

HEARINGS DURING COVID-19

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Introduction

This paper is prepared for a webinar I am presenting to the Society of Construction Law (Australia) on 27 May 2020.

This paper draws on my experience with use of technology in my practice.

By way of background, I am a commercial barrister with a technology, engineering and construction specialisation. I have been a member of the Victorian Bar since 2008. During that time I have conducted an electronic and paperless practice. In 2018, I chaired a working committee of the Commercial Bar Association of Victoria (**CommBar**) to assist the Supreme Court of Victoria to update its technology practice note (now [SC GEN 5](#)). I am presently on the Innovation and Technology Committee of the Victorian Bar, and recently assisted the Bar in developing its 'Working Remotely and Preparing for Virtual Appearances Guide' ([here](#)) so as to assist practitioners to adapt to remote working. Also, during the pandemic I was appointed to a committee of 4 to assist the Commercial Division of the County Court of Victoria with its remote hearing and ADR practice notes, which have been adopted by the Supreme Court of Victoria. I am also the chair of Melbourne TEC Chambers and a member of the Civil Procedure Section of CommBar.

This paper is separated into 3 parts. They are (a) what each jurisdiction is doing now, (2) when might a matter be unsuitable for remote hearings, and (3) best practice for practitioners appearing remotely.

References to external material are hyperlinked.

I hope you find the information below helpful for your practice. I welcome any feedback and updates that my audience is aware of that I have not included below.

Please note that this paper is current as at its publication date, but because of the dynamic nature of the response to COVID 19 it is likely to quickly become outdated. As such, the hyperlinks below are provided for your future reference.

1. What each jurisdiction is doing now

Generally speaking, each commercial jurisdiction is presently doing the following:

- Requiring electronic filing.
- Not requiring sworn or affirmed affidavits until it is convenient to provide jurat details.

- Appearances by video conference or telephone.
- Preferring determination ‘on the papers’ if possible.
- Requiring documentary evidence to be in PDF electronic format.
- Requiring attendance of witnesses by video conference.

The video conferencing platform for each jurisdiction often differs, but each video conferencing platform is largely similar to each other in function. For instance, the Federal Court prefers Microsoft Teams, and the Victorian Courts prefer Zoom and Webex, but the interface is largely the same. They all have readily accessible icons for muting, chatting, sharing screens and documents, and ending the video conference.

In Victoria, there has been a different degree of development by each jurisdiction of their remote hearing protocols.

The Supreme Court of Victoria and the County Court of Victoria have been very quick to adapt to remote hearings and have been conducting hearings by video conferencing (Zoom and Webex) for some time. The Magistrates’ Court of Victoria and the Victorian Civil and Administrative Tribunal (VCAT) have not been quick to adapt to remote hearings, most likely because of underfunding of technology and the large volume of matters in their respective jurisdictions.

VCAT has been the least active, and has ceased all work except for urgent matters in its non-commercial lists (e.g. guardianship and residential tenancies) [until 18 May 2020](#). It is now [receiving funding](#) to upgrade its technology so it can recommence work in its commercial lists, such as planning and environment and building and property. VCAT has [now advertised](#) that it intends to conduct matters remotely from 18 May 2020 where a matter can reasonably proceed via that means. The Magistrates’ Court of Victoria is now sitting on its non-sitting days to attempt to clear its backlog.

The [Building Appeals Board](#) remains operational and, like the other jurisdictions, is conducting its business via Zoom or on the papers. I just had a decision (*In the matter of 750 Collins Street, Docklands* [\[2020\] VBAB 33](#)) handed down from the BAB, which although delayed, indicates that it has continued to progress through its matters despite the pandemic.

The County Court of Victoria Commercial Division, including the Building List, is using non-binding neutral evaluation - known as NNE, which is the same as ENE but conducted later in the proceeding - as a means to resolve matters without going to trial. It is promoting resolution via NNE by making the evaluation of the Court confidential except on the question of costs in the event the matter proceeds to trial. If a party does not better the evaluation, it has the same cost consequences as though the evaluation was an unaccepted offer. I do not know whether the Court will retain this protocol once restrictions are lifted; however, it seems like a sensible incentive to get parties to settle that may have a place long-term.

