Defending Your Client in the Age of Surveillance

The Advocate's Role in a Hyper-Observed Society

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Forbes Chambers

Introduction

Rise of pervasive surveillance in Australia

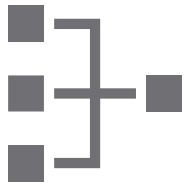
Increasing integration of tech into policing and investigations

The defence lawyer's critical role in protecting client rights in this context

Key Surveillance Technologies

- CCTV: widespread, public/private, high-resolution
- BWV: police interactions, selective activation
- Location Data: cell-site, GPS tracking

CCTV and BWV



High-definition, networked systems

BWV challenges:

Discretion in use
Lack of context
Missing footage
Back capture
Admissibility
Surveillance Devices Act

Identification Evidence

CCTV/BWV

Low quality, suggestibility (*Mundarra Smith*)

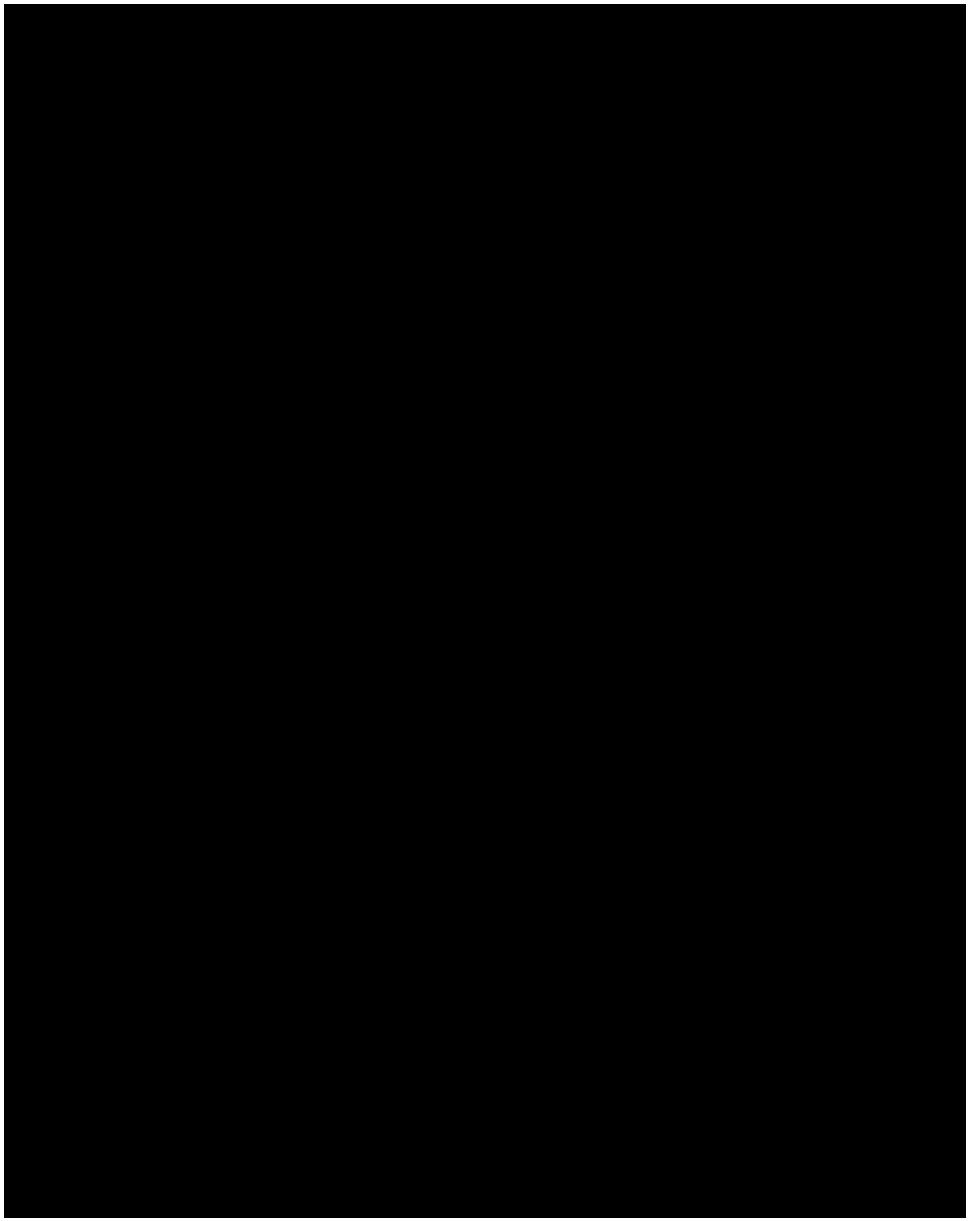
Identification of clothing, shoes, tattoos

