Australian Courts in the Age of Covid-19

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So far Australia has enjoyed the benefit of being an island continent where relatively quick introduction of border controls and physical distancing has meant limited introduction of the Covid-19 virus. In a population of 27 million, there have been less than 7 000 cases and less than 70 deaths. Some 90% of cases have come from those travelling to Australia from overseas. Over 80% of the cases are found in just three states: New South Wales, Queensland, and Victoria.

With 9 different jurisdictions (one federal, 6 states, and 2 territory court systems) exercising civil jurisdiction, it is not surprising that responses to Covid-19 have varied across the jurisdictions. In part, this reflects the different degrees of threat Covid-19 poses across Australia. Responses are continuing evolve even within jurisdictions so that, at the moment, change seems continual. Nevertheless, there are some common themes emerging as experience of the virus and the emergency measures grows. This brief summary outlines four themes.

The first, and most obvious, theme has been to accelerate the move to electronic communications and the decline of 'face to face' hearings. The majority of court work is procedural – the never-ending supervision and management of cases as they proceed to trial. In the past, these were held as face to face hearings before a judicial officer. Where oral hearings are required, increasingly they are to be done by telephone or video conferencing.

Associated with this is the second theme– the decline in orality. More and more applications for procedural orders are being determined on the 'papers' - the written submissions and written evidence provided by the parties. Some appellate courts have decided that they will only hear appeals on the papers unless otherwise ordered.

The third theme is the 'papers' are no longer paper. Australian courts are now discouraging the use of paper documents and requiring parties to file and handle documents electronically.

The fourth theme is that in many courts, most trials have been suspended until the situation becomes clearer. This suspension is expected to continue for some months. However in jurisdictions where Covid-19 has remained relatively contained, like South Australia, civil trials have resumed but with rules about physical distancing, etc.

Many Australian courts were already well down the path to adopting many of these measures anyway – Covid-19 has just speeded up the process. As a result, some courts are well advanced in the use of ICT, but others are less so. As a result, some courts do not have the IT resources to manage the new demands being made of it. As a result, they are having to use email and other third-party software systems (e.g. Microsoft teams, Zoom, etc.) while

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they ramp up their IT systems. This then raises issues of efficiency and security that need to be addressed.

As a final observation, the need to urgently introduce changes has meant that courts have sometimes proceeded without sound legal foundations. So, for example, the Queensland Magistrates Court provided in a Practice Direction that local courts within its system would make up local guidelines for conduct of cases in those courts. The Practice Direction also provided that the local guidelines could override the Court's Practice Directions. The legal status of these Guidelines is not entirely clear. Interestingly, a fortnight later this Practice Direction was repealed and replaced by a new Practice Direction with more detailed provisions governing the conduct of business in the times of Covid-19 (including adjourning all but a few specified types of civil and criminal matters to date to be fixed in due course by the Court). In South Australia some of the changes were simply decided by the chief and/or senior judges and conveyed in letters on the court website.