The New South Wales Supreme Court has published a practice note ([here](#)) that contemplates a return to in-person hearings. The Court intends to have a staged return to in-person hearings from Monday 1 June 2020, and a return to jury trials on 29 June 2020. Each stage (3 stages

overall) will involve reducing social distancing and increasing face to face contact. Hearings will be staggered.

On 1 April 2020 the Queensland Supreme Court [announced](#) that it will conduct trials by teleconference or video conference. On 25 May 2020 it [announced](#) that parties and practitioners in applications requiring an oral hearing are expected to attend court in person for the hearing, and if it is not practicable to do so, to appear by video conference subject to leave being given.

On 22 May 2020, Chief Justice Allsop [advised](#) that the Federal Court is hearing 80-85% of all matters filed and the regularity of hearings is approaching business as usual. Also, the Federal Court has established a working group to develop a transition plan as restrictions relating to COVID 19 ease, and it has engaged a disaster assessment body to assess the Court's readiness to permit in-person hearings, and that assessment is expected to take until late June. As such, it seems the Federal Court might recommence in-person hearings in July 2020.

The COVID-19 resource for each court is located where indicated below:

- [Federal Court of Australia](#)
- [Supreme Court of Victoria and Court of Appeal](#)
- [County Court of Victoria](#)
- [Magistrates Court of Victoria](#)
- [VCAT](#)
- [Building Appeals Board](#)
- [New South Wales Supreme Court](#)
- [Queensland Supreme Court](#)
- [South Australia Courts](#)
- [Supreme Court of Western Australia](#)
- [Supreme Court of Tasmania](#)
- [Supreme Court of the ACT](#)
- [Supreme Court of the NT](#)

Other useful resources for information on measures to reduce the spread of COVID 19 are here:

- [Judicial College of Victoria](#)
- [Victorian Bar consolidated guide](#)

- [COVID 19 and the Law of Australia e book](#) written by Emrys Nekvapil, Maya Narayan and Stephanie Brenker

2. When might a matter be unsuitable for remote hearings.

There have been several superior court and appellate decisions during the pandemic considering whether a commercial matter is suitable for remote hearings. They are:

- *Ascot Vale Self Storage Centre Pty Ltd v Nom De Plume Nominees Pty Ltd & Ors* [\[2020\] VSC 242](#) (11 May 2020) in which the plaintiff applied to have a defence heard separately, and, in dismissing the application, McDonald J disagreed with a submission that video conferencing is inapt where credit is in issue.
- *Motorola Solutions, Inc. v Hytera Communications Corporation Ltd (Adjournment)* [\[2020\] FCA 539](#) (23 April 2020) in Perram J held that time zone differences when conducting remote trials is not enough to warrant an adjournment.
- *Capic v Ford Motor Company of Australia Limited (Adjournment)* [\[2020\] FCA 486](#) (15 April 2020) which was an application for adjournment of a 6-week trial commencing 15 June 2020 on the basis of technological limitations, and the application was refused by Perram J.
- *Australian Securities and Investments Commission v GetSwift Limited* [\[2020\] FCA 504](#), (9 April 2020) was an adjournment application of a 6-week class action trial commencing 9 June 2020, and the application was refused.
- *Seven Sisters Vineyard Pty Ltd v Konigs Pty Ltd* [\[2020\] VSC 161](#) (3 April 2020), which was a successful application for adjournment of a trial on the basis of late discovery and the impact of the pandemic on preparation of an expert report in time for the trial.
- *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [\[2020\] WASCA 38](#) (25 March 2020) which was an application for adjournment of an appeal listed on 27 March 2020 on the basis of technological limitations, and the application was refused.
- *Mulquiney v Reynolds & Anor (Ruling No 1)* [\[2020\] VSC 119](#) (16 March 2020), which was an application for a trial listed to be heard by jury to be heard by Judge alone instead, and the application was granted.

Capic contains the most comprehensive discussion of the considerations that are at play in a commercial electronic trial, including whether any of them render conducting the trial ‘unfair or unjust’. These include:

- Technological limitations such as internet connection disruptions, which although aggravating can be overcome with planning and interposing.
- The physical separation of legal teams, which can be managed through the use of instant messaging solutions like WhatsApp.