CCTV & BWV

- Defence strategies (if admissible):
  - Expose gaps or inconsistencies
  - Use it to your advantage

Trial example- video 1

Trial example video 2



Mobile phone tower records and telephone records:

10 tips on cross examining to challenge their usefulness and accuracy

Event based monitoring records and Call Charge records

Companies generate records of, in many cases, all of the cell towers that a mobile phone connects to over the requested period.

CCRs record the cell towers connected to for when calls are made.

EBMRs refer to the cell towers that were in use in between.

1. “Negotiation” to get the best signal

1. A phone will always be searching for the cell tower that provides the best signal.

Usually a phone is going to be within range of multiple towers. A phone is constantly “negotiating” with the cell towers to find the best signal.

What will be reported in the EBM’s is the one cell tower that that phone actually makes a connection to. It won’t tell you about all the other cell towers that that negotiation is going on with to get the best signal.

2. and 3. Proximity does not guarantee connection

2. Merely being close to a cell tower will not guarantee that a phone connects to that cell tower.

3. The cell tower which a phone connects to will not always be the nearest cell tower.

2. and 3. Proximity does not guarantee connection

There will always be variation ins signal strengths between towers.

Some towers can be much larger; they're higher, and they can project greater distances.

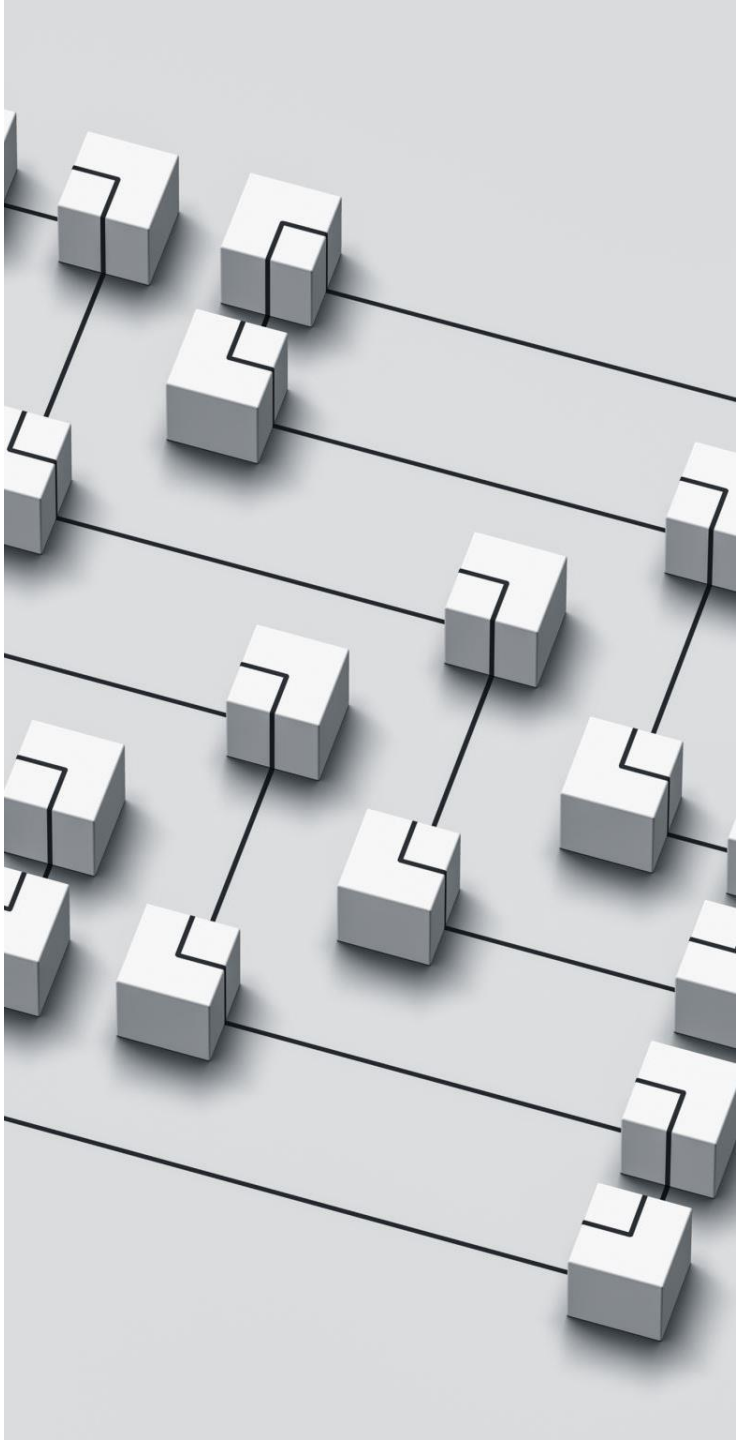
Some are smaller, a bit closer to ground level; the strength of their signal is likely to be less strong.

