clients were in Ballarat and the lawyers were in Melbourne in lockdown

BIOGRAPHY

Peter Cawthorn QC

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Peter Cawthorn QC is an experienced and accomplished legal practitioner who qualified as a solicitor in 1984 before signing the Victorian Bar Roll in 1987. Accredited as a mediator in 1993. Peter became a nationally accredited mediator in 2008 following his appointment as Silk in 2007. He has an extensive practice in all aspects of commercial law. He has conducted a number of long running trials. He has been involved in a number of class actions.

Peter Caillard

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Peter Caillard is a commercial barrister with extensive legal and commercial experience in Australian and overseas. He accepts briefs to advise on or appear in a broad range of commercial matters including commercial and corporate law, administrative law, sport law, contracts, trade practices and negligence. He has also been a Director of ASX Listed, private and not for profit companies and regularly lectures on ethics for the Leo Cussen Institute.

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Legislation

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Evidence (Audio and Audio Visual Links) Act 1999 (NSW)

Civil Procedure Act 2010 (Vic)

Case Law

Porter v Mulcahy & Co Accounting Services Pty Ltd (Ruling) [2020] VSC 430

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