- Remote expert witnesses, including conferring with counsel, conducting enclaves and conducting hot-tubs, which can be managed through video conferencing.
- Remote lay witnesses particularly in cross examination, including preventing off-screen coaching, lack of technology and inexperience in use of technology, managing large numbers of witnesses, and cross-examination as to credit and observation of the witness, which can all be managed.
- Voluminous documentary evidence, which can be managed by the use of digital court books in online cloud services.
- Future issues including sudden illness of participants or the need to supervise children, which can be managed as they arise.
- Trial length and expense, in particular the prolonged time for conducting a hearing and therefore expense, which should be balanced against the uncertainty of the duration of the lockdown.

The following a useful statement from Perram J in *Capic* at [25] about why the Courts are pressing on through the pandemic despite the limitations of appearing remotely. This also explains why the limitations of video-conferencing are usually not enough to warrant an adjournment.

Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. But these are not ordinary circumstances and we have entered a period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try.

The facts in *Seven Sisters*, in which the defendant’s application to adjourn was granted, were peculiar because of late discovery by the plaintiff just 3 weeks prior to trial. There, the defendant’s expert reasonably estimated it would take 4 weeks to review that material and prepare a report on it, where that estimate was partly based on the constraints caused by the pandemic. This highlights that there needs to be something more than just the limitations of appearing remotely to warrant an adjournment.

3. Best practice for practitioners appearing remotely

Justice Perram of the Federal Court (clearly the frontrunner in the effective use of video-conferencing to conduct hearings) published a [note](#) and [FAQs](#) on conducting hearings by Microsoft Teams and Dropbox. A sample video conference hearing was also included in the FAQs and the most recent guide. It is [here](#). By way of summary, the video shows:

- The Judge on a hands-free headset controlling the video conference hearing.
- Each party’s solicitor and counsel taking evidence and giving submissions separately via video conference, with court books in front of them.
- A witness being sworn in by the Judge and giving evidence by video.

I recommend familiarising yourselves with the video as it is a good tutorial on conducting hearings remotely.

Based on feedback I have received from the courts and the profession, the following are the take-home messages for practitioners appearing remotely:

- Treat a video conference hearing as though it is an in-person hearing, maintaining the same degree of formality. This may require robing, standing for the Judge (if required) and the usual courtesies for in-court appearances.
- Ensure the technology you have is appropriate for video conferencing, including two or more large screens for reading documents and observing the proceeding, and wearing a headset with a good microphone.
- Be ready for the hearing beforehand, as a court is likely to have a ‘dry run’ to make sure each participant can participate by listening and speaking. The court will let participants know of the timing of the ‘dry run’.
- Clear your desk of coffee cups and food. Pretend it is the bar table.
- Although the video conferencing ‘chat’ function is tempting to use to send documents and to communicate with others, it is easy to accidentally send a private (and privileged) message to all participants including the Judge and your opponents. I suggest using another instant messaging solution for private communications, such as email, WhatsApp, or Facebook messenger.
- Often a judge will swear in or affirm a witness and ask the witness to pan the camera around the room to make sure no-one else is in the room.
- Ensure each member of your team and your witnesses have good internet connections.
- Do not appear by phone or tablet unless you have no alternative.
- Use neutral virtual backgrounds that are provided by the platform, the court or by your professional association. If you do not use a neutral virtual background, ensure your background is tidy and looks professional.
- Try to have the webcam pointed directly at you so your full head and shoulders are in the picture. Sometimes a participant will not have the angle right – particularly one that appears by phone or tablet – and the video ends up looking up that person’s nose.
- Try to find a quiet place where you will not be interrupted. This may require a separate room on the other side of the house, or worst case, your office.
- Mute the video conference until you intend to speak. This will prevent your coughing, movement and typing from being picked up by your microphone and interrupting the hearing.

The Inns of Court College of Advocacy has prepared a guide titled ‘Principles for Remote Advocacy’, [here](#). This is an excellent guide on how to maintain good advocacy through remote hearings. It contains 8 core principles ((1) liaise in advance, (2) understand the technology, (3) make sure all parties can be seen and heard, (4) know how to handle the documents, (5) make the best use of written argument, (6) be prepared, then be brief and to the point, (7) avoid overspeaking, and (8) maintain confidentiality), which are then expanded on. It is not wedded to a particular video conferencing platform, so it is of general application. I recommend reading it regularly as a reminder of how to approach e-hearings.

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