The distance in which you will effectively be able to hear that signal is dependent upon having line-of-sight connectivity to that tower. So, you're more likely to have a better signal from a tall tower that has line-of-sight.

2. and 3. Proximity does not guarantee connection

Some carriers produce coverage maps which are helpful in terms of looking at connection to cell towers, and what cell towers may be connecting to what phones.

Ask whether the witness has access to those coverage maps.



4, 5 and 6. What do the records show?

- 4. The records give the location of the *relevant cell towers*.
- 5. The EBMR / CCRs do not give the location of the phone which connects to that cell tower.
- 6. If a connexion is made by a phone to a certain cell tower, all that can be said is the phone could have been near a particular location, that is, the cell tower, when the connection was made.

7. And 8: The actual location of a phone

7. A phone might connect to a cell tower and that phone could be 10, 20, 30 or more kilometres away.

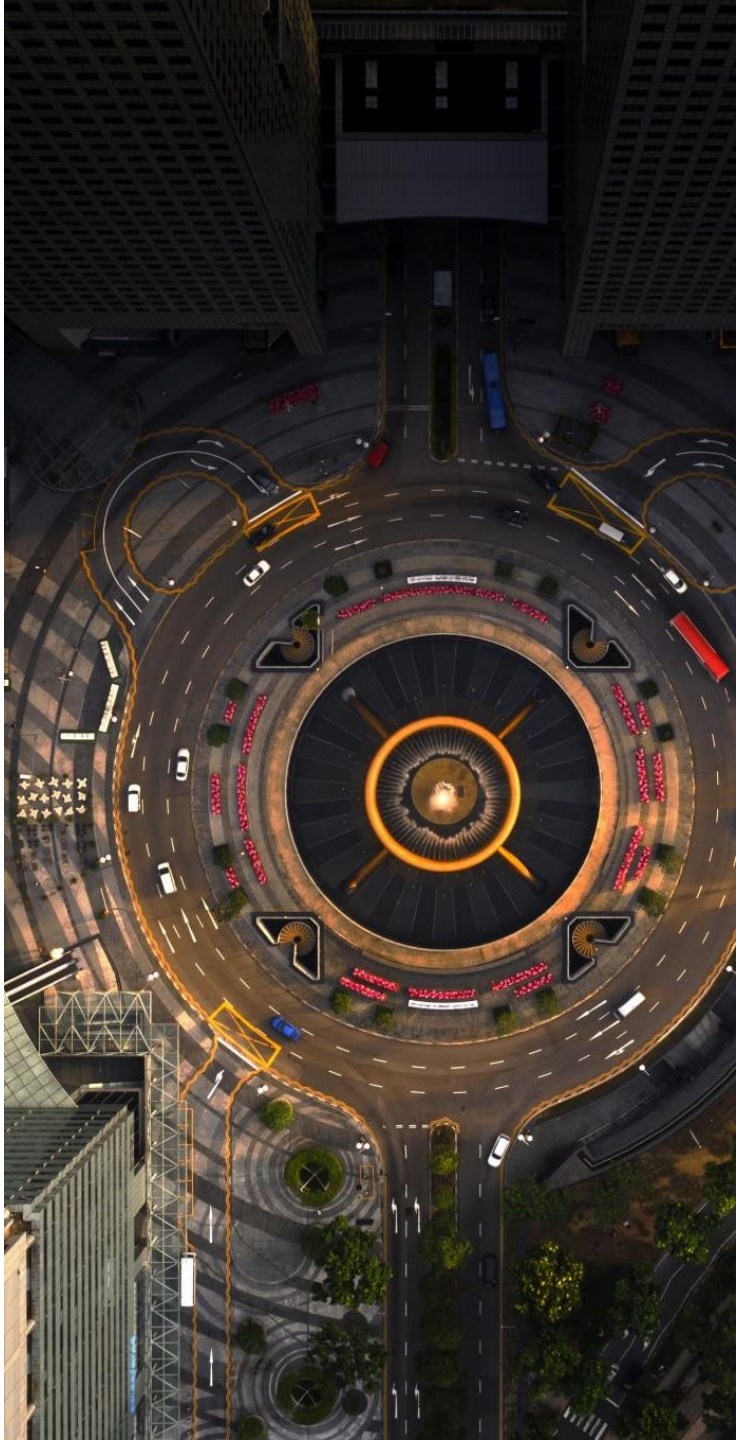
8. A cell tower connection cannot tell you the actual location of a phone at the time that connection to that cell tower is made.

9. Factors which determine which cell tower a phone may connect to

(a) Range

The range can be upwards of 60 kilometres, but it would be highly unusual to connect to a tower at that sort of distance.

If there are taller towers, it's less likely to have line of sight obstructions.



9. Factors which determine which cell tower a phone may connect to

(b) Wattage output means some cell towers will just have more strength, more ability to pick up a connection to a phone.

(c) Companies can actually configure the setting or the strength of the cell tower, which is going affect the connections that cell tower makes to phones.

9. Factors which determine which cell tower a phone may connect to

(d) Antennae

On a cell tower, typically are three antennae.

Typically, each antenna operates at an angle of about 120 degrees.

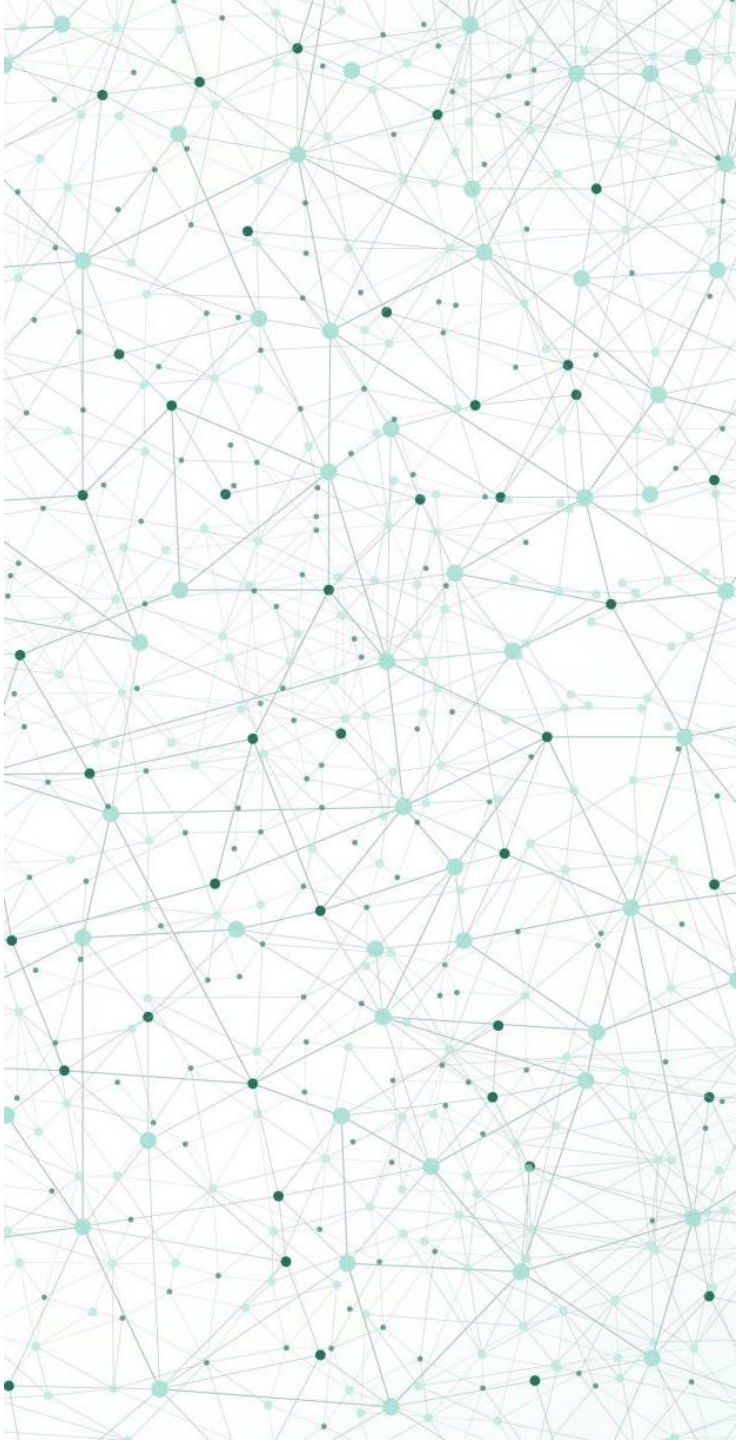
What that means is there's a particular angle within which that particular antenna can connect to a phone.

9. Factors which determine which cell tower a phone may connect to

(d) Antennae

If an antenna is not giving the best signal, it could connect to another antenna on that same cell tower, as long as you were on the edge of coverage of those two antennas, so if directly in line of sight with that antenna, with it pointing directly at you, you wouldn't connect to one of the other antennas pointing in different directions.

It's more likely that, if that one antenna on the cell tower is not able to connect to a phone, it's likely that phone is going to connect to another cell tower altogether.



9. Factors which determine which cell tower a phone may connect to

(e) Tower capacity - that is, the volume or information capacity of a cell tower.

Cell towers will have a maximum capacity beyond which they can't make connections to phones.

There is a "handover process" - if a phone was trying to connect to a tower which was very busy, there can be a handover failure.

9. Factors which determine which cell tower a phone may connect to

(f) Managing congestion

Telecommunications companies look at ways to manage congestion on their cell towers. They'll be tuning their networks, increasing capacity where it's needed more and potentially reducing it in other areas.

This is sometimes called "balancing the network"

9. Factors which determine which cell tower a phone may connect to

(g) Operation

Cell towers are not always in operation 24 hours a day.

Scheduled maintenance / unscheduled outages / software updates, and work on hardware all affect the ability to connect. .

Or the network could be down in a particular location.

9. Factors which determine which cell tower a phone may connect to

(h) Obstructions

Factors which are going to affect the likelihood of connection to a cell tower.

Anything that can physically block the signal will affect what cell tower a phone will connect to.

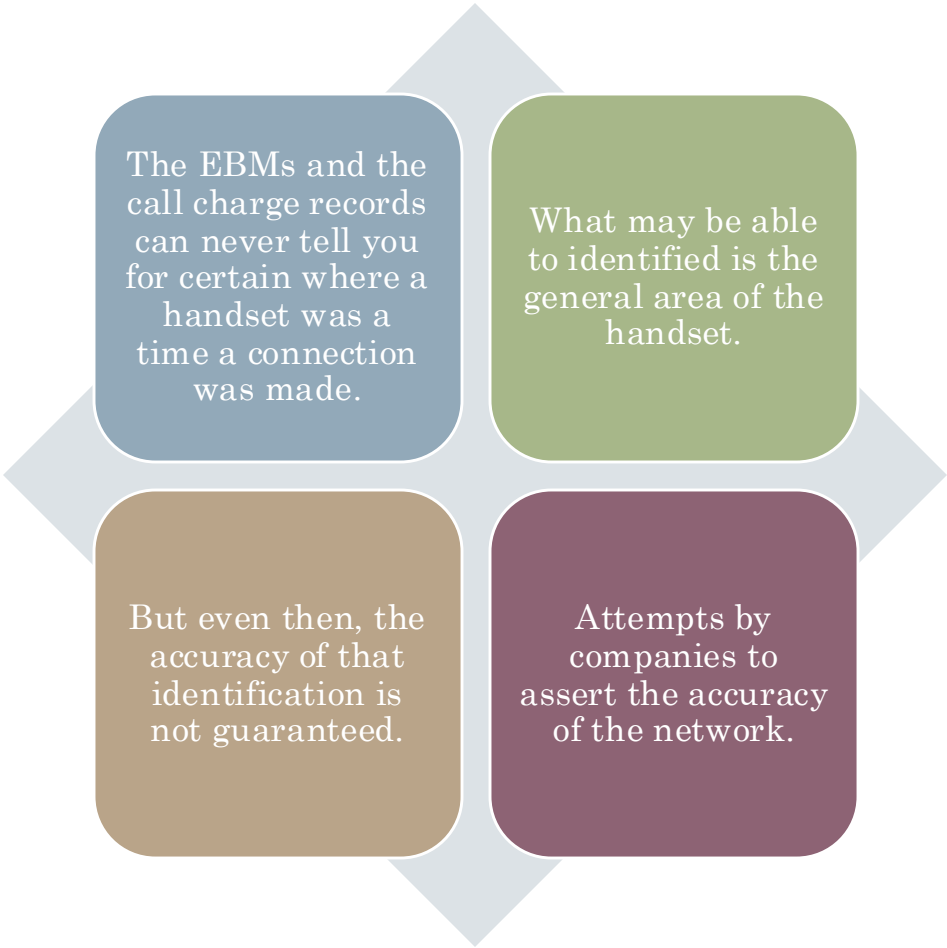
9. Factors which determine which cell tower a phone may connect to

(i) The technology of the handset

- Some older handsets, older mobile phones are more based on the technologies that are supported by the mobile phone. So 3G phones, specifically, can only connect to 3G towers.

- How the handset is configured will also affect its connection to different towers.

10. What can an EBM / CCR tell you?



Strategic & Ethical Considerations

- Early access and review of materials
- Pre-trial objections:
  s 135, 137, 135
- Ethical issues: privacy, leaked/defence-gathered surveillance

Pre-Trial Applications to Exclude or Limit Use

Section 138

Relevant in cases of unapproved surveillance, overbroad warrants, or discretionary BWV activation

Sections s135, 136, 137

Key authorities

- Reinforce the need to interrogate how surveillance was sourced and whether it was state-sanctioned

Other applications

- Abuse of process
- Stay applications

Ethical considerations

Handling surveillance obtained by the defence

- Must comply with surveillance legislation
- Avoid unlawful recordings
- Consider disclosure obligations

Using leaked or unauthorised surveillance materials

- Example: leaked police BWV or covert recordings posted online or sent anonymously
- Consider whether material was lawfully obtained; consider ethical and legal duty not to use unlawfully accessed information

Professional conduct obligations

- Duty not to mislead the court about surveillance materials
- Ensuring clients understand both the power and limitations of the footage

Advocacy in Court

Cross-examining on collection/handling

Highlighting gaps, contradictions

Framing footage as curated/partial

Use of visual/technical tools to illustrate defence arguments

Conclusion & Q&A

Defence practitioner's evolving responsibilities

Takeaways: vigilance, early strategy, ethical practice

Invite questions, discuss hypotheticals/case studies